

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED)
ACN 077 208 461

First Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS
OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288

AND

Respondent: 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

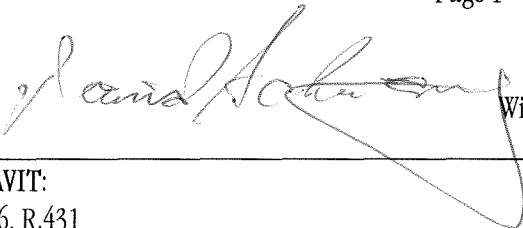
AFFIDAVIT OF DAVID HEINER SCHWARZ

I, DAVID HEINER SCHWARZ, solicitor of Level 15, 15 Adelaide Street, Brisbane in the State of Queensland,
state on oath:-

1. I am a solicitor of this Honourable Court and a Principal at Tucker & Cowen Solicitors, the
solicitors for the Respondent, David Whyte.

Page 1

Signed:



Witnessed by:



AFFIDAVIT:
Form 46, R.431

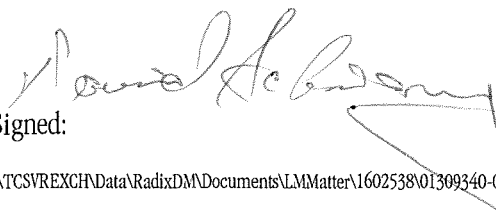
Filed on behalf of the Respondent,
Mr David Whyte

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000.
Tel: (07) 300 300 00
Fax: (07) 300 300 33

2. I have seen and read the Affidavit of John Richard Park sworn 18 October 2016 on behalf of the Applicants in this proceeding ("**Mr Park's Affidavit**").
3. Exhibited hereto and marked as follows, are copies of the following correspondence exchanged between Tucker & Cowen and Russells (the solicitors for the Applicants) in connection with this application, which are not exhibited to Mr Park's Affidavit:-
 - (a) "DHS-1": letter from Tucker & Cowen to Russells dated 10 June 2016;
 - (b) "DHS-2": letter from Russells to Tucker & Cowen dated 16 June 2016;
 - (c) "DHS-3": letter from Tucker & Cowen to Russells dated 21 June 2016;
 - (d) "DHS-4": letter from Russells to Tucker & Cowen dated 27 June 2016;
 - (e) "DHS-5": letter from Russells to Tucker & Cowen dated 8 November 2016, enclosing the Affidavit of Mr Park, and foreshadowing delivery of a bundle of documents referred to in paragraph 14 of the Affidavit of Mr Park;
 - (f) "DHS-6": letter from Tucker & Cowen to Russells dated 10 November 2016;
 - (g) "DHS-7": email from Russells to Tucker & Cowen dated 15 November 2016;
 - (h) "DHS-8": letter from Tucker & Cowen to Russells dated 17 November 2016;
 - (i) "DHS-9": letter from Russells to Tucker & Cowen dated 22 November 2016;
 - (j) "DHS-10": letter from Tucker & Cowen to Russells dated 23 November 2016;
 - (k) "DHS-11": letter from Russells to Tucker & Cowen dated 13 December 2016;
 - (l) "DHS-12": letter from Russells to Tucker & Cowen dated 15 December 2016;
 - (m) "DHS-13": letter from Russells to Tucker & Cowen dated 12 January 2017;
 - (n) "DHS-14": letter from Tucker & Cowen to Russells dated 19 January 2017;

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Signed:



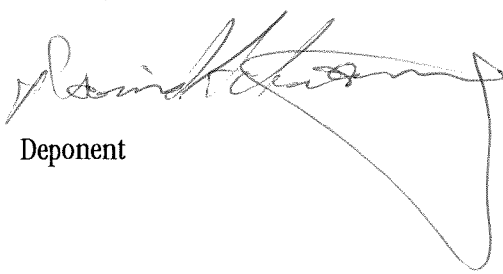
Witnessed by:



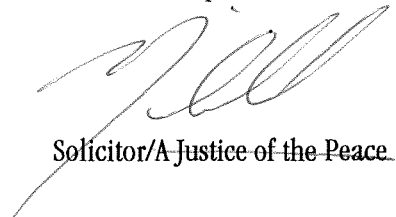
- (o) "DHS-15": letter from Tucker & Cowen to Russells dated 3 February 2017;
- (p) "DHS-16": further letter from Tucker & Cowen to Russells dated 3 February 2017;
- (q) "DHS-17": letter from Russells to Tucker & Cowen dated 14 February 2017;
- (r) "DHS-18": letter from Tucker & Cowen to Russells dated 15 February 2017;
- (s) "DHS-19": further letter Tucker & Cowen to Russells dated 15 February 2017;
- (t) "DHS-20": email from Russells to Tucker & Cowen dated 15 February 2017, received at 4.56pm;
- (u) "DHS-21": email from Tucker & Cowen to Russells dated 15 February 2017, sent at 6.39pm;
- (v) "DHS-22": email from Russells to Tucker & Cowen dated 16 February 2017, received at 8.21am.

4. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by **DAVID HEINER SCHWARZ** on the 16th day of February 2017 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
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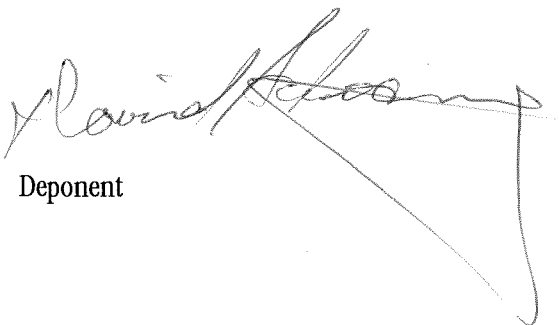
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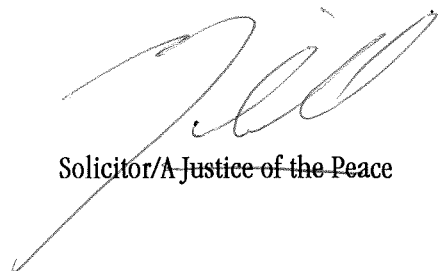
Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE
THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN
089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS
ACT 2001

CERTIFICATE OF EXHIBIT

Bound and marked "DHS-1" to "DHS-22" are the exhibits to the Affidavit of DAVID HEINER SCHWARZ
sworn this 16th day of February 2017



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Respondent,
Mr David Whyte

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000
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SUPREME COURT OF QUEENSLAND

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"DHS-1"

Tucker & Cowen Solicitors.

TCS Solicitors Pty Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St, Brisbane, Qld, 4000 / GPO Box 345, Brisbane, Qld, 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

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Marcelle Webster.
Emily Anderson.
Dugald Hamilton.
Olivia Roberts.
James Morgan.

Our reference: Mr Schwarz / Mr Ziebell

10 June 2016

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
Russells Lawyers
Brisbane Qld 4000

Email: seanrussell@russellslaw.com.au
atiplady@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF")
Indemnity Claim

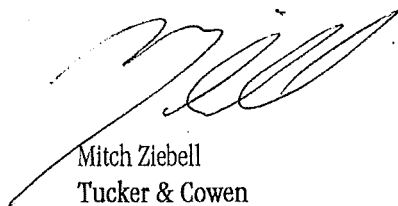
We refer to your letter dated 9 June 2016.

We are obtaining instructions in regard to those matters raised by your letter, and are making inquiries with our client's Counsel as to their availability for the suggested directions hearing.

We expect to be in a position to respond to your queries early next week.

In the meantime, would you please provide us with a copy of the draft directions your clients intend to seek at the proposed hearing? It may be that draft directions can be agreed between the parties, and the costs of an appearance avoided.

Yours faithfully



Mitch Ziebell
Tucker & Cowen

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Direct Line: (07) 3210 3541

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RUSSELLS

16 June, 2016

Our Ref: Mr Tiplady/Mr Sean Russell
Your Ref: Mr Schwarz

Tucker & Cowen
Solicitors
BRISBANE

email: dschwarz@tuckercowen.com.au

Dear Colleagues

**LM Investment Management Limited (In Liquidation)(Receivers
Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First
Mortgage Income Fund ("FMIF") - Indemnity Claim**

We refer to your letter dated 10 June, 2016, regarding our clients' application filed 20 May, 2016.

We also refer to your letter dated 9 June, 2016, enclosing your client's further application for approval of his remuneration.

Your client's application is returnable on 28 June, 2016. Perplexingly, your client seems to have listed the application in the general applications list, in circumstances where Justice Jackson has been hearing all LMIM matters on the commercial list and his Honour is, as such, familiar with and holds an understanding of the background to your client's appointment and the likely return to members of the FMIF flowing from the work conducted by Mr Whyte.

We suggest that it is more appropriate, and in the interests of the members of the FMIF, that Justice Jackson, who is intimately familiar with the issues regarding LMIM hear your client's application instead of another judge not as familiar with the various matters.

Given the coincidence of the return date of your client's application and the proposal for our clients' application contained in our letter of 9 June, 2016, it seems that a directions hearing in both applications before Justice Jackson on 28 June, 2016 is appropriate.

Our clients have not yet finalised their consideration and reached a position on your client's application. They envisage doing so in the next seven days. We will thereafter correspond with you to outline our clients' position concerning your client's application.

While we do not expect the directions to be made on our clients' application to be particularly contentious (they will likely simply be for the exchange of

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material and submissions); we think it is appropriate for an actual directions hearing to be held so that his Honour can familiarise himself with the issues in dispute in advance of any substantive hearing.

We look forward to your prompt response.

Yours faithfully



Sean Russell
Associate

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SeanRussell@RussellsLaw.com.au

Tucker&CowenSolicitors.

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James Morgan.

Our reference: Mr Schwarz / Mr Ziebell

21 June 2016

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
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Brisbane Qld 4000

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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Administration Indemnity Claims & Recoupment Indemnity Claims; Application filed 20 May 2016

We refer to your letter of 16 June 2016.

We have also received your correspondence of 25 May and 9 June 2016, to which we will respond more fulsomely, separately.

Your clients have suggested that the application filed 20 May 2016, be listed for a directions hearing before Justice Jackson on 28 June 2016. Your letter provides an explanation that the directions "*will likely simply be for the exchange of material and submissions*", and that an actual directions hearing is appropriate so that "*His Honour can familiarise himself with the issues in dispute*".

Our client does not wish to put either the parties or, particularly, the FMIF to any unnecessary expense. Unless there is some dispute between the parties as to the directions proposed, our client does not consider that a directions hearing is justified. Given that Justice Jackson, having presided upon both the 'residual powers' proceeding and your clients' application for approval of their remuneration, is already very familiar with the matter, it is unlikely to be necessary for the application to be mentioned for review by His Honour for that purpose alone.

Further, given the inter-relationship between issues that will arise in connection with your clients' Application filed 20 May 2016 ("the Indemnity Application") and the issues presently being considered by Justice Jackson in connection with your clients' Further Amended Originating Application (which was heard on 22 February and 14 March 2016, and in which His Honour has reserved judgement) ("the Remuneration Application"), our client considers that the efficient disposition of your clients' Indemnity Application would be best be achieved by a hearing to take place after delivery of His Honour's judgment in relation to your clients' Remuneration Application.

The broad categories of issues that arise in respect of both applications (as outlined in your letter of 9 June 2016) include:-

1. LMIM's costs of the appeal from the decision of Dalton J which resulted in the Order for our client's appointment, dated 21 August 2013.

As to that:-

- (a) The affidavit of Mr Whyte filed on 19 February 2016 referred to the litigation before Dalton J at paragraphs 38 to 47, and to the appeal specifically at paragraph 47;
- (b) The affidavit of Mr Whyte filed on 11 March 2016 directly referred to the costs of the appeal at paragraph 14(c);
- (c) The Respondent's supplementary submissions of 14 March 2016 directly raised a concern regarding indemnity for work performed in resisting and appealing the proceedings which resulted in Justice Dalton's order of 21 August 2013 (see paragraphs 2(c), 6 and 50(a));
- (d) Your clients' written submissions also addressed the appeal and, in particular, the question of whether the appeal was necessary and in the interests of the FMIF (for example see paragraphs 64 and 72 of the Applicants' Supplementary Submissions dated 14 March 2016);
- (e) His Honour heard oral submissions on 14 March 2016 concerning the proceedings before Dalton J and the subsequent appeal.

While the submissions in the Remuneration Application were directed to whether, and if so to what extent, your clients are entitled to be remunerated for work connected with the proceedings and appeal, His Honour will necessarily be considering whether the appeal was necessary or reasonably undertaken for the benefit of the FMIF (as distinct from whether it was otherwise justified). Accordingly, (as was stated in the letter from Gadens to your firm of 21 April 2016 providing Mr Whyte's reasons in relation to this aspect of the claim) it is highly likely that His Honour's judgment will touch upon matters relevant to subject of your clients' claim for an indemnity in respect of the costs of the appeal.

We note that the letter from Gadens to you dated 21 April 2016 contained a proposal for dealing finally with your clients' claim within seven days of receipt of Justice Jackson's judgment in the Remuneration Application.

2. LMIM's costs of dealing with the books and records in ASIC's prosecution of the directors of LMIM in the Federal Court.

In relation to this:-

- (a) Mr Park's Affidavit filed on 8 March 2016 explained work undertaken in relation to dealing with books and records issues (for example at paragraph 38(e));
- (b) Mr Whyte's Affidavit filed on 11 March 2016 raised a concern as to whether the work undertaken by your clients in relation to books and records issues was for the benefit of the FMIF (as distinct from related to and for the benefit of LMIM itself or for other funds);
- (c) The connection of the books and records work with the FMIF was addressed at paragraph 13(c) of Mr Whyte's Supplementary Submissions dated 14 March 2016; and
- (d) The issue of the appropriate apportionment of 'Category 2' costs (to the extent to which your clients are to be indemnified from the FMIF for them) was addressed extensively by the parties in both written and oral submissions.

We note that, in your letter of 25 May 2016, it is said that your clients agree that the last-mentioned issue of apportionment is one which may be impacted by the reserved judgment of Jackson J in the Remuneration Application.

In addition to those issues, there is also the matter of the potential application of the 'clear accounts' rule. That is a matter that was addressed in Mr Whyte's affidavit material and submissions, and that was the subject of oral submissions before Justice Jackson on 14 March 2016. We will write to you in relation to that separately, by way of a more fulsome response to your letter of 11 May 2016.

Given that the above issues arise in the context of both the Remuneration Application and the Indemnity Application, it is likely that His Honour's judgment in relation to the Remuneration Application will, at the least, provide some guidance as to the determination of some parts of the Indemnity Application; indeed, it may be that His Honour's reasons for judgment will largely determine parts of the Indemnity Application.

We would be grateful if you could confirm that your clients are agreeable to deferring the hearing of the Indemnity Application, and the making of any directions concerning that application, until after His Honour's judgment in respect of the Remuneration Application has been delivered.

In the event that your clients do not agree to the deferral of the Indemnity Application, please note that neither of our client's Counsel, Sue Brown QC and David de Jersey, are available in the week of 27 June 2016 (including on 28 June 2016).

As you know, Ms Brown QC and Mr de Jersey have appeared for Mr Whyte at each hearing throughout this proceeding, including on the hearing of the 'residual powers' application which resulted in the making of the Orders on 17 December 2015 and on each of 22 February 2016 and 14 March 2016 when, your clients' Remuneration Application was heard by Justice Jackson for a full day on each occasion. They are familiar with the long history of the proceeding in which the Indemnity Application is brought, including the extensive material that has been filed in the proceeding to date.

Your letter of 16 June 2016, suggests that a directions hearing in both this Application, and also in our client's unconnected application in proceeding 3383/2013, be listed for directions before the Honourable Justice Jackson on 28 June 2016. Neither Ms Brown QC nor Mr de Jersey is briefed for Mr Whyte in respect of the application made in proceeding 3383/2013. That Application is not one that bears any relevance to this Application, nor has it been placed on the Court's Commercial List.

Accordingly, our client does not agree that the Indemnity Application should be listed for directions on 28 June 2016.

In the event that it becomes relevant, we are informed that Ms Brown QC is presently available:-

- during the period on and from 18 to 20 July 2016 (inclusive) (when Mr de Jersey is also available);
- possibly (subject to confirmation) on 21 July 2016 (when Mr de Jersey is also available);
- on 25 July 2016; and
- during the weeks commencing 1 August and 8 August 2016.

In due course, when the time comes for directions to be made in respect of the Indemnity Application, we are instructed that our client would have no difficulty in principle with directions that provide for:-

1. your clients to file any affidavit material upon which they intend to rely;


2. our clients to be afforded an opportunity to file any affidavit material upon which he intends to rely a reasonable time thereafter;
3. your clients to file any affidavit material in reply to that material by our client, and for your clients to deliver a written outline of submissions at the same time;
4. our client to be afforded a reasonable opportunity to consider those submissions and any material in reply, and to then deliver a written outline of submissions prior to the day listed for the hearing of the Application; and
5. for the Application to be listed before the Honourable Justice Jackson on a date convenient to His Honour.

Given that we have not yet received any material upon which your clients intend to rely on the hearing of the Application, it is presently difficult to estimate how long the Application will require for hearing. We therefore propose that, if the matter is to be reviewed before a hearing, your clients file and serve their affidavit material before the review. It may be that directions are able to be agreed without the need to trouble His Honour for a review.

For the reasons explained above, we and our client consider that the hearing of the Indemnity Application, and the making of any directions concerning that application, should be deferred until after His Honour's judgment in respect of the Remuneration Application has been delivered. Please let us know if you agree.

We look forward to hearing from you.

Yours faithfully



David Schwarz
Tucker & Cowen

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RUSSELLS

27 June, 2016

Our Ref: Mr Tiplady/Mr Sean Russell
Your Ref: Mr Schwarz/Mr Ziebell

Tucker & Cowen
Solicitors
BRISBANE

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Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") - Indemnity Claim

We refer to your correspondence of 21 June, 2016 regarding our clients' suggested pathway to advance this matter.

When we originally wrote to you on 16 June, 2016 we had envisaged being in a position to have shortly thereafter prepared and filed our clients' supporting affidavit material regarding their application dated 20 May, 2016. That has not proven possible. We anticipate that occurring in the next seven (7) days or so.

We do not agree, for the reasons previously articulated, that this application is in anyway connected with our clients' remuneration application which is currently a reserved decision before His Honour Justice Jackson. Nor should, or will, that judgment impact on the issues raised in this matter. Accordingly, we have been instructed to advance this application forthwith.

In progressing this proceeding, we agree that there is benefit to both parties in your client having the opportunity to review our clients' affidavit material before we engage in any meaningful dialogue regarding appropriate directions to be made and a timeframe to advance the application. Accordingly, we will serve our clients' affidavit material upon you as soon as that is possible and will thereafter contact you regarding the steps to take the matter forward.

Yours faithfully



Sean Russell
Associate

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Liability limited by a scheme approved under professional standards legislation

RUSSELLS

8 November, 2016

Our Ref: Mr Tiplady/Mr Sean Russell
Your Ref: Mr Schwarz

Tucker & Cowen
Solicitors
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Dear Colleagues

**LM Investment Management Limited (In Liquidation)(Receivers
Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First
Mortgage Income Fund ("FMIF") - Indemnity Claim**

We refer to our clients' application to resolve their outstanding claim for expenses filed on 20 May, 2016.

Please find enclosed, by way of service, an affidavit of Mr Park filed on 18 October, 2016 in support of the application.

The bundle of documents referred to in paragraph 14 of Mr Park's affidavit will follow shortly. The documents contained therein are, of course, documents which your client has already considered.

Would you please let us know if your client intends to raise the 'clear accounts rule' or some other conduct on behalf of our clients in opposition to our clients' claim for indemnity.

If your client does intend to make that case, he ought to be obliged to make the point clearly and directly by way of pleadings. In that circumstance, we would propose listing the matter only for directions.

Otherwise, we believe our clients' application could be heard within half a day.

Would you please let us know convenient dates to put to his Honour for the hearing of the application (or directions on the application).

Our clients' preference would be to enquire whether his Honour would be prepared to hear the matter in the week of 5 December, 2016.

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We intend to write to Justice Jackson's associate at 3:00pm on 10 November, 2016 so would you please let us know your client's position before then.

Yours faithfully



Sean Russell
Associate

Direct (07) 3004 8844
Mobile 0400 521 611
SeanRussell@RussellsLaw.com.au

Tucker&CowenSolicitors.

TCS Solicitors Pty Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Ziebell

10 November 2016

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
Russells Lawyers
Brisbane Qld 4000

Email: seanrussell@russellslaw.com.au
atiplady@russellslaw.com.au

Principals.
David Tucker.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Special Counsel.
Geoff Hancock.
Alex Nase.
Paul McGrory.

Associates.
Marcelle Webster.
Emily Anderson.
Dugald Hamilton.
Olivia Roberts.
James Morgan.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Administration Indemnity Claims & Recoupment Indemnity Claims; Application filed 20 May 2016

We refer to your letter of 8 November 2016, and the affidavit of John Park, both received after 5.00pm on Tuesday, 8th November 2016.

We also refer to the previous correspondence in respect of this matter dated 21 June 2016, and 27 June 2016.

In your letter of 27 June 2016, you stated that your clients' affidavit material in support of the application filed 20 May 2016 would be forthcoming in "seven days or so", from the date of that letter; we received nothing more, until the evening of 8 November.

In our letter of 21 June 2016 we proposed deferring any further steps in the application until after delivery of his Honour's judgment in the Further Amended Originating Application (which was heard on 22 February and 14 March 2016, and in which His Honour has reserved judgement) concerning your client's remuneration, given the overlap of issues between those applications.

We have had only a short opportunity to consider Mr Park's affidavit sworn 18 October 2016 (but only sent to us in the evening of 8 November), and have not yet been able to do so in any detail. We note that in your letter of 27 June 2016, you said that "*there is benefit to both parties in your client having the opportunity to review our client's affidavit material before we engage in any meaningful dialogue regarding appropriate directions to be made and a timeframe to advance the application.*" We agree that would be sensible.

You have foreshadowed writing to His Honour's Associate by 3.00pm today, 10 November 2016, and requested a response from our client before that time. You will no doubt appreciate that the affidavit sworn by Mr Park is very large, totaling some 26 pages, plus a further 336 pages of exhibits. With respect, given the volume of the material served on our client just over a day ago, and in light of the time that has elapsed since the last exchange of correspondence about the matter, this is a plainly unreasonable timeframe within which to provide a considered response.

Accordingly, please do not contact his Honour's Associate until we revert to you, having had the opportunity to consider your correspondence and the affidavit of Mr Park and to take proper instructions from our client. We anticipate being in a position to do that, next week.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Schwarz', with a large, stylized loop at the end.

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

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From: Sean Russell [SeanRussell@russellsLaw.com.au]
Sent: Tuesday, 15 November 2016 11:06 AM
To: David Schwarz; Ashley Tiplady
Cc: Mitch Ziebell
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM"); Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte - Supreme Court Proceedings No. 3508 / 2015

Dear David

I refer to your letter dated 10 November, 2016. May we please have your client's response to our correspondence of 8 November, 2016.

Despite your comments about the volume of Mr Park's affidavit, the material contained therein is, with perhaps only one or two exceptions, all material which your client must have carefully reviewed already in coming to his decision (and giving reasons) on our client's application for indemnity. I do not accept that he would be surprised or unfamiliar with vary much in Mr Park's affidavit.

Similarly, the issues on the application have been well canvassed between the parties. Indeed, in your letter of 11 May, 2016 and our response of the same day, we debated, in correspondence, the very point about which clarification is now sought.

Your client is perfectly well aware of the issues and the delivery of Mr Park's affidavit would not have changed that.

We simply wish to ascertain whether your client intends to press the allegations in your letter dated 11 May, 2016 on this application. If so, our clients will require him to prove the alleged personal wrongdoing properly, by way of pleadings or points of claim.

Would you please let us know your client's position before 4:00 pm tomorrow.

Yours faithfully

RUSSELLS

Sean Russell
Associate

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From: Michelle Voser [<mailto:mvosser@tuckercowen.com.au>] **On Behalf Of** David Schwarz
Sent: Thursday, 10 November 2016 8:48 AM
To: Sean Russell; Ashley Tiplady
Cc: David Schwarz; Mitch Ziebell
Subject: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM"); Park &

Dear Colleagues,

Please find **attached** correspondence.

SENT ON BEHALF OF DAVID SCHWARZ, PRINCIPAL

Michelle Voser
Personal Assistant

E: mvoser@tuckercowen.com.au
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Leading Litigation & Dispute Resolution and Insolvency & Reconstruction Lawyers 2015/2016 (Doyle's Guide to the Australian Legal Profession) , with the most ranked practitioners - David Tucker, Richard Cowen, David Schwarz and Justin Marschke, recognised again as one of Australia's Best Lawyers for litigation and regulatory practice **Best Lawyers® International 2017**

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Our reference: Mr Schwarz / Mr Ziebell

17 November 2016

Your reference: Mr Tiplady / Mr Sean Russell

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Dugald Hamilton.
Olivia Roberts.
James Morgan.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Administration Indemnity Claims & Recoupment Indemnity Claims; Application filed 20 May 2016

We refer to your letter of 8 November 2016, our letter to you dated 10 November 2016, and to your email sent on 15 November 2016.

We are still considering the affidavit of Mr Park and taking our client's instructions. Nonetheless, if your client is minded to bring the matter back before His Honour, our client suggests that the matter be listed for directions. The application will not be ready for hearing in the week beginning 5 December 2016.

Our Counsel is presently available for a directions hearing on 9 December 2016.

We are currently considering the form of any directions that ought to be made. We invite you to provide us with a draft of any directions that your clients propose, for our client's consideration. Otherwise, we will write to you regarding proposed directions once we have taken appropriate instructions and had the benefit of Counsel's consideration of the matter.

Our client remains of the view that, given the significant overlap between issues raised by this application, and the issues raised by the application by your clients for approval of their remuneration (in which Justice Jackson has reserved judgment), the hearing of this application ought to be deferred until after His Honour has delivered judgment on the remuneration application. Such an approach would have obvious benefits in terms of both the efficient use of Court time and the minimisation of costs to the parties, and to the members of the FMIF.

Please provide us with draft correspondence to His Honour's Associate requesting that the matter be listed for directions only on 9 December 2016, if that date is convenient to His Honour, for our consideration.

Yours faithfully



David Schwarz

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RUSSELLS

22 November, 2016

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen Solicitors

email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") - Indemnity Claim

We refer to your letter dated 17 November, 2016.

Would you please explain precisely what it is that you and your client are considering. As we pointed out in our email of 15 November, 2016 the issues in this application have been well known to your client for some considerable period of time. There is nothing new in the affidavit material. Your client has also prepared a detailed analysis of the various claims for indemnity in giving his reasons for rejecting our clients' claims the subject of this application. Presumably, he also took legal advice about those matters. We do not understand why those matters would require any further consideration.

Similarly, if your client intends to run the "clear accounts" point, he ought to be in a position to say so now.

We ask that Mr Whyte "come clean" on his intentions in that regard. Mr Whyte has had literally years to consider that issue and to determine his position.

In passing, we note that yesterday, 21 November, 2016, your client served a further application for more than \$1.1 million in remuneration for his work in the six month period ended 31 October, 2016. With that application he served an affidavit more than 650 pages long. It seems that your client has ample time to consider and move quickly upon his own remuneration application, but for some reason the straightforward points of indemnity raised by our clients can not be considered in that time.

Your client has a most regrettable history of obfuscation and delay wherever the performance of his role as Court appointed receiver involves the payment of monies to our clients.

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As we said in our letter of 8 November, 2016, the directions that our clients will propose will depend on whether your client intends to run the clear accounts point.

We disagree that there is significant overlap between the issues raised by this application and the matter currently reserved before Justice Jackson. There has already been much correspondence on this very issue. The principal complaint raised by your client on our client's remuneration application was (in summary) that the overall quantum of our client's remuneration, in light of other amounts potentially received, should factor into the Court's assessment of reasonableness. That has nothing at all to do with whether any particular expense, for which an indemnity is claimed, and was reasonably and properly incurred in connection with the FMIF.

Our clients intend to move the matter forward before the end of the year (if that is convenient to the Court). Accordingly, we will write to Justice Jackson's associate tomorrow requesting that the matter be listed for directions at the earliest possible date this week or early next week and note your objection to that course.

Yours faithfully



Ashley Tiplady
Partner

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Our reference: Mr Schwarz / Mr Ziebell

23 November 2016

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Indemnity Claims by LMIM - Application filed 20 May 2016

We refer to your letter of 22 November 2016, received by email at approximately 4.07pm.

The substance of your letter appears to go to the following two points:-

1. First, to inquire as to whether Mr Whyte intends to raise the "clear accounts rule" in relation to indemnity claims by LMIM; and
2. To foreshadow that you intend to write to Justice Jackson's Associate tomorrow "*requesting that the matter be listed for directions at the earliest possible date this week or early next week*" and to note an asserted objection on our part, to that course.

The balance of your letter consists of disparaging remarks concerning our client that we consider are unjustified, and are probably best left to one side for the time being.

As regards the two substantive points:-

1. As to the first point, our client's position as to the "clear accounts rule" and its application to LMIM's indemnity from the FMIF has been made plain, repeatedly. It has been raised by Mr Whyte or his representatives:-
 - (a) in correspondence from this firm dating back to December 2015;
 - (b) in correspondence from Gadens (who, as you know, act for Mr Whyte in respect of certain aspects of the winding up and receivership of the FMIF);
 - (c) in affidavit material filed by Mr Whyte in connection with your client's application for remuneration from the FMIF;
 - (d) in written submissions to the Court; and

(e) in oral submissions to the Court by Queen's Counsel for Mr Whyte.

With respect, we fail to see how there can be any mystery about Mr Whyte's position. If there is, please let us know in what respect the position may yet be further clarified.

2. As to the second point, you appear to have misconstrued or misread what was said in our earlier correspondence. In our letter of 17 November 2016 we invited you to propose directions, and to provide us with your draft correspondence to Justice Jackson's Associate requesting that the matter be listed for directions on 9 December 2016, being the date when our client's Counsel is available in the week suggested in your correspondence of 8 November 2016.

We have received neither proposed directions, nor a draft email to His Honour's Associate, from you.

Our client remains of the view (as do we) that there is a significant overlap of issues raised by this application and those raised by your clients' remuneration application, in which His Honour has reserved judgment. That said, if your clients wish to bring the application before the Court, then we expect that the same point can be made in submissions to His Honour.

You have said that you intend to seek to have the application listed for directions. As to that, there is no objection from our client. Our client does, however, seek the usual courtesy of requesting a date for review that is convenient to both parties, particularly when you invited us to nominate convenient dates and we did so.

If that date is no longer convenient to your client's Counsel, then please provide us with a range of suggested dates so that we may ascertain whether any of them also suit our Counsel. You might also kindly let us know the directions your client proposes so that we may consider them and, potentially, save both the Court's time and unnecessary expense to the parties.

We also again request that you send us a draft of your proposed email to His Honour's Associate so that, once convenient dates have been ascertained, there might possibly be a joint approach to His Honour's Associate.

We look forward to receiving your reply.

Yours faithfully



David Schwarz
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RUSSELLS

13 December, 2016

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen Solicitors
BRISBANE QLD 4000

email: dschwarz@tuckercowen.com.au

Dear Colleagues

**LM Investment Management Limited (In Liquidation)(Receivers
Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First
Mortgage Income Fund ("FMIF") - Indemnity Claim**

We refer to your letter dated 23 November, 2016.

Thank you for confirming that your client will contend that the 'clear accounts' rule applies to our clients' indemnity claims for their expenses in connection with the FMIF. This serves to clarify the issues to be raised on our clients' application. We also assume your client will take this point regarding all further claims which may be made by our clients for indemnity from the FMIF, including regarding their remuneration. Please correct us if we are incorrect in this assumption.

Of course, as you will be aware from our correspondence of 11 May, 2016, our clients consider your client's contention as tantamount to an allegation of personal misconduct.

It is worth restating why our clients consider that to be the case.

Clause 19.1(c) of the constitution of the FMIF provides:-

"In addition to any indemnity under any Law, the RE has a right of indemnity out of Scheme Property on a full indemnity basis, in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust." [Emphasis added]

Clause 19.1(a) of the constitution of the FMIF provides:-

"The RE is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:-

- i. otherwise than in accordance with this Constitution and its duties;*
- and*

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-
- ii. without a belief held in good faith that it was acting in accordance with this Constitution or its duties..." [emphasis added]

In our view, while the principles have a long pedigree and are clear, they have been conveniently summarised recently by Gordon J (as her Honour then was), in *ASIC v Letten (No 17)* (2011) 286 ALR 346 at 350 – 353.

In light of the terms of the FMIF constitution, in order for our clients, the administrators and then liquidators of the trustee, to be denied a right of indemnity on the basis of these principles, your client must be alleging a breach of trust involving the absence of a belief, held by our clients in good faith, that they were acting in accordance with the constitution and their duties. Given the express wording of the FMIF constitution and your client's stated intention to argue that our clients are disentitled from an indemnity against the assets of the FMIF, Mr Whyte's case must be that the administrators (now liquidators) were motivated by *mala fides* in their dealings which founded the indemnity claims which have been made. We are proceeding on that basis. We draw these principles to your client's attention in an effort to ensure that he is perfectly aware of the seriousness of the case he proposes to advance.

Mr Whyte's now stated allegations are no mere set-off; they must go beyond that. It is also not sufficient that there may be potential cross-liabilities; again, much more is needed. Despite this, your client seems committed to the course outlined in your letter. We invite Mr Whyte to reconsider his position in light of the matters raised in this letter so that the members of the FMIF might be spared further unnecessary expense.

It is worth noting against this background that at paragraph 63 of his affidavit sworn 8 March, 2016 in Supreme Court proceeding number 3508 of 2015, Mr Park deposes that he and Ms Muller took legal advice about the loan management fees and their ability to continue to charge those fees. No responsive material was put to that evidence. Without waiving the content of that advice, it should suffice to say that the advice was followed. This is, in our view, sufficient to dispose of Mr Whyte's claims (as presently formulated).

If, after considering these comments, Mr Whyte nevertheless intends to press the 'clear accounts' rule:-

1. our clients will contend that Mr Whyte is prevented from raising that point on this application because of the principles in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 197 CLR 589; and
2. if that argument does not succeed, our clients will require your client to put the claim with a level of particularity appropriate to the seriousness of the allegations.

Our clients, also, do not believe that the FMIF should bear the cost of Mr Whyte running this argument as it is destined to fail.

The allegation is estopped

Despite what is said in your letter of 23 November, 2016, your client has never clearly articulated his opposition to our client's indemnity on the basis of the 'clear accounts' rule.

There have been at least three substantial opportunities which your client has had to raise the issue, the failure to do so making your client's current reliance on the rule unreasonable:-

1. on 22 May, 2015, your client agreed to pay Mr Shotton's costs of the appeal to the Queensland Court of Appeal from the decision of Justice Dalton. That liability arose consequent upon an order that LMIM pay Mr Shotton's costs. Your client agreed, in respect of that liability (ultimately payable to your firm), that LMIM was entitled to exercise its right of indemnity. The relevant circumstances are set out with more particularity in paragraphs 21 to 36 of Mr Park's affidavit sworn 18 October, 2016;
2. on 17 December, 2015, Justice Jackson relevantly directed your client (a court appointed receiver) to provide reasons for his decision to reject any claim for indemnity for our clients' expenses. Your client provided reasons on 21 April, 2016 and 27 April, 2016 (which appear at pages 99 to 101 and 105 to 111 respectively of the exhibits to Mr Park's affidavit sworn on 18 October, 2016 ("the Reasons")). The Reasons did not clearly state your client's reliance on the clear accounts rule; and
3. if your client had intended to run the point, he ought to have done so at our clients' application for the approval of their remuneration heard on 22 February, 2016 and 14 March, 2016. He did not.

You have previously contended in correspondence that the issue was raised before Justice Jackson at our clients' remuneration application (the matters raised before Justice Jackson being the only reference to the position your client now takes which appears in the Reasons). We will explain why that is not so.

At paragraph 50 of his affidavit sworn 19 February, 2016, and filed in the remuneration application your client deposes:-

"There may be a set off against any indemnity claimed by LMIM."

Mr Whyte then refers to a letter from his other solicitors, Gadens, dated 17 February, 2016, being exhibit DW-11 to that affidavit. Therein, in addition to raising the 'clear accounts' rule (and we pause to note that Gadens did not address the constitution of the FMIF and simply referred to 'breaches of trust'), Gadens say that your client has "... identified a number of potential claims against LMIM (in its capacity as responsible entity for the FMIF) for breach of trust". The comments under the subheading "Loan recovery costs" in that letter appear to relate to the matters on which your client now relies.

Importantly, Mr Whyte did not depose to needing more time to investigate or to any obstacle to his investigations. That stance continued into the hearing of our clients' remuneration application in February and March, 2016.

It follows that, by mid-February, 2016, your client was aware of (at least) the substance of the claims he now says that he wishes to advance.

In response to the late delivery of that affidavit (which was served at 3:22 pm on Friday, 19 February, 2016, ahead of a hearing listed for the following Monday morning), our client managed, by working through the weekend, to provide responses to the matters raised by your client so late in the piece.

Paragraphs 34 to 46 of Mr Park's affidavit of 22 February, 2016 dealt with those issues as best our client was able in the short time permitted.

In written submissions prepared by Ms Brown QC and Mr de Jersey for your client on 22 February, 2016, the clear accounts rule was not pressed. The thrust of the submissions is a complaint about the insufficiency of our clients' evidence to persuade the Court that an order for remuneration should be made. The only reference to the substantive issue appears at paragraphs 70 and 71. The high point of the submission is at paragraph 71:-

"...The basis of the calculation of historical Management Fees is unclear, and whether any such charging was a breach of trust by LMIM as RE of the FMIF, and may, in turn, set off any such indemnity to LMIM."

At the conclusion of our clients' counsels' oral submissions the following exchange between Justice Jackson and Mr McQuade QC, for our client, occurred:-¹

MR McQUADE: There's one other point, which I'm not quite sure whether is still being pressed, but in the respondent's, Mr Whyte's affidavit and in the submissions, there was a point raised that my clients wouldn't be entitled to an indemnity for anything because of alleged defalcations by the trustee prior to the appointment, and what I'll do is I reserve the position to wait and hear from - - -

HIS HONOUR: This is the setoff argument?

MR McQUADE: Yes, and I'm not quite sure how that's being pressed and on what basis, but I'll leave that to reply, if I may, your Honour.

HIS HONOUR: All right.

Between pages 1-63 and 1-67, Ms Brown QC on behalf of Mr Whyte makes oral submissions about the relevancy of the loan management fees. At 1-66, his Honour summarises the effect of Ms Brown QC's oral submissions as follows:-

HIS HONOUR: All right. So that's not the problem that I'm seeing. The problem I'm seeing is you say there's an unclear aspect as to whether LMA was reimbursed but through distress asset controllership appointments for fees or otherwise for invoices that may be included in the LMA amounts that it claimed by way of remuneration or expenses.

MS BROWN: Yes.

That is distinctly not an assertion that the incurrence of the loan management fees amounts to a breach of trust of sufficient gravity to disentitle our clients to an indemnity at all. It raises a general concern that there may be double counting or, perhaps, that a sufficient quantum of money to satisfy our clients' claim for remuneration has already been paid by the FMIF.

Paragraphs 43(b) and 53 to 67 of Mr Park's affidavit sworn 8 March, 2016 set out the factual matters which underpin the loan management fees, which your client suggests amount to a breach of trust involving *mala fides*.

¹ Transcript of argument 22 February, 2016, 1-42, lines 21-32

In respect of the loan management fees, in his affidavit of 11 March, 2016, your client deposes:-

28. *I refer to the explanation by Mr Park at paragraph 43(b) of Mr Park's March Affidavit, to the effect that the loan management fees were ultimately borne by borrowers.*
29. *I have reviewed the loan account positions with respect to each of the borrowers in respect of whom there were controllership appointments at the time of (and subsequent to) my appointment. After realisation of the securities held by the FMIF over or with respect to those borrowers, there was a significant shortfall in each case of the amount recovered as against the total amount owing to the FMIF.*
30. *I have concerns about the reasonableness of charging such loan management fees, and whether it was a proper expense to the FMIF.*

Your client's affidavit material is replete with references to his "concerns" or "queries", the factual relevance of which to the application is unclear. Mr Whyte here seems to be contending, with the substantial benefit of hindsight, that the loan management fees should not have been charged because the risk of borrower default was foreseeable, as was the outcome that such fees would not be recoverable from the specific secured assets but rather would ultimately lie as an expense payable by the FMIF.

He does not, however, put the proposition anywhere near that directly.

In any event, it is certainly not a statement that the loan management fees amount to a breach of trust of sufficient gravity to disentitle our clients to an indemnity.

On 14 March, 2016, your client provided supplementary written submissions.

Paragraphs 35 to 38 of those written submissions contain submissions under the subheading "*Significance of Loan Management Fees paid to LMA*". The relevant parts of the submission are:

37. *In this regard there is a question of whether there may be a set-off available against any indemnity claimed from LMIM against FMIF assets given the matters raised in the correspondence from Gadens lawyers to Russells of 17 February, 2015 [sic, 2016]: affidavit of Mr Whyte at exhibit DW-11 which raised whether loan management fees were paid in breach of trust.*
38. *Mr Park in his March affidavit indicated that those fees have been added as an expense to the borrowers' costs: [43(b)]. These costs have just added to amount of default of the loans (Whyte March Affidavit [29]). Given the resource fee that was already paid to LMA which would appear to have included loan management there is a question as to whether this could be an expense properly incurred by LMIM for the benefit of FMIF when there appears to be little prospect of recovery. As such if that was not a properly incurred expense of the fund it should be set off against any other indemnity claimed from LMIM through LMA or as category 2 expenses. It should be assessed accordingly and any dispute dealt with pursuant to the Court's orders of 17 December, 2015. [Emphasis added]*

That is a submission, in substance, that:-

1. in Mr Whyte's letter of 17 February, 2016, he raised a concern that the loan management fees were paid in breach of trust; and
2. Mr Whyte's position now is that it may (not will) be the case that those expenses were not a proper expense of the FMIF in that they were not for the benefit of the FMIF given that there was little prospect of their recovery.

What it is not is a submission that our clients acted in breach of trust with an absence of good faith so as to disentitle them to an indemnity. Such a submission would require very careful substantiation.

Paragraph 21 contains the only reference to the 'clear accounts' rule in the written submissions. Therein, Mr Whyte's counsel submit:-

"It may be that the Court would consider, in deciding whether to make any order for direct payment to the first applicants as administrators or liquidators, the fact that any indemnity of LMIM could be subject to the application of the clear accounts rule."

The submission does not deign to actually submit that a particular course is appropriate; it merely raises the spectre of suspicion on a matter not properly argued, though clearly in contemplation and left to linger for Jackson J to work through himself; your client having avoided taking a definite position.

The submission is further clouded by the fact that there is a footnoted reference to *Re Rivercity Motorway Pty Ltd* (2014) 102 ACSR 185 at [68] and [69]. Those paragraphs of Greenwood J's judgment read:

"Third, confirming a direct right of indemnity in the liquidators avoids any risk that the interests of the trusts and their members might be subordinated to any concern the liquidators might have as they undertake particular tasks concerning any personal liability."

I am satisfied that the work required of the liquidators is work which will benefit the trusts and their beneficiaries, and the liquidators are in the best position to efficiently, and particularly cost efficiently, undertake that beneficial work."

Whatever your counsel had in mind with that reference, it has nothing at all to do with the 'clear accounts' rule; perhaps where his Honour's attention was being drawn was the necessary element of there being benefit to a trust from work undertaken by a liquidator to support any claim for the costs associated with such work. A wholly different point to that is presently under consideration.

In oral argument at the second day's substantive hearing, your client brushed up against the argument but, again, failed to press it in any detail. There is a discussion between your client's counsel and Justice Jackson throughout pages 1-53 to 1-56 before lunch and then again at pages 1-60 to 1-62. Therein, your client's counsel withdraws the 'at large' concern about our clients' right to remuneration being defeated by any conduct of LMIM prior to their appointment and substantially narrows the submission in respect of post-appointment conduct.

Relevantly:-

MS BROWN: ... In terms of the question of the clear accounts rule and any setoff, I clarified the position over lunch in that regard, your Honour, and the only matter that would be raised as a point of setoff by any indemnity claimed by LMIM post appointment of the applicants would be in relation to conduct by them which could be said to be disentitling conduct for an indemnity.

HIS HONOUR: But what's that? That's a statement by you of some future attitude by Mr White?

MS BROWN: It's actually – it's – the only matter that has been raised has been identified in his affidavit, which is in relation to the loan management fees and that 45 has been the subject of correspondence by Gadens to Russells.

HIS HONOUR: But that's not what his affidavits have said. His affidavits have relied on the proposition in general twice, but you are now clarifying and you're saying that Mr White's intention is narrower?

MS BROWN: Yes.

HIS HONOUR: But that's not binding unless you're promising to be bound for him. You could be sued if he changes his mind. I mean, how am I supposed to pay any attention to that?

MS BROWN: Well, the point – the point about that, though, is this, your Honour: the pre-administration – pre-administration conduct would ultimately, in terms of creditors' claims, be dealt with under the 17 December 2015 regime. The claims by

- - -

HIS HONOUR: But you're saying this should be not a remuneration claim by a liquidator which he or she seeks to have made payable out of a trust fund carried on by the company that was in liquidation, this should be dealt with under the constitution, meaning it should be a company claim, and that would be a claim subject to – however framed, to the rules about indemnities.

MS BROWN: It would, but as I said, your Honour, my – at least in terms of the conduct which could disentitle the first applicants from being able to claim their indemnity - - -

HIS HONOUR: But the first applicants don't have an indemnity under the hypothesis that it's going to be a company claim.

MS BROWN: Well, the company has the indemnity, you're right.

HIS HONOUR: Once you say it's done under the constitution, it's not some officer of the company, it is the company.

MS BROWN: It is the company, your Honour is quite right, and I can't take it further than the fact that – in terms of any setoff that would be claimed in terms of work carried out by the company post the appointment of the liquidators, that I'm instructed to say it would not be raised, other than in relation to conduct by them, but returning to the question of the remuneration application here, there is no general entitlement after Mr White's appointment to continue to carry out the work which Mr Park has referred to in his affidavit, and the requisite nexus between the administration of the trust and the work carried out which is required under any of the principles, whether it be under Suco Gold, Universal Distributorship or Berkeley Applegate, has not been established..." [Emphasis added]

Your client could not be said to have argued the point when there were absolutely no submissions put towards how or why our clients' conduct in respect of the loan management fees was a breach of trust.

There are only two possible analyses of your client's approach to the issue on our client's remuneration application; either:-

1. the argument was not raised, despite the opportunity to do so; or
2. it was raised and the submissions and evidence put were those to which we have referred above, in which case:-
 - (a) your client never said what our clients' obligations were;
 - (b) your client never said how the loan management fees are said to have breached those obligations;
 - (c) your client never said why it is that type of breach of trust is so serious as to amount to disentitling conduct;
 - (d) your client never said how it can be inferred that our clients acted in the absence of good faith;
 - (e) your client never said why it is that taking legal advice on the transactions does not evidence good faith; and
 - (f) no case was relied upon in which an administrator or liquidator was denied their remuneration because of their *mala fide* conduct of the affairs of the company.

If your client considers that the latter position is correct and the argument was raised, the only evidence on the matter is your client's broadly expressed concern (at paragraphs 28 to 30 of his affidavit of 11 March, 2016) and our clients' unchallenged explanation of the transactions (at paragraphs 43(b) and 53 to 67 of Mr Park's affidavit sworn 8 March, 2016), including his unchallenged evidence that he took advice about the transactions.

We have focused the substance of our clients' response to your client's attitude to the application on the loan management fees because that is the sole basis raised in your letter of 11 May, 2016 for the application of the 'clear accounts' rule. If your client believes that there exists other grounds to found his allegations, please let us know immediately what are those facts.

Your letter of 11 May, 2016 also suggests there are some outstanding amounts due from LMIM for operational expenses. There does not seem to be any serious attempt in your letter to suggest that the 'clear accounts' rule (that is, the principle that a sufficiently serious breach of trust can deprive a trustee of their right to exercise their indemnity) applies. Rather, an amorphous "set off" is claimed. Again, if we have misunderstood your client's contentions please let us know.

In any event, would you please let us know if you contend that your client does not need to establish the absence of good faith on our clients' part in order for the 'clear accounts' rule to apply and, if so, the basis for that position (including by reference to clauses 19.1(a) and 19.1(c) of the constitution of the FMIF).

In summary, the position which our clients take is that your client was well apprised of the circumstances surrounding the loan management fees by, at the latest, the hearing of our clients' remuneration application and, as such, your client could have submitted that those transactions involved a sufficiently serious breach of trust to operate to deprive LMIM (and our clients) of a right to an indemnity. He did not.

Your client could have sought an adjournment of the application to permit those matters to be fully investigated if (as he deposed and submitted) he remained in real doubt about the effect and propriety of the transactions. He did not.

The only conclusion which can therefore be drawn is that:-

1. your client was aware of the substance of the transactions;
2. your client was aware (and must have taken advice to the effect) that he could contend that the transactions amounted to a breach of trust in the absence of good faith on the part of our clients; and
3. your client made a forensic decision not to do so.

Your client's foreshadowed submission that the loan management fees amount to a (bad faith) breach of trust is so clearly connected and relevant to the subject matter of the earlier proceedings mentioned above that it is unreasonable (in the sense meant by Gibbs CJ, Mason and Aickin JJ in *Anshun*) to raise it now.

Doing so only serves to unnecessarily and unfairly increase the costs of this application.

If, in light of the matters raised above, your client still intends to press the allegations of personal misconduct, and then fails, our client will seek an order that your client personally pay our clients' costs of the application on the indemnity basis without recourse to the assets of the FMIF.

Such an order would be justified because:

1. there is a clear basis for an *Anshun* estoppel set out above and your client is being given an opportunity to retreat from his position; and
2. in light of the unchallenged evidence by Mr Park (including that he took legal advice) there can be no proper basis for the allegation of personal misconduct and bad faith on our clients' part.

Directions to advance

Assuming, for the moment, that your client intends to proceed with the argument that the 'clear accounts' rule applies to our clients' application, it seems to us that there are three 'limbs' to the proceeding:-

1. the *Anshun* point raised above;
2. if your client is not estopped from raising the 'clear accounts' rule, whether our clients have, in fact, committed a breach of trust and whether that breach is sufficiently serious to displace their right of indemnity; and
3. whether the particular expenses claimed fall within the scope of the indemnity or have the requisite connection to the FMIF.

The first matter ought to be heard as a separate question pursuant to rule 483 of the *Uniform Civil Procedure Rules 1999* (Qld). If it succeeds, there is no need for any argument in relation to the second issue (which will likely be lengthy and expensive). If it fails, our clients will require your client to establish his contention with the level of specificity befitting the gravity of the allegation; that is, by pleadings.

The third issue is, in our view, relatively narrow and could be heard in less than half a day. The parties' respective positions in this regard have been reduced to writing for some time now.

Accordingly, there ought to be a hearing on the substance of our clients' *Anshun* point at the earliest opportunity and, if it succeeds, the parties can immediately move to a hearing on the substantive third issue. We do not see the need for directions before a hearing of that nature is set down.

If the *Anshun* point fails, there ought to be directions requiring your client to plead the alleged breach of trust with associated directions for the exchange of evidence. As the 'moving party' in respect of that allegation, your client should plead first.

On the basis of your previous correspondence, we anticipate that your client will resist that course. Accordingly, we propose to write to Justice Jackson's associate in the following terms:

Dear Associate

We act for Mr John Park and Ms Ginette Muller, the liquidators of LM Investment Management Limited ("LMIM"). Tucker & Cowen, who are copied in to this correspondence, act for Mr David Whyte, the person appointed to supervise the winding up of the LM First Mortgage Income Fund ("the Fund"), a registered managed investment scheme of which LMIM was (and remains) the responsible entity. Several matters relating to the affairs of LMIM have been heard by his Honour in the past eighteen months or so.

On 17 December, 2015, his Honour made the attached orders in this proceeding. On 20 May, 2016, our clients filed an application as contemplated by paragraph 9(a) of the order.

The parties have been in correspondence about the application and have been unable to agree on the best course to move the matter forward.

In essence (and without intending to pre-empt the submissions which will be made to the Court), our clients contend that they are entitled to an indemnity out of the Fund for certain expenses. Mr Whyte disputes that position for (at least) two reasons;

- a) firstly, that there is not a sufficient connection between the expense incurred and the Fund. Our clients believe that part of the dispute can be determined in very short order; perhaps in a few hours, certainly in much less than a day; and*
- b) secondly, Mr Whyte contends that certain other transactions call for the application of the 'clear accounts' rule, such that our clients are not entitled to an indemnity. In respect of the second point, in addition to a substantive answer to the matters raised by Mr Whyte, our clients wish to rely on the principles in Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 to argue that Mr Whyte is estopped from running that point and wish to have that issue determined as a separate question pursuant to UCPR 483.*

The parties' respective contentions to move the matter forward are as follows:-

- (a) Mr Whyte contends that there should be a directions hearing to allow these matters to be ventilated; and*
- (b) our clients wish to have the Anshun point set down immediately to be determined in advance because, if that issue is decided in their favour, there can then be a very short hearing disposing of the entire substantive application.*

Would you please let us know which course would be preferable to his Honour.

This correspondence has been sent with the consent of Mr Whyte's solicitors.

Would you please let us know if your client objects to correspondence in those terms being sent. We intend to send that correspondence by email to his Honour's associate at midday, Friday, 16 December, 2016.

Yours faithfully



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Our reference: Mr Schwarz / Mr Ziebell

15 December 2016

Your reference: Mr Tiplady / Mr Sean Russell

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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Indemnity Claims by LMIM - Application filed 20 May 2016

We refer to your letter of 13 December 2016.

On pages 10 and 11 of your letter, you have set out the terms of a draft email you propose to send to the Associate to Justice Jackson. You have asked whether our client objects to correspondence in those terms being sent to His Honour's Associate. He does object.

Our client is presently overseas. We will seek instructions to respond more fulsomely. We do not anticipate being in a position to do so by Friday.

We do note, however, that in our correspondence of 17 November 2016, and again in our letter of 23 November 2016, we said that our Counsel was available for a directions hearing on 9 December 2016, that date being provided in response to a request by you for a suitable date on which the proceeding might be reviewed, subject to the convenience of His Honour. We did not hear from you.

It is neither necessary, nor appropriate, to seek to characterise the respective positions of the parties (inaccurately, in the case of our client) or to make submissions in correspondence to His Honour's Associate.

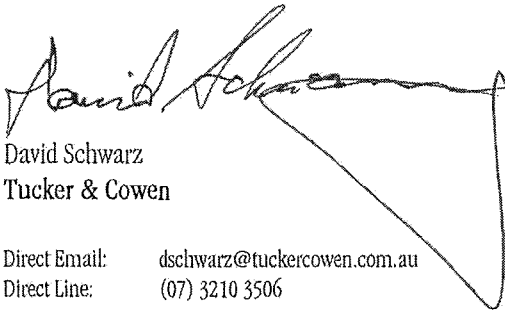
While we remain of the view that the hearing of this application should be deferred until after His Honour has delivered judgment on the remuneration application, if your clients wish to progress their application, then a short request may be made of His Honour's Associate that the matter be listed for directions in the New Year, on a date convenient to His Honour and to the parties. At that directions hearing, the issues that have been raised in your correspondence can be ventilated and a hearing date may be fixed or appropriate directions made (if need be) as to the further conduct of the matter made. If there is a divergence of opinion between our respective clients as to the more appropriate way of dealing with the application, then Counsel for the respective parties may make submissions to His Honour at the review. That is the orthodox and, with respect, appropriate way to deal with the application.

Given the time of year, our Counsel is unavailable until after the Court returns from the Christmas holiday. We are informed that our Counsel would presently be available for a review in the week of 6 February 2017. Please let us know if that is suitable to your Counsel or, if not, please let us know a range of dates that are suitable so that we may make inquiries of our Counsel, and ascertain a mutually convenient date (or range of dates) to propose to His Honour.

Once mutually convenient dates have been ascertained, an email can be sent in agreed terms seeking the listing of the matter for review; please provide the terms of a revised draft email to His Honour's Associate for our consideration when advising of your Counsel's availability.

We look forward to hearing from you.

Yours faithfully



David Schwarz
Tucker & Cowen

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RUSSELLS

12 January, 2017

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz

Mr David Schwarz
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Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") - Indemnity Claim

Thank you for your correspondence of 15 December, 2016.

In your letter you have proposed that the matter be listed for review in the week commencing 6 February, 2017. As you would appreciate, this is still some weeks into the future.

Given the elevation of Ms Brown QC to the Supreme Court bench, we query whether or not it may now be possible for the matter to be brought on before Justice Jackson earlier than the week commencing 6 February, 2017. To this end, we and our counsel are available in the week commencing 23 January, 2017 (except, of course, on the Thursday, being Australia Day) as well as in the week commencing 30 January, 2017 save for Monday, 30 January, 2017.

Would you please let us know whether or not, given the change in circumstances, these dates would be convenient to your client and your counsel.

We also await from you comments in relation to our proposed correspondence to be delivered to Justice Jackson as outlined in our correspondence of 13 December, 2016. We understand that Mr Whyte has now returned from overseas and seek his response.

Our position remains as outlined in that letter.

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We look forward to hearing from you.

Yours faithfully



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19 January 2017

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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Indemnity Claims by LMIM - Application filed 20 May 2016

We refer to your letter of 12 January 2017.

In view of the elevation of Ms Brown QC to the Supreme Court bench, you will appreciate that it is necessary for our client to secure appropriate substitute senior counsel; it would be highly desirable that replacement senior counsel be briefed prior to any review of the Application filed by your client on 20 May 2016.

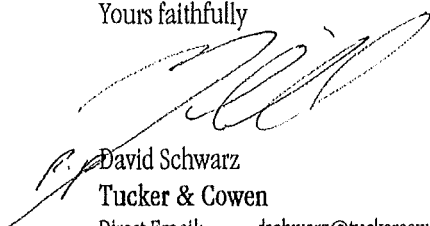
That said, we are presently taking steps to brief replacement Queen's Counsel as a matter of priority, but do not anticipate being in a position to provide the availability of any such replacement Counsel this week. As such, it is unlikely that any such review of the matter could be listed in the week commencing 23 January 2017 (next week). Accordingly, we again enquire as to your Counsel's availability in the week beginning 6 February 2017 (as requested by our letter to you on 15 December 2016).

Our client objects to the content of the draft email to the Associate included in your letter of 13 December 2016. Any correspondence to the Associate should be limited to requesting a review of the Application at a time convenient to the parties, and the Court. Please provide us with an alternate email to the Associate in those terms, for our client's approval.

We also note that, while Mr Whyte has returned from overseas, he is presently on leave to 27 January 2017, returning to the office on Monday, 30 January.

In the circumstances, a review of the matter earlier than the week of 6 February 2017 is not convenient to our client, and is unlikely to be convenient to our Counsel.

Yours faithfully



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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("*LMIM*");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("*FMIF*") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Indemnity Claims by LMIM - Application filed 20 May 2016

We refer to your letter of 12 January 2017, and to the subsequent exchanges of correspondence concerning your clients' intention to approach the Associate to Jackson J for the purpose of listing the Indemnity Application for directions.

Proposed dates for review

As was foreshadowed in our letter of 19 January, we have taken steps to brief new Queen's Counsel in the matter and have now briefed Mr Roger Derrington QC.

We are informed that Mr Derrington is relevantly available to appear at a review of the matter on any of 14, 16 or 20 February 2017. Of those dates, our preference would be for it to be on either 16 or 20 February.

In order that a range of dates may be offered to His Honour's Associate, we have also ascertained that Mr Derrington is available to appear at a review on 21, 22 or 24 February 2017 if those dates are more convenient to His Honour.

That said, we intend to raise in separate correspondence issues which you and your clients may wish to take additional time to consider prior to a review. If your client would prefer a later date for a review, please let us know and we will ascertain the availability of Mr Derrington.

Proposed correspondence to Jackson J's Associate

Your letter of 12 January 2017 indicated that you were awaiting our comments in relation to proposed correspondence which was outlined in your letter of 13 December 2016.

In our letter of 19 January, we outlined our client's objection to the content of the draft email to the Associate proposed in your letter, and requested an alternate email to the Associate simply requesting a review of the Application at a time convenient to the parties, and to the Court.

We have not yet received from you the proposed content of such a draft email, and we look forward to receiving that proposed email, shortly.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Schwarz', with a long horizontal flourish extending to the right.

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3 February 2017

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Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Administration Indemnity Claims & Recoupment Indemnity Claims by LMIM; Application filed 20 May 2016

We refer to your letter of 13 December 2016 in relation to your clients' application filed on 20 May 2016.

It appears from your letter that your clients do not have a clear understanding of our client's position as to the 'clear accounts' rule and its application to LMIM's indemnity from the FMIF, notwithstanding that our client's position has been the subject of considerable correspondence, affidavit material and submissions to the Court.

We are instructed to attempt to further clarify the position in order to limit the scope for any misunderstanding. We are also instructed to write to you as follows, to address some of the other issues raised in your correspondence.

The Indemnity Application

Your letter appears to misconstrue the nature of the application filed 20 May 2016 ("the Indemnity Application"); your letter refers to "*our clients' indemnity claims for their expenses...*" (emphasis added) thus suggesting that the indemnity referred to is one available to, or claimed by, both Mr Park and Ms Muller personally, as well as by LMIM as responsible entity. As we understand the Indemnity Application, however, the application concerns only LMIM's right of indemnity, and does not in its terms purport to seek any directions or orders at all concerning any indemnity in favour of Mr Park and Ms Muller personally.

We pause at this point to note that, while the Indemnity Application seeks declarations as to LMIM's right of indemnity for certain amounts (being amounts that Mr Whyte rejected) under paragraphs 4 and 5 of the Order of the Honourable Justice Jackson dated 17 December 2015 ("the December Order"), your clients' Indemnity Application is (as we understand it) in fact for directions as contemplated by paragraph 9 of the December Order.

If our understanding is incorrect, please tell us.

Remuneration of the LMIM liquidators

Insofar as the remuneration of Mr Park and Ms Muller is concerned:-

1. Your clients have already made application to the Court for orders concerning their remuneration referable to the period to 30 September 2015; that application has been heard, extensive submissions made and judgment is reserved;
2. An order has been made (by paragraph 18 of the December Order) for your clients to be remunerated for work carried out by them and their staff in connection with the performance of the requirements of the December Order; although your clients have not yet made application for any such remuneration, the entitlement of your clients (Mr Park and Ms Muller) to be remunerated is the subject of a Court order for an indemnity to them personally and Mr Whyte, naturally, recognises your clients' entitlement to seek approval of remuneration under that Order; and
3. We had understood that there would be little, if any, additional remuneration sought by your clients for work not required by the December Order which has not already been sought by that part of the Further Amended Originating Application filed 16 December 2015 which was heard by Justice Jackson on 22 February and 14 March 2016 ("the Remuneration Application"); at least so far as we are aware, it has not been suggested that there is any such additional remuneration and there has been no claim made for any. If your clients do envisage making further claims for "Category 1" or "Category 2" remuneration (as those categories were defined in the Remuneration Application) other than under the December Order, please let us know.

Accordingly, so far as we can see, the questions that arise in the context of the Indemnity Application concerning the application of the clear accounts rule are not likely to have any real bearing upon any future remuneration claims by your clients under the December Order.

LMIM's indemnity from the FMIF

Your letter refers to clauses 19.1(a) and (c) of the constitution of FMIF ("the Constitution"). Your letter of 11 May 2016 also addressed these provisions of the Constitution of the FMIF, and advanced a construction of them which, it was said, effectively precluded the operation of the clear accounts rule except in relation to liabilities for conduct in bad faith or undertaken fraudulently.

We do not agree with that construction.

Clause 19 (or any other provision of the Constitution providing for an indemnity in favour of LMIM out of the property of the FMIF) must be read subject to section 601GA(2) of the *Corporations Act 2011*, (Cth) ("the CA"). As you know, that provides that any right of indemnity out of scheme property in favour of the responsible entity for (relevantly) liabilities or expenses incurred in relation to the performance duties "*must be available only in relation to the proper performance of those duties*" and further provides that "*any other agreement or arrangement has no effect to the extent that it purports to confer such a right*".

Clause 19.1(c), as we read it, does not seek to go further than to confer a right to indemnity for expenses and liabilities properly incurred; nor could it. The provision appears to attempt a restatement of the conditions upon a trustee's right of indemnity in equity, namely that the indemnity will be available only if the relevant expense or liability was "properly incurred"; that is to say, not "improperly incurred". By stating that the indemnity is available in respect of a matter "*unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust*" we think that the Constitution does

no more than reflect the principle, concisely stated by Gordon J (as Her Honour then was) in *ASIC v Letten (No 17)*¹ ("*Letten*"), that:-

*"the indemnity is not available if the activity which generated the liability involved a breach of trust or a breach of a duty by the trustee, was beyond the powers given to the trustee or was criminal or fraudulent in nature... The indemnity is also not available where the liability is "unreasonable or unnecessary" and therefore is not "properly incurred"."*² (citations omitted) (emphasis added)

Such a construction of clause 19.1(c) is consistent with other provisions of the Constitution, such as clause 18.8 which provides that:-

"The RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with this Constitution."

Clause 19.1(c) accordingly simply draws attention to the point that, when considering whether an indemnity is available at all in respect of an expense or liability (setting to one side any potential application of the clear accounts rule), it is the activity that generated the liability that must be examined in order to determine whether the liability or expense was properly incurred.

Clause 19.1(a) does not seek to oust the operation of the clear accounts rule, either. That clause does not seek to expand the right of indemnity, but rather to limit the responsible entity's liability for loss or damage arising out of a breach of duty. It is possible, of course, for a trust instrument to limit the liability of a trustee arising from a breach of duty, or even to exclude such liability to an extent, but it is well established that the trust instrument cannot exempt the trustee from liability for breaches of those duties that constitute the "*irreducible core*" of a trustee's obligation.

An important point, for present purposes, is that clause 19.1(a) does not say anything about LMIM's obligation to account, or to restore to the FMIF property that has been applied in breach of trust, nor does it seek to expand the right of indemnity beyond an indemnity for liabilities properly incurred.

Further, clause 18.7 of the Constitution provides as follows:-

"In the event of any dispute regarding the payment of fees and expenses, the RE shall be paid such fees and expenses until the dispute is fully determined. Any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment." (emphasis added)

Accordingly, if an amount has been paid out of the FMIF in respect of an expense for which the RE did not, in fact, have a right of indemnity (because, for example, it was an expense not properly authorised by the terms of the trust), the amount of that overpayment must be repaid by the RE; that is, restored to the FMIF.

The point of this recitation of provisions of the FMIF Constitution and an explanation of our client's understanding of how they are to be construed, is that, contrary to the proposition advanced in your correspondence, our client does not understand the Constitution to preclude the operation of the clear accounts rule except where the trustee has acted fraudulently or in bad faith, nor to allow an indemnity other than for (relevantly) expenses and liabilities properly incurred.

¹ (2011) 87 ACSR 155; [2011] FCA 1420

² At [14]

Anshun estoppel

Your letter of 13 December 2016 asserts that Mr Whyte “*has never clearly articulated his opposition to our client’s indemnity on the basis of the clear accounts rule.*” On page 3 of your letter, you identify “*three substantial opportunities*” when you say Mr Whyte might have raised the clear accounts rule, but did not do so. Of those three, only two involve court proceedings in which the clear accounts rule might have been raised for determination (a necessary circumstance if *Anshun estoppel* is to be raised); namely, our client’s decision in respect of your clients’ claims for indemnity under the December Order, and your clients’ Remuneration Application.

As to the first of those two occasions, the acceptance or rejection of an Eligible Claim by Mr Whyte did not call for the consideration of the clear accounts rule. Rather, by adjudicating upon those claims, Mr Whyte was deciding simply whether LM had a right to be indemnified from the property of the FMIF in respect of the particular expenses or liabilities the subject of those claims.

As you know, the clear accounts rule was described by Gordon J in *Letten* as “*essentially a mathematical exercise setting off the trustee’s right to indemnity against its liability with respect to previous breaches of trust.*” Mr Whyte’s task was directed only to the first of those countervailing considerations – that is, the ascertainment of the trustee’s right to indemnity. It did not involve (at least as far as Mr Whyte and we understand it) a determination about any liability on the part of LMIM to restore funds to, or make good loss suffered by, the FMIF with respect to previous breaches of trust, nor any determination about whether any such claims ought be set off against the right to indemnity.

That said, we do not think that your clients could have been under any misapprehension that our client considered there to be a potential for the clear accounts rule to apply.

As to the Remuneration Application:-

1. that application was, in substance, an application for remuneration to be approved and paid to the liquidators personally, rather than a claim for indemnity by LMIM; and
2. the clear accounts rule was in fact the subject of both affidavit material and submissions to His Honour.

In any event, the issues arising under the December Order have not yet been fully and finally determined; neither, for that matter, has the Remuneration Application, in which judgment remains reserved.

For these reasons, we fail to see how Mr Whyte could be estopped from raising the clear accounts rule.

Regardless of these matters, the potential application of the clear accounts rule is not a “newly” articulated position, contrary to what was said in your letter of 11 May 2016. Our letter of 23 November 2016 identified instances in which the issue had been raised. Those instances include the following:-

1. On 18 December 2015, you wrote to us regarding your clients’ remuneration; in particular, your letter noted that the orders made on 17 December 2015 oblige your clients to undertake work, and you explained that “*our clients wish to ensure that they will be paid for those tasks. . .*” Your letter then asked the following:-

“If your client is of the view that there is some reason why clients ought not be paid for the work they have and will undertake because there is some impediment or reason to deny or defer LMIM’s right of indemnity against the assets of the FMIF, we ask that be communicated to us immediately.”

2. We responded by our letter of 23 December 2015. In that letter, we said the following:-

"As regards LMIM's right of indemnity from the property of the FMIF, we are instructed that our client considers that there may be circumstances by which LMIM's right of indemnity from the property of the FMIF may be impaired, or which give rise to claims as against LMIM in connection with the FMIF. Your clients are, of course, aware of at least one of those claims, being the claim made in proceeding no. 12317 of 2014 in the Supreme Court of Queensland.

Our client's investigations and consideration of those matters are ongoing. Our client reserves completely his position and rights concerning those circumstances and any claims, including any circumstances that may be relevant to the operation of the "clear accounts rule".

3. On 17 February 2016, Gadens (who, as you know, act for Mr Whyte in respect of certain aspects of the winding up and receivership of the FMIF) wrote to you. Their letter gave notice of certain potential claims against LMIM (in its capacity as responsible entity of the FMIF) for breach of trust. Those potential claims included the following:-

"A claim against LMIM in its capacity as responsible entity of the FMIF in respect of the entry into and payment of fees and certain costs and expenses to LM Administration Pty Ltd (LMA) purportedly for services provided by LMA for loan management and controllership services in replacement of appointing external receivers."

Those LMA loan management and controllership fees mentioned in the letter included an amount of \$928,483.39 referable to the period from 1 March 2013 (calculated by reference to LMIM's ledger report for the period from 1 March 2013 to 30 June 2013). As was noted in the letter from Gadens to your firm, the circumstances surrounding those payments were (and are) still being investigated by our client.

At the conclusion of their letter, Gadens referred to the substance of the 'clear accounts' rule upon any right of indemnity of a trustee (such as LMIM) and said the following:-

"As part of our client's consideration of any claim for indemnity from the FMIF, our client will necessarily have to consider the nature of the claim for indemnity, whether such claim was properly incurred by LMIM on behalf of the FMIF and whether there are any matters which disentitle or reduce LMIM's entitlement to an indemnity from the FMIF (which may include further consideration of the claims against LMIM for breach of trust, foreshadowed above)."

The Gadens letter concluded by reserving Mr Whyte's rights, and by noting that it may be appropriate for Mr Whyte to apply to the court for directions as contemplated by paragraph 10 of the Indemnity Order.

4. That letter from Gadens was exhibited to Mr Whyte's affidavit filed in this proceeding (for the purposes of the Remuneration Application) on 19 February 2016; it is exhibit "DW-11". Paragraphs 50 to 53 of Mr Whyte's affidavit referred to the possibility of a set-off against any indemnity claimed by LMIM, and referred to the letter from Gadens.
5. Paragraph 114 of Mr Whyte's February affidavit referred to the LMA loan management fees (among the other fees charged to the FMIF) and referred to Mr Whyte's concern about the possibility of duplication and lack of clarity in connection with those fees. You will recall that in our letter of 25 January 2016, we had referred to the LMA 'loan management fees' and the state of accounts as between LMA and LMIM as responsible entity for the FMIF; our

letter invited your clients to address those issues in their material to be filed in support of their Remuneration Application.

6. The written outline of submissions on behalf of the Respondent dated 22 February 2016 referred, at paragraph 15, to the position that, *"A right of indemnity would normally be subject to a set off for breach of trust or breach of duty"*.
7. The issue was dealt with in a more direct fashion in Mr Whyte's affidavits sworn and filed on 11 March 2016 in which:-
 - (a) Paragraphs 14(b)(iii) and (iv) were in the following terms:-
 - "(iii) I have concerns (but in the absence of a full reconciliation have not yet been able to form a concluded view) that the loan management fees may not have been reasonably justified;*
 - (iv) to the extent to which LMIM claims an indemnity from the FMIF property, it may be that the "clear accounts rule" would operate such that the indemnity would not, in fact, be enforced against the FMIF property;..."*
 - (b) Paragraph 30 stated, *"I have concerns about the reasonableness of charging such loan management fees, and whether it was a proper expense to the FMIF."*
8. The written supplementary submissions on behalf of Mr Whyte which were relied upon at the hearing on 14 March 2016 addressed the issue of the clear accounts rule as follows:-
 - (a) At paragraph 21 (in the part of the submissions dealing with claims made under the FMIF constitution, and thus claims relying on LMIM's indemnity) the submissions say the following:-

"It may be that the Court would consider, in deciding whether to make any order for direct payment to the first applicants as administrators or liquidators, the fact that any indemnity of LMIM could be subject to the application of the clear accounts rule. ...";
 - (b) Paragraphs 35 to 38 concern the LMA loan management fees. Paragraph 37 is in the following terms:-

"In this regard there is a question of whether there may be a set off available against any indemnity claimed from LMIM against FMIF assets given the matters raised in the correspondence from Gadens Lawyers to Russells of 17 February 2015: affidavit of Mr Whyte at exhibit DW-11 which raised whether loan management fees were paid in breach of trust."
 - (c) Paragraph 38 submits that *"there is a question as to whether..."* the LMA loan management fees could be an expense properly incurred by LMIM for the benefit of FMIF, when there appears to be little prospect of recovery.

Notwithstanding those matters, paragraph 4 of the submissions makes clear the position of Mr Whyte that work undertaken by your clients for "getting in, preserving, managing or realising the property of the FMIF" is work that would have been properly undertaken for the benefit of the FMIF, and is work for which your clients *"would be entitled to be paid remuneration directly from the property of the FMIF"*.

9. There were significant exchanges between Justice Jackson and Counsel for the respective parties on 14 March 2016 as to the operation of the clear accounts rule; your letter of 13 December 2016 refers to some of them.

In these circumstances, it can hardly be said that Mr Whyte has been keeping the issue of the clear accounts rule “up his sleeve”.

Mr Whyte’s position – the clear accounts rule and your clients

As mentioned at the beginning of this letter, it appears that your clients do not fully or clearly understand Mr Whyte’s position concerning the clear accounts rule and its potential operation in connection with indemnity claims by your clients. It is appropriate to clearly state the following, and we do so upon instructions:-

1. Where a claim for indemnity is made by LMIM (as distinct from a claim for indemnity or payment to the liquidators personally; so far only the Remuneration Application), the clear accounts rule has potential operation in respect of LMIM’s liabilities ‘to the FMIF’³ (subject to what is said below) – that fairly clearly appears to be the position that emerges from the relevant authorities that consider the issue;
2. Nonetheless, Mr Whyte considers it reasonable that the liquidators be appropriately remunerated and reimbursed from the FMIF property for work they have done, and expenses they have properly incurred, to benefit the FMIF or to perform (through LMIM) the relevant obligations of the RE of the FMIF; and
3. Mr Whyte therefore considers that it would be reasonable and appropriate that a distinction be drawn between liabilities incurred before the appointment of your clients, the liquidators, to LMIM and those incurred after; and that, in respect of claims for indemnity by your clients in connection with liabilities by them incurred after their appointment, only liabilities ‘to the FMIF’ arising from transactions, acts or omissions of your clients after the appointment of the liquidators (first as administrators) should be set off against the indemnity claim.

In other words, to the extent that LMIM claims indemnity from the FMIF under the regime established by the December Order for expenses properly incurred in the performance of the FMIF during the appointment of the liquidators either as administrators or liquidators, Mr Whyte thinks it reasonable and appropriate that the only off-setting claims or liabilities that should be taken into account for the purposes of the operation of the clear accounts rule are those arising from your clients’ own conduct. This is, we think, another way of expressing Mr Whyte’s intention as conveyed in oral submissions by Ms Brown QC (as Her Honour then was) to Jackson J on 14 March 2016.

While the summary in point 3 above is, and was then, our client’s view as to what would be a reasonable position, Jackson J appeared to express some doubt as to whether Mr Whyte could adopt such a position. We also note that the general position may be identified in point 1 above may be wider than Mr Whyte intends. It is therefore a matter about which our client considers that judicial guidance is likely required. Since the matter was raised before Jackson J, our client is hopeful that His Honour will provide that guidance in his judgment on the Remuneration Application.

Potential set-off raised by Mr Whyte

In our letter of 11 May 2016, we raised two matters that potentially give rise to liabilities that should be set off against a post-appointment right of indemnity, namely:-

³ To use loose, but convenient, language; we mean obligations to make good any loss caused to the fund (the FMIF) or otherwise to compensate the FMIF; similarly, the RE would usually be required to make good any debts owed to the FMIF as a condition of gaining reimbursement

1. First, we suggested that there were questions as to the reasonableness and propriety of certain payments which LMIM caused the FMIF to make to LM Administration Pty Ltd (in liq.) ("LMA") for "loan management fees" in the period of March to July 2013, following the appointment of the liquidators as administrators of LMA and LMIM; and
2. Second, we mentioned the amount of \$779,266 which we were instructed was owing by LMIM to the FMIF, arising from the arrangements put in place with Mr Clout as liquidator of LMA for the utilisation of LMA's staff, premises and resources – the amount claimed related to, in effect, the proportion of the amounts that had been paid by the FMIF to LMA (Mr Clout) in connection with work being undertaken by your clients other than in connection with the FMIF. We are instructed that this amount remains unpaid to the FMIF, but that your clients have requested some further information to support the allocation of costs, which information is being gathered by Mr Clout.

The second of those is not, we think, controversial.

It is the first, relating to the loan management fees, that is the subject of controversy between our respective clients.

Loan management fees

The first point to note about these fees, is that the concern held by our client as to whether loan management fees (charged prior to the appointment of the liquidators) were properly incurred in the performance of the FMIF is a concern that was also held by Mr Park; although the issue for present purposes relates to fees charged after the appointment of your clients, our client understands that the pre-appointment arrangement about which Mr Park had been concerned, did not alter for the purposes of the fees charged after the appointment of the liquidators.

The payments in question amount to just under \$1 million. Such sum relates to the following invoices:-

1. \$560,722.62 (inc GST) paid prior to 19 March, 2013 – and apparently credited, after the event, as a part payment of LMA's invoice 8973Inv003 of 31 May, 2013 for \$785,462.68 (inc GST) said to be for "loan management fees";
2. \$224,740.07 (inc GST) on 17 June, 2013 – evidently in satisfaction of the balance said to be owing then in respect of LMA invoice 8973Inv003 of 31 May, 2013; and
3. \$214,426.40 (inc GST) on 8 July, 2013 – evidently in satisfaction of LMA invoice 8973Inv004 of 30 June, 2013 for the same amount.

These payments are mentioned in Table C of the Summary of Fees which formed part of our client's written outline of submissions at the hearing in March, 2016. The specific invoices formed part of the evidence before the Court.

As you know, our client is continuing investigations concerning the loan management fees. It is appropriate to set out our client's understanding of a relevant chronology of some of the relevant circumstances relating to the relevant loan management fees, as follows:-

1. 19 March 2013: John Park and Ginette Muller appointed as voluntary administrators of LMIM;
2. 19 March 2013: John Park and Ginette Muller appointed as voluntary administrators of LMA;
3. 21 March 2013: Ms Muller signs 'LMA Services Agreement' between LMIM and LMA, for provision of resources and payment of Resource Fee;

4. 31 March 2013: Invoice 1106 raised by LMIM to FMIF for 'loan management fees' in the amount of \$209,953.38;
5. 15 April 2013: Originating Application filed by Raymond and Vicki Brice (members of the FMIF) seeking the replacement of LMIM by Trilogy as RE of the FMIF ("the Bruce Proceedings");
6. 31 May 2013: Invoice 8973003 from LMA to PTAL as custodian of the FMIF for 'loan management fees' in the gross amount of \$785,462.68 (said to be for the periods March to May 2013). Net amount of \$224,740.07 (inclusive of GST), following an off-set of income received in advance by LMA from the FMIF prior to 19 March 2013 (\$509,747.84 + GST; being \$560,722.62 inclusive of GST);
7. 30 June 2013: Invoice 8973Inv004 from LMA to PTAL as custodian of the FMIF for 'loan management fees' in the amount of \$214,426.40;
8. 15 July 2013: affidavit by John Park in proceeding 3383 of 2013. As to 'loan management fees':-

15. *...I have not been able to gain anything approaching a full understanding of these transactions. I understand, however, that the Board and Management of LMIM took the view that, in order to save external costs paid or payable to third party receivers or agents for a mortgagee in possession, default work was done inhouse.*

16. *I also understand from my very brief discussions today that detailed advice was taken from independent solicitors - Allens about these arrangements. They are of course a very reputable firm.*

17. *The managements fees for 2012 were not \$20 million but \$9.1 million, according to the accounts.*

18. *However, I am not defending the transactions; nor am I impugning them.*

19. *I do believe, however, that, as with the distributions of income that were declared but not paid, the same applies to these fees. Accordingly, should it transpire that these fees were not properly charged, it will be a relatively simple matter of righting the situation. Again, we will obtain legal advice, now that the matter has been raised. If a conflict develops, appropriate action will be taken.*

[emphasis added]

9. 15 to 17 July 2013: trial before Justice Dalton in Supreme Court proceeding 3383;
10. 16 July 2013: John Park cross-examined in regard to, amongst other things, the charging of 'loan management fees'. The exchange, beginning at page 2-20 of the transcript of proceedings, is as follows:-

[Mr Tucker] *If I could take you over to the next issue in your affidavit at paragraph 15 where you deal with loan management services?---*[Mr Park] *Yes.*

*Now, you had identified these in the accounts previously?---**I have seen those, yes.*

*Yes. And did it cause you - did it cause you to have cause for concern?---**It's an issue that certainly we needed to - to address and report on, yes.*

Okay. Now, could I ask you to look at page 157 of Mr Bruce's affidavit?---Yes.

And you'll see that about halfway down the page there's a heading Fees Paid to and Interest Held by the RE and Associated Entities?---Yes, I can see that.

And then the auditors record, "The following fees were paid to the RE and its associated companies out of scheme property."?---Yes.

Okay. Have you made any investigations as to whether these fees were in fact paid?---No, I have not.

Okay. Well, the next - further down it says "management fees paid or payable". Are you able to tell us whether these management fees have in fact been paid or paid?---No, I cannot personally.

So we don't know whether there's still a debt owing?---No, I don't know.

You don't know. So when you say in paragraph 19 - sorry, I'll withdraw that. So if you go down further, Mr Park, in the accounts, you'll see the last dotted paragraph describes what are called loan management fees paid to the responsible entity for loan management and receivership services provided by the RE?---Yes.

And there's collectively \$10 million?---Correct, yes.

You don't know - - ?---Over - over two years.

Over two years?---Yes, yes.

That's right, yes?---Yes.

And you don't know whether they've been paid or are still due to be paid?---I don't know the answer to that, no.

Okay. But the accounts actually say they're paid, so - - ?---Yes. - - - it's fair to assume they've been paid?---It's fair to assume that. They've been audited, yes.

So in paragraph 19 of your affidavit, when talking about these fees you say, "I do believe, as with the distributions of income that were declared but not paid, that the same applies to these fees." What's the basis of your belief for that?---Sorry, if I can just - I just want to read that paragraph.

Sure?---My affidavit is referring to the fact that I personally hadn't determined if those - if those fees had actually been paid through - with respect to the \$4.8 million.

In the 2012 year?---Yes.

But what's your belief for that? What's the basis of saying this? You just told me you hadn't investigated it?---Yeah, I think what I'm suggesting to you is exactly as - as the affidavit deposes. That para is particularly going to whether the payment of the 4.8 and indeed the 5.3 - the issue at heart is whether that - they were payments in addition to the management fee and whether it is an issue that we

need to address as to whether it was proper for those to be paid and indeed not part of the management fee.

Oh, so you're not throwing doubt on to whether they're actually paid or not?---No, it's my understanding that they have been paid.

But do you say - do you say that they're in addition to the management fee or part of the management fee?---My understanding is they're in addition to the management fee, which gives us cause for concern.

Yes?---Yes.

And then you say, "Should it transpire the fees are not properly charged it's a relatively simple matter of righting the situation." How would you do that?---Again, given the complexity - from what I understand, advice was obtained by LMIM from - from both Allens and WMS that they had an ability to - to - to make those payments.

That's pre your appointment, isn't it?---That's pre our appointment.

Okay?---So I basically obtained some - again some independent legal advice to see what options are available to us with respect to those payments and whether indeed it is capable of some form of recovery in that regard.

Well, you said it's a relatively simple matter of righting the situation. Tell me the relatively simple matter?---Obtaining legal advice.

[emphasis added]

11. 25 July 2013: Invoice 8973Inv005 from LMA to PTAL as custodian of the FMIF for 'loan management fees' in the amount of \$252,310.87;
12. 26 July 2013: David Clout and Lorraine Smith appointed as liquidators of LMA (replacing Mr Park and Ms Muller who had been its administrators);
13. 1 August 2013: John Park and Ginette Muller appointed liquidators of LMIM;
14. 8 August 2013: Dalton J delivers judgment, *Bruce & Anor v LMIM & Ors*, and pronounces orders:
 - (a) directing LMIM to wind up the FMIF;
 - (b) appointing David Whyte to take responsibility for the winding-up of the FMIF;
 - (c) appointing Mr Whyte receiver of the property of the FMIF;
15. 16 December 2015: Further Amended Originating Application filed in Supreme Court proceeding 3508 of 2016 seeking remuneration for the administrators and liquidators of LMIM, Mr Park and Ms Muller (the Remuneration Application);

16. 8 March 2016: Affidavit of John Park in Supreme Court proceeding 3508 of 2015, addressing the 'loan management fees'. As to that, Mr Park relevantly deposed to the following:-

53. I refer to the invoices which appear at pages 370, 396, 399, 403, 405 and 408 of Mr Whyte's Affidavit. Those invoices relate to the practice of charging loan management fees which was in place at the time of my appointment.

54. I have caused to be located from the books and records of LMIM and LMA documents which provide an example of how those fees were calculated and charged.

55. At [43] to [68] is an agreement, entitled 'Management Services Agreement' between The Trust Company (PTAL) Limited (the FMIF's custodian trustee, "PTAL"), LMIM and LMA, which is undated. The 'Borrower' for that agreement is Brambleton Pty Ltd ACN 118 835 742 ("Brambleton").

56. Pursuant to that agreement, PTAL appointed LMA to provide, what is described in Schedule 2 of the agreement as, services relating to general administration, development management, and marketing and sales. From the description of those services in the agreement, they appear to be largely analogous to the services required to manage a defaulting loan (akin to a controllership).

57. By clause 7.1 and schedule 1, for general administration services, LMA was entitled to charge to PTAL as custodian (and to be paid out of the Fund) a fee based on hourly rates for its staff. Ultimately, LMIM as responsible entity of a Fund would then 'on-charge' the loan management fee to a borrower's loan account as an expense through the entry of a debit to the loan account for such fees (usually on a monthly basis).

58. This charging of borrowers for this expense was provided for in the standard Fund loan agreements and thus such costs were ultimately met by the specific borrower in respect of whose asset LMA had been appointed controller. At [69] to [92] is a copy of the agreement between LMIM, PTAL and Brambleton by which PTAL agreed to loan monies to Brambleton.

59. At [93] is a spreadsheet which appears to contain a list of each borrower from the FMIF in respect of which there is a management services agreement. The spreadsheet contains hourly rates for particular LMA staff members and the hours each LMA staff member worked in relation to each borrower (with an associated charge).

60. The spreadsheet records charges, calculated at the applicable hourly rates, for Brambleton for the month of June, 2013 as \$6,848.75. For all FMIF borrowers, the total amount for June, 2013 is \$203,705.08.

61. The loan management fee for each borrower was subsequently charged to each borrower's loan account by LMIM as responsible entity or, in this case, the FMIF. At [94] to [96] is a copy of an extract from the loan statement for Brambleton for the relevant period.

62. At [98] is an invoice from LMA to PTAL for loan management fees for June, 2013.

63. Ms Muller and I took legal advice as to the effect of the administration on the loan management agreements. Having considered that advice (the privilege in which I do not intend

to waive), it was decided that those agreements should be maintained in order to continue to provide LMA with its own income stream.

64. During the course of the appointment, LMA issued PTAL as custodian for the FMIF with the following invoices for loan management fees:-

(a) for the months of March, April and May, 2013, invoice number '8973Inv003' (which appears at [97]) in the amount of \$714,056.99 (excl. GST). Of that amount, the sum of \$509,747.84 (excl. GST) was 'offset' against LMIM (acting by its administrators) because I became aware that the FMIF had prepaid, or advanced, management fees to LMA in that amount, pursuant to the historical services agreement prior to my and Ms Muller's appointment. In so doing, Ms Muller and I acted on legal advice, the privilege in which I do not intend to waive. The balance of \$224,740.07 (inclusive of GST) was paid from the assets of the FMIF to LMIM. By way of a book entry, those funds were used to partially repay the loan from LMIM to LMA referred to in paragraph 48 herein, such that no actual cash was paid to LMA. That invoice replaced the earlier invoices created by LMA staff, including those which appear at pages 352 and 353 of Mr Whyte's Affidavit;

(b) for the month of June, 2013, invoice number '8973Inv004' being the same invoice referred to in paragraph 62 herein, which appears at [98]. That invoice resulted in the payment of the sum of \$214,426.40 from the FMIF to LMA;

(c) for the month of July, 2013, invoice number '8973Inv005', which appears at [99], for the amount of \$252,310.87 (inclusive of GST). That invoice remains unpaid.

65. The 'offset' referred to in subparagraph 64(a) herein is not the same offset described in paragraph 48 herein.

66. At [100] to [116] is a copy of the ledger maintained by my staff for receipts into and payments out of LMA. Based on that ledger, I believe that the sum of \$214,426.50 (the amount referred to in subparagraph 64(b) herein) was applied to meet the operating costs and expenses of LMA:-

(a) which were not limited to the costs covered by the Resources Fee; and

(b) in respect of which there was a shortfall for the Resources Fee charged to MPF because of the settlement referred to in paragraph 19 of my Second Affidavit.

67. At [117] is an extract from the records maintained by my staff in the administration of LMA for the purpose of recording the transactions which occurred in respect of the loan management fees.

[emphasis added]

Requests for information

Clearly, the legal advice provided to the liquidators (both as to loan management fees charged pre-appointment, and as to the continued charging of those fees after their appointment) is highly relevant to an understanding of the justification for charging the loan management fees. Our client has not been provided with a copy of that advice, nor informed of the substance of the advice; indeed, so far as we and our client are aware, your clients have not yet advanced any reasons to justify the charging of the loan management fees other than to say that it was done in accordance with legal advice.

As you would be aware, a trustee may act in breach of trust even though the trustee acted in accordance with advice obtained by the trustee. The fact of having obtained the advice is, of course, a relevant circumstance, but it does not necessarily determine the question as to whether an expense incurred by a trustee, acting on advice, was properly incurred in the execution of the trust.

Accordingly, we are instructed to request a copy of the legal advice obtained by your clients.

We also note that our client has requested, on a number of occasions, a complete reconciliation of the amounts invoiced in respect of various fees, and also of amounts paid, as between:-

1. The FMIF and LMIM (in its corporate capacity); and
2. LMIM (whether in its own corporate capacity or as responsible entity for the FMIF) and LMA.

To date, we are instructed that our client has not received that reconciliation. We are instructed to again make the request.

Other matters

Your clients have given Mr Whyte notice (in October 2016) that they intend to make further indemnity claims for expenses incurred in the period after the appointment of the liquidators, but prior to the making of the December Order.

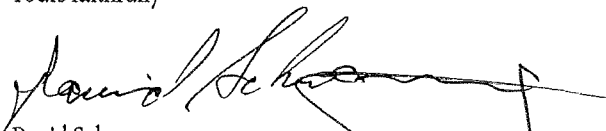
Mr Park's affidavit sworn on 18 October 2016 (received in the evening of 8 November 2016) says, at paragraph 19, that Mr Park and Mr Whyte have agreed to delay any request for information or decision about the "Further Claims" pending the resolution of the Indemnity Application. We are instructed, however, that your clients in fact stated that the schedule of the Further Claims provided without any additional information, was not to be taken as an indemnity claim under the December Order, and that Mr Whyte has not agreed that your clients should defer submitting their Further Claims if they are of the kind that your clients were required to notify within sixty days of the December Order.

Given that your clients appear to consider that determination of the Indemnity Application is likely to be relevant to Mr Whyte's decision as to the Further Claims, it may be appropriate that the Further Claims be made and determined now and, if Mr Whyte decides to reject any part of any of those claims, then your clients may seek directions regarding those rejected claims at the same time as the other claims the subject of the Indemnity Application. That seems to be an efficient way of dealing with those claims. Please let us know if your clients agree.

Conclusion

We look forward to hearing from you.

Yours faithfully


David Schwarz
Tucker & Cowen

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Individual liability limited by a scheme approved under Professional Standards Legislation.

RUSSELLS

14 February, 2017

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen Solicitors
BRISBANE QLD 4000

email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") - Indemnity Claim

We refer to your correspondence of 3 February, 2017.

We are considering the numerous matters raised therein and will respond substantively in due course. In the meantime, it occurs to us that there are several matters which are properly ventilated in correspondence prior to the directions hearing scheduled for 16 February, 2017.

The Alleged Breach of Trust

We appreciate that the intent of your letter was (likely) to attempt to narrow and define the issues between the parties. Our clients agree that is a worthwhile endeavour.

That said, despite the attempts to clarify your client's position, our clients still do not understand the claim which your client is advancing. As we understand it, Mr Whyte contends that there has been a breach of trust relating to the loan management fees identified on page 8 of your letter.

The parties seem to disagree on whether, as a proposition of law, the construction of the constitution and the applicable legal framework requires that breach to have a particular quality (i.e. bad faith) before the indemnity available to our clients (either through LMIM or in their own right, another point which seems to be in contention) can not be drawn upon. That seems to be a reasonably well defined dispute.

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However, in our view, your client has still not put succinctly what the alleged breach of trust involves or the relevant underlying law and facts. Paragraphs 53 to 67 of Mr Park's affidavit of 8 March, 2016 set out the factual background for the charging of the loan management fees (perhaps more accurately and less confusingly referred to as 'controllership fees').

If your client is able to do so, would you please state with specificity the duty or obligation (and the associated factual matrix) which it is to be alleged our clients have breached (perhaps by reference to the relevant provision of the FMIF's constitution or the duties owed by a fiduciary at law). That will assist our client in understanding the scope of the dispute and how the matter is most efficiently progressed.

The Responsible Entity

You will recall at the conclusion of our clients' remuneration application, Justice Jackson made some strong comments about the continuing operation of our respective clients' appointment to the FMIF.

We wrote to you about those matters on 24 February, 2016. You wrote to ASIC on 9 March, 2016 and received a reply from Mr Hugh Copley, on ASIC's behalf on the same day. Therein, Mr Copley indicated that ASIC would prefer to only be involved with the consent of both parties.

Our clients' position remains as set out in our letter of 24 February, 2016, to which we have never received a substantive response. Would you please let us know whether your client intends to do anything in respect of that issue.

Directions

In light of the above, our clients propose the following draft directions be made on 16 February, 2017:-

1. Your client file and serve, by 1 March, 2017:-
 - (a) any affidavit upon which he intends to rely in response to our clients' application filed 20 May, 2016; and
 - (b) brief points of claim setting out the alleged breach of trust giving rise to the operation of the clear accounts rule;
2. Our clients file and serve any affidavit in reply and brief points of defence by 15 March, 2017;
3. The parties exchange written outlines of submissions by 22 March, 2017; and
4. The matter be set down for two days at a convenient date after 22 March, 2017.

We think that it would be of assistance to the Court to provide the draft directions to his Honour's associate in advance of the hearing so we would appreciate your comments on the directions at the earliest convenient opportunity.

Yours faithfully



Ashley Tiplady
Partner

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Our reference: Mr Schwarz / Mr Ziebell

15 February 2017

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
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Associates.
Marcelle Webster.
Emily Anderson.
Olivia Roberts.
James Morgan.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015
Application filed 20 May 2016; Review 16 February 2017

We refer to the Application filed 20 May 2016 ("the Indemnity Application"), the review of the Indemnity Application to take place before Jackson J on 16 February 2017, and your letter dated 14 February 2017.

Having considered your clients' proposed directions, it is appropriate that we write to you regarding the directions our client considers ought be made. We are instructed that our client desires that the Indemnity Application be determined as cost-effectively and efficiently as possible. In our view, and in our client's view, that will be best achieved by the making of directions as outlined below as our client's "primary position".

However, while our client will seek directions to the effect of the primary position articulated below at the review, it is appropriate that we also explain our client's view as to how the matter should progress in the event that your clients submit, and His Honour accepts, that the Indemnity Application ought not await the delivery of judgment in respect of your clients' Further Amended Originating Application heard last year in connection with your clients' remuneration ("the Remuneration Application").

In the interests of ensuring that the review itself is conducted as efficiently as possible, we are instructed to outline both our client's primary position as to the directions, and the alternative.

Directions – Mr Whyte's Primary Position

We are instructed to seek directions to the following effect at the review of the Indemnity Application:-

1. That the hearing of the Indemnity Application should be adjourned until his Honour has delivered his reasons for judgment in the Remuneration Application.
2. That the parties' costs of the review be paid from the assets of the FMIF on the indemnity basis.
3. Liberty to apply.

We have, on a number of occasions, expressed the view that the determination of your clients' Application should await the delivery of judgment in the Remuneration Application, including in our letters to you of 21 June 2016, 17 November 2016,

23 November 2016 and 15 December 2016. As you know, our client's view is held on the basis that there is an overlap of issues between the two applications, and that the determination of your clients' indemnity claims will (at least to a degree) be informed by his Honour's reasons.

That is particularly so in the case of your clients' costs of the appeal from the orders of Dalton J. We are instructed that our client's position as to your clients' indemnity from the FMIF relating to the costs of the appeal will be informed by his Honour's decision regarding your clients' remuneration for work with respect to that same appeal.

Accordingly, our client's position has, from the outset, been that the final disposition of LMIM's claim to indemnity in respect of the appeal costs should occur within seven days of delivery of his Honour's judgment. The reasons for that have been explained in numerous pieces of correspondence, including in our letter to you of 21 June 2016 and in correspondence from our client's other solicitors, Gadens, by their letter to you dated 21 April 2016.

Please let us know whether your clients would consent to directions in terms of the directions outlined above.

Directions - Mr Whyte's Alternative Position

Alternatively, if his Honour does not consider that the hearing of the Indemnity Application should be deferred until after delivery of judgment on the Remuneration Application as proposed above, then the following directions (outlined in general terms) would be appropriate:-

1. That the Indemnity Application be adjourned for a period of one month in order for:-
 - (a) Our client to apply to the Court for directions as to:-
 - (i) Whether he is justified in taking an active role as a contradictor to the Indemnity Application; and
 - (ii) Whether he is justified in raising the clear accounts rule with regard to the indemnity sought from the FMIF by LMIM; and
 - (b) Your client to submit any further Administration Indemnity Claims and Recoupment Indemnity Claims for determination by our client.

As to paragraph (a), we, and our client, consider that our client's application for directions is prudent in circumstances where your client has threatened to seek an order that our client not be entitled to an indemnity for his costs from the FMIF, at least insofar as the Indemnity Application concerns the clear accounts rule.

As to paragraph (b), we note that pursuant to paragraph 5 of the Orders made by Jackson J on 17 December 2015 ("the Orders") your clients were required to notify our client in writing within 60 days of the date of that Order, of any Administration Indemnity Claims and Recoupment Indemnity Claims identified by your clients, as at the date of that Order.

Pursuant to paragraph 6 of the Orders, any further Administration Indemnity Claims and Recoupment Indemnity Claims identified by your clients, were required to be notified to our client within 14 days.

On 17 October 2016, our client received an email from Ms Renee Lobb (of FTI Consulting) attaching what was described as "*a Schedule of expenses which the liquidators intend to claim from the FMIF pursuant to the indemnity regime set out by the Order of Jackson J dated 17.07.2015.*" Ms Lobb clarified that the email and

attachment did not constitute formal notice of the claims pursuant to the Orders; those claims have not been included in the Indemnity Application.

As was explained in our letter of 3 February 2017, our client considers that, in accordance with the Orders, those claims should be notified to our client and (to the extent to which, if at all, the claims are rejected) the Indemnity Application should include all identified and rejected Administration Indemnity Claims and Recoupment Indemnity Claims.

2. If any of the further Administration Indemnity Claims and Recoupment Indemnity Claims identified and notified by your clients, to our client are then rejected, that the Indemnity Application be amended to include such claims.

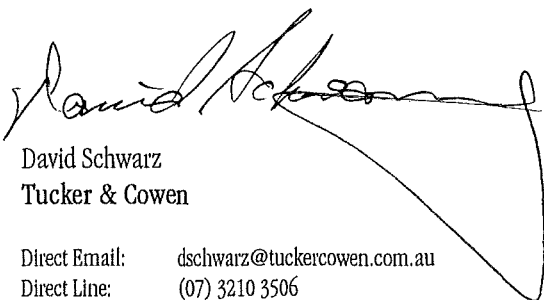
This is the most efficient way of dealing with such claims, and our client does not wish to incur the unnecessary costs associated with separate applications in regard to claims which are presently known to your client.

3. That the issue of the claim for indemnity from the FMIF with respect to the costs of the appeal from the decision of Dalton J appointing our client is, individually, adjourned until following delivery of judgment in the Remuneration Application.
4. That a further review be listed in one month, at which time the parties may be in a position to agree to dates for delivery of evidence and submissions, and a date for hearing of the Indemnity Application proper.
5. That the parties' costs of the review be paid from the assets of the FMIF on the indemnity basis.
6. Liberty to apply.

Proposed directions

Having considered the above, please let us know if the directions proposed are agreeable to your clients, so as to (if possible) reduce the issues for argument on Thursday.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

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Our reference: Mr Schwarz / Mr Ziebell

15 February 2017

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
Russells Lawyers
Brisbane Qld 4000

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Special Counsel.
Geoff Hancock.
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James Morgan.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015;
Application filed 20 May 2016 - Review 16 February 2017

We refer to your letter of 14 February, 2017 in which you proposed directions for the purposes of the review tomorrow morning, 16 February. We have written to you separately regarding the directions our client considers ought to be made.

We do note, though, that your proposed directions do not contemplate any further material being filed by your clients, except in reply. However, we observe that:-

1. Paragraph 14 of the Affidavit of Mr Park filed on 18 October 2016 (served by email on 8 November 2016) says that Mr Park has instructed your firm to deliver a paginated bundle of documents to us, comprising invoices and underlying source documents; your letter of 8 November 2016 (which was received with the Affidavit) said that, *"The bundle of documents referred to in paragraph 14 of Mr Park's affidavit will follow shortly."*

We have not yet received that bundle of documents.

2. The affidavit of Mr Park addresses only some, but not all, of the claims which are the subject of the Indemnity Application. Paragraph 16 of the affidavit summarises the categories of Eligible Claims which (it is said) are the subject of the Application.

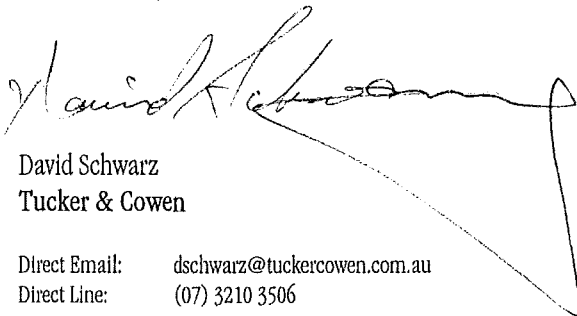
The Indemnity Application concerns a total amount of \$410,694.84, of which \$169,241.30 is said to relate to the amounts rejected by Mr Whyte and dealt with by his letters of 22 and 27 April 2016 (concerning the claims the subject of your clients' letter of 15 February 2016).

However, the amounts mentioned in paragraph 16 of Mr Park's affidavit total only \$328,390.20, of which \$86,936.66 appears to relate to the claims made by the letter of 15 February 2016. The balance does not appear to be addressed in Mr Park's affidavit at all.

In the circumstances, could you please let us know whether your clients intend to rely upon any additional material, or whether Mr Park's affidavit comprises the entirety of the material upon which your clients intend to rely?

We look forward to hearing from you, both as to the question asked by this letter, and as to the matters raised in our separate correspondence to you today.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Schwarz', with a long horizontal flourish extending to the right.

David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

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From: Sean Russell [SeanRussell@russellslaw.com.au]
Sent: Wednesday, 15 February 2017 4:55 PM
To: David Schwarz; Ashley Tiplady
Cc: Mitch Ziebell
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

David

Thank you for your letters of today.

Our clients will not consent to either of your client's proposed directions.

We remain of the view that it will assist the Court to proceed expeditiously tomorrow to be apprised of the parties' respective positions before tomorrow's hearing. We intend to provide his Honour's associate with our clients' draft directions this afternoon. We would have no objection to your client doing the same, with either or both of his proposed directions.

As to the further Administration Indemnity Claims and Recoupment Indemnity Claims, leaving aside the costs associated with the remuneration application and this indemnity application, they total approximately \$3,000. Our clients do not believe it is commercially viable to conduct the entire indemnity claim and review regime in respect of claims in that amount, particularly in light of the other propositions your client is advancing.

We are sure that you would agree that dealing with our clients' expenses of the remuneration application and indemnity application should await the outcomes of those applications and any orders as to costs.

Yours faithfully

RUSSELLS

Sean Russell
Associate

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Mobile 0400 521 611
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From: Alison Woodbury [<mailto:awoodbury@tuckercowen.com.au>] **On Behalf Of** David Schwarz
Sent: Wednesday, 15 February 2017 12:39 PM
To: Sean Russell; Ashley Tiplady
Cc: David Schwarz; Mitch Ziebell
Subject: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

Please see attached, forwarded on behalf of David Schwarz.

Regards

Alison Woodbury
Personal Assistant

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From: David Schwarz
Sent: Wednesday, 15 February 2017 6:39 PM
To: Sean Russell; Ashley Tiplady
Cc: Mitch Ziebell
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017
Attachments: Schedule - FMIF Indemnity Claim Notification 2016 10 14 (submitted to BD.....pdf

Sean,

Your email below appears to say that the further indemnity claims total only some \$3,000, excluding costs associated with the remuneration application and this indemnity application. I presume that the further claims you refer to are those mentioned in paragraph 18 of Mr Park's affidavit, and which are summarised in a schedule provided to our client by email from your clients on 17 October 2016. A copy of the schedule is **attached**.

That schedule includes amounts totalling almost \$1 Million relating to invoices issued in 2013, and which could not have related to this application or the remuneration application. Could you please clarify whether your clients abandon any claim for indemnity from the FMIF in respect of those amounts invoiced in 2013, or do they intend to make that indemnity claim?

Regards

David

David Schwarz
Principal

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From: Sean Russell [<mailto:SeanRussell@russellslaw.com.au>]
Sent: Wednesday, 15 February 2017 4:55 PM
To: David Schwarz; Ashley Tiplady
Cc: Mitch Ziebell

Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

David

Thank you for your letters of today.

Our clients will not consent to either of your client's proposed directions.

We remain of the view that it will assist the Court to proceed expeditiously tomorrow to be apprised of the parties' respective positions before tomorrow's hearing. We intend to provide his Honour's associate with our clients' draft directions this afternoon. We would have no objection to your client doing the same, with either or both of his proposed directions.

As to the further Administration Indemnity Claims and Recoupment Indemnity Claims, leaving aside the costs associated with the remuneration application and this indemnity application, they total approximately \$3,000. Our clients do not believe it is commercially viable to conduct the entire indemnity claim and review regime in respect of claims in that amount, particularly in light of the other propositions your client is advancing.

We are sure that you would agree that dealing with our clients' expenses of the remuneration application and indemnity application should await the outcomes of those applications and any orders as to costs.

Yours faithfully

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From: Alison Woodbury [<mailto:awoodbury@tuckercowen.com.au>] **On Behalf Of** David Schwarz

Sent: Wednesday, 15 February 2017 12:39 PM

To: Sean Russell; Ashley Tiplady

Cc: David Schwarz; Mitch Ziebell

Subject: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

Please see attached, forwarded on behalf of David Schwarz.

Regards

Alison Woodbury

Personal Assistant

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LM First Mortgage Income Fund Indemnity Claim									
Consultant	Invoice Date	Invoice Number	Total Amount	GST Exc	GST	Amount Paid to date by LMIM "Recoupment Indemnity Claim"	Amount Outstanding "Indemnity Claim"	Matter Number	Notes
Russells	09-May-13	B14778	\$ 246,854.33	\$ 224,762.13	\$ 22,092.20	131,924.40	114,929.93	20130471	Chesterman Counsel bill portion sent for payment from LMIM account, \$17,655. Additional \$12,263.9 oops paid from LMIM. Remaining OOPS paid from funding received from FMIF plus \$94 in fees from 20% FMIF contribution.
Russells	30-Jun-13	B15201	\$ 192,091.97	\$ 174,650.85	\$ 17,341.12	56,152.15	135,939.82	20130471	Savage counsel bill portion sent for payment from LMIM account, \$52,600, Law in Order bills paid \$1,684.41. Remaining OOPS paid from funding received from FMIF, \$100 paid in WIP previously.
Russells	31-Jul-13	B15450	\$ 387,431.18	\$ 352,250.68	\$ 35,180.50	163,615.32	223,815.86	20130471	\$132083.27 paid from LMIM , Law in order bills paid \$21,894.75. Remaining OOPS paid from funding received from FMIF.
Russells	10-Oct-13	B16042	\$ 108,094.10	\$ 98,267.36	\$ 9,826.74	36,845.49	71,248.61	20130471	Counsel fees paid from LMIM \$24750 - possible overpayment of \$8,250. Remaining OOPS paid from funding received from FMIF.
Russells	22-Dec-14	B20219	\$ 5,236.94	\$ 4,760.85	\$ 476.09		5,236.94	20141565	LM FMIF remuneration
Russells	30-Jan-15	B20527	\$ 6,584.45	\$ 5,985.86	\$ 598.59		6,584.45	20141565	LM FMIF remuneration
Russells	29-Jan-16	B24277	\$ 41,341.92	\$ 37,583.56	\$ 3,758.36		41,341.92	20141565	LM remuneration claim
Russells	29-Feb-16	B24471	\$ 4,853.71	\$ 4,412.46	\$ 441.25		4,853.71	20131259	MIF indemnity
Russells	29-Feb-16	B24483	\$ 1,439.02	\$ 1,308.20	\$ 130.82		1,439.02	20131545	Books and Records
Russells	29-Feb-16	B24495	\$ 673.75	\$ 612.50	\$ 61.25	673.75	673.75	20150297	Liquidators residual powers. Funds recovered via \$205k residual powers settlement
Russells	29-Feb-16	B24496	\$ 1,627.09	\$ 1,479.17	\$ 147.92		1,627.09	20150954	Cost Assessment
Russells	29-Feb-16	B24631	\$ 66,748.09	\$ 60,680.08	\$ 6,068.01		66,748.09	20141565	LM remuneration claim
Russells	30-Mar-16	B24777	\$ 148,681.23	\$ 135,164.75	\$ 13,516.48		148,681.23	20141565	LM remuneration claim
Russells	30-Mar-16	B24779	\$ 5,707.63	\$ 5,188.75	\$ 518.88		5,707.63	20131259	MIF indemnity
Russells	29-Apr-16	B25114	\$ 1,655.00	\$ 1,504.55	\$ 150.45		1,655.00	20131259	MIF indemnity
Russells	29-Apr-16	B25146	\$ 11,735.16	\$ 10,668.33	\$ 1,066.83		11,735.16	20141565	LM remuneration claim
Russells	30-May-16	B25406	\$ 19,587.76	\$ 17,807.05	\$ 1,780.71		19,587.76	20131259	MIF indemnity
Russells	31-May-16	B25441	\$ 2,640.00	\$ 2,400.00	\$ 240.00		2,640.00	20141565	LM remuneration claim
Russells	28-Jun-16	B25741	\$ 7,745.80	\$ 7,041.64	\$ 704.16		7,745.80	20131259	MIF indemnity
Russells	28-Jun-16	B25746	\$ 2,942.56	\$ 2,675.05	\$ 267.51		2,942.56	20141565	LM remuneration claim
Russells	28-Jun-16	B25745	\$ 3,506.37	\$ 3,187.61	\$ 318.76		3,506.37	20141556	MIF indemnity
Russells	31-Aug-16	B26465	\$ 3,872.91	\$ 3,520.83	\$ 352.08		3,872.91	20131259	MIF indemnity

From: Sean Russell [SeanRussell@russellslaw.com.au]
Sent: Thursday, 16 February 2017 8:21 AM
To: David Schwarz; Ashley Tiplady
Cc: Mitch Ziebell
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

David

Thank you for your email.

The first four entries in the list relate to the legal costs of the trial of the matter before Dalton J. They have been included in the table in error. I understand it to be common ground that the FMIF's liability for the trial costs has been settled.

Of the balance, those described as "LM remuneration claim" and "FMIF indemnity" are the legal costs of the remuneration application and this application, respectively. Of the three remaining entries, and while I do not have final instructions, it is unlikely that my clients will press the amount of \$673.75 in respect of the residual powers application (in respect of which the costs order has already been settled).

Yours faithfully

RUSSELLS

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Associate

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Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

Sean,

Your email below appears to say that the further indemnity claims total only some \$3,000, excluding costs associated with the remuneration application and this indemnity application. I presume that the further claims you refer to are those mentioned in paragraph 18 of Mr Park's affidavit, and which are summarised in a schedule provided to our client by email from your clients on 17 October 2016. A copy of the schedule is **attached**.

That schedule includes amounts totalling almost \$1 Million relating to invoices issued in 2013, and which could not have related to this application or the remuneration application. Could you please clarify whether your clients abandon any claim for indemnity from the FMIF in respect of those amounts invoiced in 2013, or do they intend to make that indemnity claim?

Regards

David

David Schwarz
Principal

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Leading Litigation & Dispute Resolution and Insolvency & Reconstruction Lawyers 2015/2016 (Doyle's Guide to the Australian Legal Profession), with the most ranked practitioners - David Tucker, Richard Cowen, David Schwarz and Justin Marschke, recognised again as one of Australia's Best Lawyers for litigation and regulatory practice **Best Lawyers® International 2017**

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From: Sean Russell [<mailto:SeanRussell@russellslaw.com.au>]

Sent: Wednesday, 15 February 2017 4:55 PM

To: David Schwarz; Ashley Tiplady

Cc: Mitch Ziebell

Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

David

Thank you for your letters of today.

Our clients will not consent to either of your client's proposed directions.

We remain of the view that it will assist the Court to proceed expeditiously tomorrow to be apprised of the parties' respective positions before tomorrow's hearing. We intend to provide his Honour's associate with our clients' draft directions this afternoon. We would have no objection to your client doing the same, with either or both of his proposed directions.

As to the further Administration Indemnity Claims and Recoupment Indemnity Claims, leaving aside the costs associated with the remuneration application and this indemnity application, they total approximately \$3,000. Our clients do not believe it is commercially viable to conduct the entire indemnity claim and review regime in respect of claims in that amount, particularly in light of the other propositions your client is advancing.

We are sure that you would agree that dealing with our clients' expenses of the remuneration application and indemnity application should await the outcomes of those applications and any orders as to costs.

Yours faithfully

RUSSELLS

Sean Russell
Associate

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From: Alison Woodbury [<mailto:awoodbury@tuckercowen.com.au>] **On Behalf Of** David Schwarz
Sent: Wednesday, 15 February 2017 12:39 PM
To: Sean Russell; Ashley Tiplady
Cc: David Schwarz; Mitch Ziebell
Subject: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Application filed 20 May 2016 - Review 16 February 2017

Please see attached, forwarded on behalf of David Schwarz.

Regards

Alison Woodbury
Personal Assistant

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