

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 3508/15

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

First Applicant: **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 098 343 288**

AND

Second Applicant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 098 343 288**

AND

Respondent: **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 098 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001**

AFFIDAVIT OF DAVID WHYTE

I, DAVID WHYTE of Level 10, 12 Creek Street, Brisbane in the State of Queensland, Official Liquidator, say on oath:

1. I am an Official Liquidator and a Registered Liquidator and a Partner of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand (formerly the Institute of Chartered Accountants Australia) and a professional member of the Australian Restructuring Insolvency and Turnaround Association (formerly known as the Insolvency Practitioners Association of Australia).
2. By Order of this Honourable Court made on 21 August 2013 (the **Order**) in Supreme Court Proceedings No. 3383 of 2013, a copy of which is exhibited as Exhibit DW-39 to my affidavit sworn 29 May 2017, I:

Signed:

Taken by:

Affidavit
Filed on behalf of the Respondent
Form 46 R.431

GADENS LAWYERS
240 Queen Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
JXO:201401822

- (a) was appointed pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) (the **Act**) to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**) is wound up in accordance with its constitution (**Appointment**);
 - (b) was appointed pursuant to section 601NF(2) of the Act as the receiver of the property of the FMIF;
 - (c) was granted access to the books and records of LMIM which concern the FMIF; and
 - (d) was granted, in relation to the property of the FMIF for which I am appointed receiver, the powers set out in section 420 of the Act.
3. The responsible entity of the FMIF was and remains LM Investment Management Limited (in liquidation) (receivers and managers appointed) ACN 077 208 461 (**LMIM**).
Relevantly:
- (a) The First Applicants had been appointed as the administrators of LMIM on 19 March 2013; and
 - (b) The First Applicants had been appointed as liquidators of LMIM on 1 August 2013.
4. Subsequently, by orders made in the present proceedings on 17 December 2015 (the **17 December Order**):
- (a) I was further empowered to determine “whether, and if so to what extent, [LMIM] is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against, LMIM in acting as Responsible Entity of the FMIF”; and
 - (b) a regime was established by which indemnity claims were to be brought to my attention by the First Applicants, and then determined by me.
5. In this affidavit, I address one such indemnity claim which was identified to me under the 17 December Order, namely a claim for recoupment of the Applicants’ legal costs of the appeal matter known as *LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) as responsible entity of the LM First Mortgage Income Fund v Bruce and Others* (CA 8895 of 2013) (the **Appeal Proceedings**) (the **Appeal Indemnity Claim**).
6. I address the Applicants’ other indemnity claims (the **Second Indemnity Claim**) in a separate affidavit (my **Second Indemnity Claim Affidavit**).

Background – The Appeal Proceedings

7. My Appointment by the Order followed a judgment by Justice Dalton of this Honourable Court handed down on 8 August 2013, in *Bruce v LM Investment Management Limited* [2013] QSC 192. Now produced and shown to me and marked “**DW-1**” is a copy of that judgment.
8. Having read the judgment, I observe that:
- (a) The proceedings were initially commenced by two members of the FMIF, Mr and Mrs Bruce, who sought the appointment of Trilogy Funds Management Limited as responsible entity, to replace LMIM;

Signed:

Taken by:

- (b) Mr Shotton, another member of the FMIF, then filed an application seeking orders directing LMIM to wind up the FMIF, and that an independent liquidator be appointed to take responsibility for ensuring that the FMIF was wound up in accordance with its Constitution;
 - (c) The Australian Securities and Investments Commission (“ASIC”) then applied seeking similar orders, but with the addition that the said independent liquidators be appointed as receivers of the property of the FMIF;
 - (d) Ultimately, her Honour made the Orders including as described above, adopting the submissions made by Mr Shotton and ASIC.
9. Following the judgment, on 20 December 2013, her Honour gave a further judgment and made orders as to costs, in *Bruce v LM Investment Management Limited (No 2)* [2013] QSC 347. Now produced and shown to me and marked “DW-2” is a copy of that judgment, which I obtained from Exhibit SCR-1 to the Affidavit of Mr Stephen Charles Russell sworn 29 February 2016 and filed in this proceeding.
10. On 23 September 2013, the First Applicants caused LMIM to commence an appeal, by filing a Notice of Appeal in Court of Appeal proceedings 8895 of 2013. Now produced and shown to me and marked “DW-3” is a copy of the Notice of Appeal, a copy of which was provided to me by Mr David Tucker in late September 2013. I observe that:
- (a) With only one exception, the grounds of appeal concerned the findings of the trial judge about the propriety of the conduct of the First Applicants. The exception is in Ground 7, which raised against me a potential conflict of interest where I was at the time also a liquidator of two companies which were debtors of the FMIF. That conflict was resolved before the hearing of the appeal, in that I had successfully applied to the Court to be removed from that office.
 - (b) None of the grounds of appeal contended that the trial judge incorrectly exercised her discretion in appointing a receiver by failing to give weight or sufficient weight to the interests of the members of the FMIF, or to possibility of duplicated costs.
11. Now produced and shown to me and marked “DW-4” is a copy of the judgment of the Court of Appeal in *LM Investment Management Ltd v Bruce* [2014] QCA 136, which was handed down on 6 June 2014.

The Remuneration Application

12. On 16 December 2015, the Applicants filed in these proceedings a Further Amended Originating Application seeking orders including for the remuneration of the First Applicants from the property of the FMIF for the work performed by them in relation to the FMIF (**Remuneration Application**). I am aware from the remuneration claims detailed at page 595 of Exhibit JRP-1 of the affidavit of Mr Johnathan Richard Park sworn 28 January 2016 (court index 39) that the remuneration claims included a claim for work in relation to the Appeal Proceedings.
13. Justice Jackson heard the matter over two days, on 22 February and 14 March 2016. His Honour has reserved judgment.

Background to the Appeal Indemnity Claim and Mr Shotton’s costs

14. At the conclusion of the Appeal Proceedings, the Court of Appeal ordered LMIM to pay the costs of the respondents to the appeal, including Mr Shotton’s costs.



Signed:

Taken by:



15. There was then correspondence between Mr Shotton's representative (Mr David Tucker of Tucker & Cowen Solicitors) and the solicitors acting for the Applicants, and also between Gadens and the solicitors acting for the Applicants, regarding the payment of his costs.
16. Some but not all of the material parts of that correspondence is exhibited to the affidavit of Mr Johnathan Richard Park sworn and filed on 18 October 2016 (court index 60) (**Mr Park's October Affidavit**), at pages 175 to 206 of Exhibit JRP-5.
17. For completeness, I will set out in this affidavit the material correspondence between Gadens and the solicitors acting for the Applicants.
18. On 26 November 2014, the solicitors for the Applicants wrote to Gadens (by email) in relation to a claim for indemnity from the FMIF for Mr Shotton's costs. Now produced and shown to me and marked **DW-5** is a true and correct copy of that email (which is not exhibited to Mr Park's October Affidavit), and the copy of a letter to Mr Tucker dated 19 September 2014 which was attached to it.
19. Gadens responded to that email by a letter dated 26 November 2014 in which they requested that the Applicants "clarify the basis upon which your clients seek an indemnity" for their liability to pay Mr Shotton's costs. Now produced and shown to me and marked **DW-6** is a true and correct copy of that letter (which is also at pages 186 and 187 of Exhibit JRP-5 to Mr Park's October Affidavit).
20. Following my appointment on 8 August 2013, and in the course of my receivership, I caused management accounts of the FMIF to be prepared. As part of that process, I would, cause my staff to request updates from the First Applicants as to any claims which they may have on the FMIF, including for remuneration and for indemnity.
21. Relevantly, in the course of preparing the management accounts for the FMIF for the half year ended 31 December 2014, Ms Joanne Garcia (nee Kedney), a Manager at BDO, requested information from the Applicants about outstanding claims and, on 22 January 2015, Mr Glen O'Kearney provided that information, and identified an amount of only \$123,354 for legal advisers. Now produced and shown to me and marked **DW-7** is a true and correct copy of Mr O'Kearney's email dated 22 January 2015 (which is not exhibited to Mr Park's October Affidavit).
22. In the course of finalising those accounts, I was made aware of that correspondence, and inferred from it that the Applicants were probably not pressing any claim for an indemnity for their own costs of the Appeal Proceedings, although I was not entirely certain.
23. On 31 January 2015, the solicitors for the Applicants then wrote again to Gadens, to identify the basis for the claimed right of indemnity against the FMIF in respect of Mr Shotton's costs. There was no mention in that correspondence of any claim for any indemnity for its own costs of the Appeal Proceedings. Now produced and shown to me and marked **DW-8** is a true and correct copy of that letter (which is also at pages 188 to 194 of Exhibit JRP-5 to Mr Park's October Affidavit).
24. On 10 February 2015, Gadens responded to the solicitors for the Applicants and, among other things, sought clarification "whether your liquidator clients intend to seek an indemnity from the Fund in respect of their legal costs which were incurred in relation to the Appeal Proceeding?". Now produced and shown to me and marked **DW-9** is a true and correct copy of that letter (which is not exhibited to Mr Park's October Affidavit).

Signed:

Taken by:

25. On 19 February 2015, Gadens sent an email seeking a response to its letter, and further stating that “*We look forward to receiving the clarification sought in our correspondence as soon as possible in order so that our client may consider further the matters raised in your correspondence*”. On 12 March 2015 and again on 16 April 2015, Gadens again sought a response to its letter dated 10 February 2015, and again further stated (in both emails) “*Would you please advise when we can expect to receive the clarification sought in our correspondence of 10 February 2015*”? Now produced and shown to me and marked **DW-10** are true and correct copies of Gadens’ email dated 16 April 2015, which includes its earlier emails of 19 February and 12 March 2015 (none of which are exhibited to Mr Park’s October Affidavit).
26. The solicitors for the Applicants eventually responded on 20 May 2015, noted that Mr Shotton’s solicitors had written to them contending “that LMIM is entitled to indemnity for the appeal costs” (and attached a copy of their letter so contending), and demanded that a cheque be drawn for \$87,841.20, being the amount of Mr Shotton’s assessed costs. However, no demand was made for any amount representing the Applicants’ own costs of the Appeal Proceedings. Now produced and shown to me and marked **DW-11** is a true and correct copy of that letter (which is also at pages 200 to 204 of Exhibit JRP-5 to Mr Park’s October Affidavit).
27. In light of that correspondence, Gadens’ previous correspondence with the Applicants’ solicitors, the passage of time since the Appeal judgement was handed down, the correspondence from Mr O’Kearney and that the applicants had never advised they would be claiming their own Appeal costs, I formed the view that the Applicants were not pursuing an indemnity for their own costs of the Appeal Proceedings against the FMIF.
28. I then made a commercial decision to indemnify LMIM for Mr Shotton’s costs of the Appeal Proceedings, because the costs which would have been involved in challenging the payment of those costs would likely have exceeded the amount of the costs themselves.
29. However, had I been aware that the Applicants in fact intended to seek an indemnity for their own costs, I would instead have applied to the Court for directions as to whether I was obliged to pay those costs.
30. On 22 May 2015, Gadens sent a letter to the solicitors for the Applicants informing them of my decision to indemnify LMIM for Mr Shotton’s costs, but expressly stating that “the fact Mr Shotton’s costs are being paid from the Fund should not be taken as an indication or agreement that any other costs incurred in respect of the Appeal Proceedings will be paid from the Fund”. Now produced and shown to me and marked **DW-12** is a true and correct copy of that letter (which is also at pages 205 and 206 of Exhibit JRP-5 to Mr Park’s October Affidavit).
31. The Applicants did not advise me of any claim for its own legal costs in relation to the appeal until 22 July 2015. Now produced and shown to me and marked **DW-13** is a true copy of an email dated 22 July 2015 from Mr O’Kearney of the Applicants’ office to Mr Daniel of my office.
32. Although the Applicants did not advise me of any claim for its own legal costs in relation to the appeal until 22 July 2015, I note from the description of tasks dated 22 May 2015 and 28 May 2015 in the Certificate of Costs Assessment dated 1 February 2016 at pages 170 and 171 of this Affidavit, that the Applicants solicitors discuss payment of Shotton’s costs and their Appeal costs. Immediately after noting payment of Shotton’s costs on 22 May 2015 are entries on 28 May 2015 describing emails between FTI and Russells,



Signed:

Taken by:



including the comments "Preparing email to Mr Park advising as to timing of request to Mr Whyte for payment of appeal costs". This was despite the Applicants/their solicitors failing to respond to numerous requests over a number of months as to whether or not the Applicants would be pursuing payment of their own legal costs of the Appeal. As stated at paragraph 29 above, had they made their position known before the decision was made on Shotton's costs, I would instead have applied to the Court for directions as to whether I was obliged to pay the Shotton costs.

The Appeal Indemnity Claim

33. Gadens Lawyers have been engaged by me to provide advice to me in my capacity as the person appointed to supervise the winding up of the FMIF and as receiver of the property of the FMIF, in relation to the Appeal Indemnity Claim. Where I refer below to any correspondence sent by Gadens, it was sent on my instructions. And, where I refer below to any correspondence received by Gadens, a copy of that correspondence was forwarded to me by Gadens around the time it was received.
34. The Appeal Indemnity Claim is contained in a letter from the solicitors for the Applicants dated 10 February 2016 addressed to Gadens. Now produced and shown to me and marked "DW-14" is a true and correct copy of the letter from the solicitors for the Applicants dated 10 February 2016 addressed to Gadens.
35. By letter dated 24 February 2016 Gadens wrote to the solicitors for the Applicants seeking further material and information which I considered necessary to assess the Applicants appeal costs claim in accordance with paragraph 8(a) of the 17 December Order. Now produced and shown to me and marked "DW-15" is a true and correct copy of the letter from Gadens to the solicitors for the Applicants dated 24 February 2016.
36. As no response was received from the Applicants within the time required by paragraph 7(b) of the 17 December Order, by letter dated 10 March 2016 Gadens wrote to the Applicants solicitors seeking a response. Now produced and shown to me and marked "DW-16" is a true and correct copy of the letter from Gadens to the solicitors for the Applicants dated 10 March 2016.
37. In response to Gadens letter dated 24 February 2016, the solicitors for the Applicants provided further information under cover of a letter dated 11 March 2016. Now produced and shown to me and marked "DW-17" is a true and correct copy of the letter to Gadens from the solicitors for the Applicants dated 11 March 2016.
38. I have not included in DW-17 a copy of the documents which were thereby provided. I understand that a further bundle of documents, which purported to include those documents, was provided to Tucker & Cowen Solicitors by correspondence dated 28 February 2017, which it is intended will be tendered at the hearing. There are some differences between the bundle provided on 11 March 2016 and the bundle provided on 28 February 2017. I understand, however, that it is intended that a bundle of relevant documents will be agreed, and that the agreed bundle will be tendered for the purposes of the hearing of the Indemnity Application on 19 and 20 June 2017.
39. There are also a number of passages on page 4 of the letter dated 11 March 2016 in DW-17 in which Mr Stephen Russell, the solicitor for the Applicants, makes irrelevant and serious allegations against myself and solicitors otherwise acting for me, Tucker & Cowen. I refute them absolutely. However, I do not consider that it is appropriate for me to further address the allegations in these proceedings. Nonetheless, I take objection to those passages

Signed:

Taken by:

being read into evidence in these proceedings. I have masked them in Exhibit DW-17, and I would request that the Court do the same with the copy at page 87 of Exhibit JRP-5 to the affidavit of Mr Park's October Affidavit.

Reason for the delay in responding to the Appeal Indemnity Claim

40. On 7 April 2016 Gadens wrote to the solicitors for the Applicants to propose in effect that the parties agree that I postpone determining the Appeal Indemnity Claim until after the delivery of judgment in the Remuneration Application, because the reasons for any judgment would touch on matters the subject of the Appeal Indemnity Claim. Now produced and shown to me and marked "DW-18" is a true and correct copy of the email from Gadens to the solicitors for the Applicants dated 7 April 2016.
41. On 8 April 2016, the solicitors for the Applicants wrote to Gadens rejecting that proposal, and required payment or a decision on the Appeal Indemnity Claim the same day. Now produced and shown to me and marked "DW-19" is a true and correct copy of the email to Gadens from the solicitors for the Applicants dated 8 April 2016.
42. On 11 April 2016 Gadens wrote to the solicitors for the Applicants' again proposing the parties await the delivery of His Honour's judgement prior to my delivery of my determination on the Appeal Indemnity Claim. Now produced and shown to me and marked "DW-20" is a true and correct copy of the email from Gadens to the solicitors for the Applicants dated 11 April 2016.
43. On 11 April 2016 the solicitors for the Applicants wrote to Gadens seeking a further explanation for my suggestion that the parties await the delivery of His Honour's judgement prior to my delivery of my determination on the Applicants' appeal costs claim. Now produced and shown to me and marked "DW-21" is a true and correct copy of the email to Gadens from the solicitors for the Applicants dated 11 April 2016.
44. On 12 April 2016 Gadens wrote to the solicitors for the Applicants advising that they were seeking my further instructions and that they would respond as soon as possible. Now produced and shown to me and marked "DW-22" is a true and correct copy of the email from Gadens to the solicitors for the Applicants dated 12 April 2016.
45. On 13 April 2016 the solicitors for the Applicants wrote to Gadens to advise that they had taken the step of serving on me personally a copy of the 17 December Order, endorsed pursuant to section 665 of the Uniform Civil Procedure Rules. I confirm that I was so served on 13 April 2016. Now produced and shown to me and marked "DW-23" is a true and correct copy of the email to Gadens from the solicitors for the Applicants dated 13 April 2016.
46. On 14 April 2016 Gadens wrote to the solicitors for the Applicants to advise that in light of the fact that the Applicants had not accepted the approach proposed by me and had served a copy of the 17 December 2016 Order pursuant to the Court Rules I had now taken steps which strictly comply with the terms of the Order to reject the appeal costs claim and that I would provide my reasons for doing so within 7 days as required by the 17 December 2016 Order. Now produced and shown to me and marked "DW-24" is a true and correct copy of the email from Gadens to the solicitors for the Applicants dated 14 April 2016.



Signed:

Taken by:




Decision on the Appeal Indemnity Claim

47. On 14 April 2016 Gadens wrote to the solicitors for the Applicants under separate cover to advise of my decision, pursuant to paragraph 8(b) of the 17 December Order, to reject the Appeal Indemnity Claim and that, pursuant to paragraph 8(c) of the 17 December Order, I would provide written reasons for my decision within 7 days. Now produced and shown to me and marked “**DW-25**” is a true and correct copy of the letter from Gadens to the solicitors for the Applicants dated 14 April 2016.
48. On 21 April 2016 Gadens wrote to the solicitors for the Applicants to advise them of my reasons for rejecting the Appeal Indemnity Claim. I confirm that the letter dated 21 April 2016 sets out my reasons. Now produced and shown to me and marked “**DW-26**” is a true and correct copy of the letter from Gadens to the solicitors for the Applicants dated 21 April 2016.
49. I observe that the Appeal Indemnity Claim is comprised of the following amounts, as assessed by a Mr Hartwell in his Costs Assessor’s Certificate dated 21 January 2016:
- (a) Professional Fees, in the amount of \$164,273.66; and
 - (b) Disbursements in the amount of \$77,179.88, which *includes* the costs of the assessment, in the amount of \$9,068.68, and the costs of the solicitors for the Applicants of the assessment, in the amount of \$60.12.
50. As to the costs of the assessment, I refer to my consideration of the costs of Mr Hartwell’s various assessments of LMIM’s various legal costs in my Second Indemnity Claim Affidavit. In summary, I consider that the assessment of legal costs as between LMIM and the solicitors for the Applicants did not in any way relate to any claim for indemnity by LMIM from the property of the FMIF, but was concerned with matters only as between LMIM and its solicitors.

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 WHYTE** on this 7th day
of June 2017 at Brisbane in the presence of:


Solicitor



SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: 3508/15

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

**FIRST APPLICANT: JOHN RICHARD PARK AND GINETTE DAWN
MULLER AS LIQUIDATORS OF LM INVESTMENT
MANAGEMENT LIMITED (RECEIVERS &
MANAGERS APPOINTED) (IN LIQUIDATION)
ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE
LM FIRST MORTGAGE INCOME FUND
ARSN 098 343 288**

AND

**SECOND APPLICANT: LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 THE RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 098 343 288**

AND

**RESPONDENT: DAVID WHYTE AS THE PERSON APPOINTED TO
SUPERVISE THE WINDING UP OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 098 343 288
PURSUANT TO SECTION 601NF OF THE
CORPORATIONS ACT 2001**

CERTIFICATE OF EXHIBIT

INDEX TO EXHIBITS

Exhibits "DW-1" to "DW-26" to the affidavit of **DAVID WHYTE** sworn at Brisbane on this 7th day of June 2017.

Exhibit	Description	Page No.
DW-1	Copy of judgment by Justice Dalton handed down on 8 August 2013, in <i>Bruce v LM Investment Management Limited</i> [2013] QSC 192	1-32

Signed:

Taken by:

Certificate of Exhibit
Filed on behalf of the respondent
Form 47 R.435


GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SZC:JSO:201401822
BNEDOCs 19898417_1.DOC

Exhibit	Description	Page No.
DW-2	Copy of judgment by Justice Dalton handed down on 20 December 2013, in <i>Bruce v LM Investment Management Limited (No 2)</i> [2013] QSC 347	33-43
DW-3	Notice of Appeal in Court of Appeal proceedings 8895 of 2013	44-56
DW-4	Copy of judgment of the Court of Appeal in <i>LM Investment Management Ltd v Bruce</i> [2014] QCA 136	57-103
DW-5	True copy of email from solicitors for the Applicants dated 26 November 2014 together with copy of letter to Mr Tucker dated 19 September 2014 which was attached	104-108
DW-6	True copy of email from Gadens dated 26 November 2014 to which letter dated 26 November 2014 was attached	109-111
DW-7	True copy of email from Mr O'Kearney to Ms Joanne Garcia (nee Kedney) dated 22 January 2015	112
DW-8	True copy of letter from solicitors for the Applicants to Gadens dated 31 January 2015	113-117
DW-9	True copy of letter from Gadens to the solicitors for the Applicants dated 10 February 2015	118
DW-10	True copy of emails from Gadens to the solicitors for the Applicants dated 16 April 2015, 19 February 2015 and 12 March 2015	119-121
DW-11	True copy of letter from the solicitors of the Applicants to Gadens dated 20 May 2015	122-124
DW-12	True copy of letter from Gadens to the solicitors of the Applicants dated 22 May 2015	125
DW-13	True copy of email from Mr O'Kearney of the Applicants' office to Mr Daniel of my office dated 22 July 2015	126
DW-14	True copy of letter from the solicitors for the Applicants dated 10 February 2016 addressed to Gadens	127-192
DW-15	True copy of letter from Gadens to the solicitors for the Applicants dated 24 February 2016	193-196
DW-16	True copy of letter from Gadens to the solicitors for the Applicants dated 10 March 2016	197-201


Signed:

Taken by:

Exhibit	Description	Page No.
DW-17	True copy of letter to Gadens from the solicitors for the Applicants dated 11 March 2016	202-207
DW-18	True copy of email from Gadens to the solicitors for the Applicants dated 7 April 2016	208
DW-19	True copy of email to Gadens from the solicitors for the Applicants dated 8 April 2016	209-210
DW-20	True copy of email from Gadens to the solicitors for the Applicants dated 11 April 2016	211-213
DW-21	True copy of email to Gadens from the solicitors for the Applicants dated 11 April 2016	214-217
DW-22	True copy of email from Gadens to the solicitors for the Applicants dated 12 April 2016	218-221
DW-23	True copy of email to Gadens from the solicitors for the Applicants dated 13 April 2016	222-226
DW-24	True copy of email from Gadens to the solicitors for the Applicants dated 14 April 2016	227-233
DW-25	True copy of letter from Gadens to the solicitors for the Applicants dated 14 April 2016	234-235
DW-26	True copy of letter from Gadens to the solicitors for the Applicants dated 21 April 2016	236-239



 Deponent



 Solicitor

SUPREME COURT OF QUEENSLAND

CITATION: *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192

PARTIES: **RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE**
(Applicants)
v
LM INVESTMENT MANAGEMENT LIMITED
(ADMINISTRATORS APPOINTED)
ACN 077 208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND
(First Respondent)
and
THE MEMBERS OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288
(Second Respondent)
and
ROGER SHOTTON
(Third Respondent)
and
AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION
(Intervener)

FILE NO/S: BS 3383 of 2013

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 8 August 2013

DELIVERED AT: Brisbane

HEARING DATE: 15, 16, 17 and 30 July 2013

JUDGE: Dalton J

ORDER:

1. Application filed 15 April 2013 dismissed
2. Order that the first respondent wind up the LM First Mortgage Income Fund.
3. Order that Mr David Whyte, liquidator, is appointed to take responsibility for the winding-up of the LM First Mortgage Income Fund.

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

5. Consequential Orders and directions.

CATCHWORDS: *Corporations Act 2001 (Cth)*
Corporations Regulations 2001 (Cth)
ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor
 [2002] NSWSC 310
ASIC v Wellington Investment Management Limited & Anor
 [2008] QSC 243
Capelli v Shephard (2010) 77 ACSR 35
Everest Capital Limited v Trust Company Ltd [2010]
 NSWSC 231
Handberg v Cant [2006] FCA 17
In Re Gordon [2005] FCA 950
Re Giant Resources Limited [1991] 1 Qd R 106, 117
Re Orchard Aginvest Ltd [2008] QSC 2
Re Stacks Managed Investments Ltd [2005] NSWSC 753
Re Stewden Nominees No 4 Pty Ltd [1975] 1 ACLR 185, 187
Shanahan v Scott (1957) 96 CLR 245, 250
Shephard v Downey [2009] VSC 33

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

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

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

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

- [1] This matter was commenced by originating application, adjourned twice, and came on in the civil list. By the time of the hearing two further applications had been made, one by ASIC, intervening, and one by a unit holder, Shotton. All applications were heard together over three days.
- [2] The originating application was directed to the first respondent, a company in voluntary administration, which is the responsible entity of a managed investment scheme under the *Corporations Act* 2001 (Cth) (the Act), First Mortgage Income Fund, (FMIF or the fund). FMIF invested by lending on the security of mortgages to borrowers who developed real property. There are three associated feeder funds to FMIF, one is controlled by Trilogy Funds Management Limited (Trilogy) as responsible entity. Two are controlled by the first respondent as responsible entity, one of these is named Currency Protected Australian Income Fund (CPAIF). As well, there is a service company to the funds, LM Administration Pty Ltd (Administration). The same voluntary administrators were appointed to Administration as the first respondent. In a coda to the principal hearing the matter was mentioned again on 30 July 2013 and new material showed that at the second meeting of creditors of Administration, held on 26 July 2013, liquidators unconnected with the current administrators of the first respondent were appointed to Administration.
- [3] The fund was established in 1999, it was successful in attracting investment – in February 2008 it was said to be worth over \$700 million. It was adversely affected by the GFC. By June 2011 it had assets of \$450 million; by June 2012 this had declined further to around \$340 million, and again to \$320 million by 31 December 2012. The only assets of the scheme are loans made to borrowers and all of those are in default. The net loss attributable to unit holders in 2011 was \$77 million, and in 2012, \$88 million.
- [4] From 2009 the scheme had greatly reduced activities: in March it declined new applications to buy units; in October it suspended redemptions from the fund, the applicant concedes this was apparently on the basis that the fund was illiquid. Its unit value in November 2012 was said to be 59 cents; each unit had been worth one dollar on issue. In December 2012, before administrators were appointed, the responsible entity of the fund implemented a “go forward” strategy. The name was Orwellian in that this strategy involved an orderly sale of all remaining fund assets and a pro rata distribution of the proceeds (after repaying debt) to unit holders with the aim of returning investors’ capital investment to them as quickly as commercially possible. In announcing this new strategy the responsible entity said that it had determined that the fund was not liquid for the purpose of the withdrawal provisions under the Act.
- [5] Voluntary administrators were appointed to the first respondent, responsible entity of the fund, on 19 March 2013, on the basis of a board resolution that the company was insolvent or likely to become insolvent. I accept that the administrators are independent of the previous directors – Court Document 46, paragraphs 35-36.
- [6] The administrators held a first meeting of creditors on 2 April 2013. No deed of company arrangement has been proposed and there is little likelihood of one being proposed. The second meeting has not yet been held. The likelihood appears that

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

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

Trilogy Originating Application

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

Competence

- [9] Section 601FN of the Act provides:
- “ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA.”
- [10] Section 601FA of the Act provides:
- “The responsible entity of a registered scheme must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme.”
- [11] The applicant said the first respondent no longer held an Australian financial services licence which authorised it to operate a managed investment scheme. This was said to be due to ASIC’s having issued a notice to the first respondent:
- “TAKE NOTICE that under s 915B(3)(b) of the Corporations Act 2001 (Act), the Australian Securities and Investments Commission (ASIC) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ... (Licensee) until 9 April 2015.
- Under s 915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in schedule B regarding the matters specified in Schedule A.

Schedule A

¹ The application sought alternative relief under the *Trusts Act* 1973 which was not pursued before me.
² t 3-25.

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

- [12] The word “operate” is not defined in the Act. It was considered by Davies AJ in *ASIC v Pegasus Leveraged Options Group Pty Ltd & Anor.*³ In that case ASIC brought proceedings against the defendant which had duped investors into paying large amounts of money purportedly as investments in something which was held to be a managed investment scheme within the meaning of s 9 of the Act. An issue in the case was whether or not the sole director of Pegasus had contravened the Act by operating the unregistered managed investment scheme. Davies AJ noted that the word “operate” should be given its ordinary English meaning; referred to the Oxford English Dictionary, and remarked that, “The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme.”⁴ The conclusion that the sole director and directing mind of Pegasus, the person who formulated and directed the scheme and the sole person involved in its day-to-day operations, was the person who operated it was unremarkable.
- [13] The applicant relied upon the definition of “managed investment scheme” in s 9 of the Act; the constitution of the first respondent company, and various other provisions, including various of the s 601 provisions of the Act to show that a very wide range of matters could be comprehended by, or included in, the concept of operating a managed investment scheme. No doubt that is so. It does not follow that, because under the terms of ASIC’s suspension of 9 April 2013, the first respondent was limited in the activities it could perform, that it did not operate the managed investment scheme after 9 April 2013. Its operation of the scheme after 9 April 2013 was limited, but continuing. The word “operate” is a word of wide import and it must take its meaning in any particular case from all the relevant circumstances, including the nature of the fund, and the financial position of the fund. From 2009 there had been significant limits on the operation of the fund as financial circumstances excluded more and more of the potential activities open to an operator of the fund. No doubt the ASIC notice of 9 April 2013 further limited what could be done by way of operation of the fund, but as a matter of ordinary English and practical reality that notice did not bring the first respondent’s operation of the fund to an end. What it has done since then no doubt falls within the concept of operation of a managed investment scheme, and the first respondent no doubt continues to bear the obligations and duties associated with such operation. It follows that the applicant is not able to rely upon s 601FN to bring this application.
- [14] The alternative basis relied upon by the applicant was reg 5C.2.02 of the *Corporations Regulations* which provides:
- “ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme.”

³ [2002] NSWSC 310.

⁴ Above, [55].

- [15] The structure of the regulations is such that Part 5C.2, headed “The responsible entity” corresponds, on its face, with Part 5C.2, Division 2 of the Act headed “Changing the responsible entity”, ss 601FJ-601FQ. The only provision of the Act allowing ASIC or a member to apply for the appointment of a temporary responsible entity is s 601FN, just discussed. It would seem therefore that reg 5C.2.02 goes beyond the Act in that it purports to give rights greater than, or inconsistent with, those provided for in s 601FN – see s 1364 of the Act, and *Shanahan v Scott*.⁵ This point is reinforced by the fact that the regulation provides only that a member may apply to the Court, and s 601FP of the Act gives the Court power to appoint a temporary responsible entity only on application under s 601FL (not relevant to this part of the argument) or s 601FN.
- [16] The position is somewhat complicated by the last section in Chapter 5C of the Act, s 601QB, which provides that:
- “The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:
- (a) a managed investment scheme; or
- (b) all managed investment schemes of a specified class.”
- [17] Regulations 5C.1.03 and 5C.11.02 both expressly purport to modify the operation of Chapter 5C of the Act in accordance with s 601QB of the Act. However, there is no requirement in s 601QB that any regulation made pursuant to it expressly state that it is modifying the operation of the chapter pursuant to the section. Having regard to the plain terms of s 601QB, I do not think it is necessary that a regulation expressly do this before it can be valid.
- [18] Nonetheless s 601QB is not a plenary power to modify, but only a power to modify provisions, “relating to securities”. Securities is defined at s 92(1)(c) to include “interests in a managed investment scheme”. Other securities, as defined by s 92 include debentures, stocks, bonds, shares or units. At s 9 a managed investment scheme is defined as having (inter alia) the feature that “people contribute money or money’s worth as consideration to acquire rights (interests) to benefits produced by the scheme ...”. While the word “interest” or “interests” is not strictly defined, this part of the definition of managed investment scheme, together with the other types of securities defined by s 92 of the Act, shed some light on how the word “interests” in s 92(1)(c) is to be understood. An interest in a managed investment scheme is something analogous to (if less defined than) a share in a company.
- [19] Turning again to the terms of s 601QB, I cannot see that reg 5C.2.02 is a regulation which purports to modify a provision of the Act relating to securities. I do not think that s 601FN could be characterised as a provision of the Act relating to securities, notwithstanding it gives rights to members of managed schemes, who no doubt have interests in them, which would amount to securities within the meaning of s 92(1)(c) of the Act. Again by way of analogy, were the provisions dealing with companies, I would not characterise a provision along the lines of s 601FN as a provision relating to shares in a company merely because it gave a remedy to shareholders (along with ASIC). My view therefore is that reg 5C.2.02 does not authorise the application brought by the Bruces.⁶ The applicant relied upon a short report, *In Re Gordon*.⁷

⁵ (1957) 96 CLR 245, 250.

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

⁷ [2005] FCA 950.

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

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

Discretion

- [21] Even had I power to do so I would not appoint Trilogy as temporary responsible entity. Section 601FP(1) allows the Court to appoint a company as temporary responsible entity if the Court is satisfied that the appointment is in the interests of members. If reg 5C.2.02 were valid, it would additionally direct my attention to whether or not it was necessary to protect scheme property.
- [22] Section 601FQ(1) provides that a temporary responsible entity is just that. It must call a members' meeting for the purpose of the members choosing a company to be a new responsible entity. This meeting must be held "as soon as practicable" and in any event within three months of it becoming the temporary responsible entity. This will inevitably involve cost for the fund. Section 601FQ(2) provides the opportunity for more than one meeting and for applications to be made to Court. Independently, s 601FQ(5) provides that if the temporary responsible entity forms the view that the scheme ought to be wound up, it must apply to Court for such an order. There is a likelihood that any person objectively looking at this scheme would need to make such an application. Further, having regard to the way this litigation has been conducted and the history of the 13 June 2013 meeting (see below for both topics), in my view there is a distinct possibility that there would be contention and indeed litigation about any meeting held to appoint a new responsible entity.
- [23] Trilogy hoped that it would be appointed as a permanent responsible entity by the meeting required by s 601FQ(1). However, I cannot see it is in the interests of the members of the FMIF to become caught up in a process which provides an interim solution which will inevitably involve more expense by way of meeting (s 601FQ(1)), and may involve further expense by way of Court action, with the inevitable dislocation, uncertainty and expense which any interim solution must involve.
- [24] There are other reasons why I do not regard the appointment of Trilogy as responsible entity as being in the interests of the members of this fund. One very practical one is that the current administrators swear that there is a considerable overlap between the staff of the first respondent and the company Administration which would make it difficult, and I infer, expensive, to hand over to a new responsible entity – Court Document 46, paragraph 63. It seems to me that *prima facie* those staff who have long knowledge of the business of the fund ought to be working for or with the responsible entity as much as possible in order to preserve corporate memory, competence and save cost.⁸ Employees of the first respondent will have a good background knowledge of the loans which are its primary assets,

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

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

- [25] Trilogy puts itself forward as having an advantage over other persons proposed to take control of the fund by reason of the fact that it is not staffed by insolvency practitioners, but is a fund manager, with particular experience of distressed funds. I deal with these matters in detail at [37] below. In the end I do not see that there is any great advantage provided by the slightly different perspective which Trilogy's control would provide to the responsible entity. In fact, given that my view is that this fund ought to be wound up – [34]-[43] – it seems to me there is probably a disadvantage in Trilogy not having as much insolvency experience as the other contenders for control, particularly when it seems that there may be contention and litigation involved in the winding-up.
- [26] In this case there is no evidence before me that the assets of the FMIF are in danger and need particular protection, except, indirectly, because of conflicts of interests which it is said will become evident if either the first respondent or Trilogy winds up FMIF.
- [27] To the extent that the Trilogy application to be appointed temporary responsible entity is based on the idea that someone independent of the first respondent and its administrators ought to be appointed to control the FMIF, that will be achieved by the orders which I propose to make, although they differ from those which the applicant and Trilogy seek. In that regard, I have dealt with the applicant's arguments as to conflicts of interest and the need for independence at [97]ff below.
- [28] To some extent, Trilogy will have potential conflicts of interest if it is in charge of the fund because it is the responsible entity of a feeder fund to FMIF. Further, Trilogy has a view that there ought to be litigation by members of the FMIF against the first respondent or its directors. It has engaged Piper Alderman to investigate such claims (as far back as November 2012) and has touted the idea publicly of a class action. There may be claims to be made, and it may be that it is rational to make them, depending on their prospects of success, likely cost and the likely prospect of recovering anything at the end of the day. At present, however, Trilogy has not investigated the matters to any extent⁹ and I must say I find its advocacy of such claims prior to any proper assessment rather disconcerting. The first respondent says that Trilogy as a member has a right to claim against the first respondent and its directors if it wishes, but says that it seeks to become responsible entity of the fund so that it does not have to bear the cost of doing this, but can use the fund essentially to bear the expense of such actions. There is I think potential conflict of interest in this.
- [29] The applicant advanced a general argument that it was undesirable for the responsible entity of the FMIF to be a company under external administration. There may be arguments to be made in cases where the fund itself will continue to

⁹ For example, Court Document 91, paragraph 31.

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

- [30] Further, it was argued in a general way that ASIC might in the future act to further limit or wholly cancel the first respondent's financial services licence: there is the potential for breaches of the licence conditions due to the insolvency of the first respondent – see e.g., s 915B(3) of the Act. I do not think there is any realistic basis for present concern about that in circumstances where ASIC is an intervener in this litigation and is content for orders to be made which leave the first respondent as responsible entity, subject to another body being given responsibility for ensuring oversight of the winding-up of the fund.
- [31] For all these reasons, I do not think it is in the interest of the members that Trilogy be appointed as temporary responsible entity. Nor, to deal with a submission made by counsel for Trilogy outside its application, do I think Trilogy ought to be appointed to wind up the FMIF, be receiver of the property of the FMIF, or to take responsibility for seeing that the FMIF is wound up.

ASIC Application and Shotton Application

- [32] On 29 April 2013 Mr Shotton, a member of the FMIF, filed an application seeking an order pursuant to s 601ND of the Act that the first respondent be directed to wind up the FMIF and that an independent liquidator be appointed to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution – s 601NF(1) of the Act.
- [33] The ASIC application is similar. On 3 May 2013 ASIC filed an application seeking orders that the administrators of the first respondent be directed to wind up the fund pursuant to s 601ND(1)(a); that independent liquidators be appointed to take responsibility for ensuring that the fund was wound up in accordance with its constitution pursuant to s 601NF(1); that those liquidators be appointed as receivers of the property of the fund, either pursuant to s 1101B(1) or s 601NF(2) of the Act, and that they have wide powers to exercise as receivers. By the end of the hearing Mr Shotton joined with ASIC in proposing that receivers be appointed as proposed by ASIC.

Winding-up

- [34] On 6 May 2013 the administrators of the first respondent resolved to wind up the fund on the basis that it cannot accomplish its purpose – s 601NC of the Act. They have been restrained from commencing the winding-up until this proceeding is resolved. Their position in relation to the first order sought by Shotton and ASIC is that it was unnecessary on the basis that the fund will in any event be wound up.
- [35] All parties before the Court except the applicant agreed that the FMIF ought to be wound up. The current administrators depose at some length to the process undertaken by them in making the decision that the fund ought to be wound up. There was no real challenge to the substance of this evidence. Counsel for the

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

- [36] Pursuant to s 601ND(1)(a) I have power to direct a responsible entity to wind up a scheme if it is just and equitable to do so. In this case it seems to me just and equitable to do so. The case law is to the effect that the principles concerning winding-up of companies on the just and equitable ground inform the Court's thinking in applications pursuant to s 601ND.¹¹ The financial position of the fund has already been outlined. From the end of 2012, if not before, those in charge of the company have been liquidating its assets with a view to returning capital to members. The fund was originally established to provide an investment which would provide regular income to unit holders and a return of capital at maturity – cll 11 and 12 of the constitution. This purpose has failed: there is no income and members can no longer exercise their rights to withdraw their investments in accordance with the constitution.¹²
- [37] Trilogy does not advance the case that the fund should continue in a plenary way as a going concern. The point of difference between it and the other parties to this proceeding is that Trilogy puts itself forward as a more suitable person to take charge of the FMIF. It is a fund manager, unlike all the other persons proposed to take charge of the fund, who are insolvency practitioners. Trilogy has put material before the Court which shows that it has experience in dealing with distressed funds, including selling distressed assets to best advantage and dealing with claims against former fund managers. Against this background it is sworn – Court Document 29, paragraph 17 – that Trilogy would seek to: (a) consider selling the assets of the FIMF as appropriate and (b) obtain finance (either by external borrowing or on the sale of assets) to enable the development of some real properties, of which FIMF is mortgagee, to be completed. It is hoped that this second approach might provide higher sale prices than an insolvency practitioner might provide on a liquidation of the fund. In this regard Trilogy has a joint venture with a company named CYRE Trilogy Investment Management Pty Limited which specialises in marketing distressed property assets and assessing whether or not to complete incomplete development projects with a view to obtaining the best purchase price. Trilogy says that it would be advantageous if it were appointed as responsible entity for it would have an untrammelled financial services licence and full powers to pursue development of appropriate assets before sale, including borrowing for this purpose. It says that under its limited licence, the first respondent does not have sufficient power to act in this regard. For the same reason it says that I should not order the FMIF to be wound up.
- [38] On behalf of the first respondent, a Mr Corbett swears that he has already performed a great deal of work, as leader of a team which has prepared a detailed analysis of the 27 groups of property over which the FMIF is mortgagee. He says that as part of that exercise he has considered development proposals for the properties. Neither he, nor Mr Wood, on behalf of Trilogy, identifies any particular property which should be developed prior to sale, or gives any detail as to even a class of properties which might be so developed.

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

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

¹² cf [13] *Equititrust*, above.

- [39] It seems common ground before me that the winding-up of FMIF will take place over years. I do not think that the words of the limited financial services licence granted to the first respondent prohibit it developing property of which the fund is mortgagee in order to obtain a better price for that property in the course of winding-up. ASIC does not agitate such a limitation on this application, and in fact expressly does not prefer Trilogy or the first respondent as responsible entity. If there were to be doubt as to the first respondent's power to borrow or develop a particular property in the course of a winding-up, and there were a plainly sensible proposal in the interests of the fund, I cannot see that ASIC could not either clarify or modify the extent of powers under the limited financial services licence it has granted the first respondent.
- [40] Nor am I convinced that making an order that the FMIF be wound up would remove from the person charged with winding-up the power to develop a particular property with a view to sale in the course of winding-up if it were in the interests of the fund. The fund was set up to invest in "mortgage investments" – cl 13.2 of its constitution – and cl 13.6 of the constitution makes it clear that in the ordinary course of its business it could exercise all the powers of a mortgagee. Indeed one would have thought that was a necessary and incidental part of running a business which invested in mortgage investments. The liquidator of a company would normally have the right to carry on the business of a company "so far as is necessary for the beneficial disposal or winding-up of that business" – see s 477(1)(a) of the Act. Here the constitution gives the responsible entity power to "manage the scheme" during the time of a winding-up until such time as all winding-up procedures have been completed and cl 16.7(e) gives such a responsible entity power to postpone the realisation of scheme property "for as long as it thinks fit". Again, if doubt arose about a particular proposal in the future s 601NF(2) allows the Court to make an appropriate direction. At the moment, there are no specific proposals, just some conceptual thinking.
- [41] The second activity which Trilogy is keen to pursue is investigation of claims on behalf of the FMIF against the first respondent and/or the previous directors of the first respondent for conduct which is more fully detailed below, but which claims concern changes made to the first respondent's constitution being beyond power; related party transactions between the first respondent and Administration, and claims, perhaps in negligence, for the financial losses which were suffered by the FMIF during 2008 and 2009. These are the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up – cf s 477(2)(a) – and I cannot see that the limited financial services licence granted to the first respondent would prevent it from doing this. Nor is the potential existence of such claims a reason why I should not direct that the FMIF be wound up now. Clause 16.7(a) of the constitution obliges a responsible entity winding-up the fund to realise its assets. If there are claims to be made on behalf of the fund (and Trilogy has not investigated the position) then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue.
- [42] In my view, it is desirable that the FMIF be wound up and its assets realised for unit holders. Further, I think it is desirable that I make an order that this occur. If I do not, the administrators will either need to call a meeting pursuant to cl 16.2(d) of the constitution or give members an opportunity to meet pursuant to cl 16.3(a) of the constitution; see also ss 601NB and 601NC which have very similar requirements.

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

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

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

- [44] The real issue joined between ASIC and Shotton on the one hand, and the first respondent on the other, was who ought to wind up the company, or take responsibility for the winding-up, as s 601FN(1) has it.¹³
- [45] The first respondent submits that the provisions of Part 5C.9 of the Act make it clear that it is generally to be the responsible entity which winds up a managed investment scheme – ss 601NB, 601NC, 601ND and 601NE. I think this is right.
- [46] Sections 601NE and 601NF(1) provide that the scheme is to be wound up “in accordance with its constitution and any orders” which the Court makes under s 601NF(2). There has been some consideration in the cases as to the width of the Court’s power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the review which is found in *Equitrust* (above) at [42]-[49], and his own views expressed at [50]ff in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with e.g., the public aspects of a liquidation.
- [47] Section 601NF(1) confers a jurisdiction in the Court to appoint a person other than the responsible entity to take responsibility for the winding-up of a scheme, “if the Court thinks it is necessary to do so”. The first respondent submitted that the power of the Court to appoint was more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so. Again I think this correct, as a matter of plain English, against the background that the statute establishes a general regime where it is the responsible entity which will wind up a scheme in accordance with the constitution. It was the view taken by Fryberg J in *Re Orchard Aginvest Ltd.*¹⁴ It was also the view of White J in *Re Stacks Managed Investments Ltd.*¹⁵ Both these judges refused orders which might have been convenient or desirable, but were not necessary. Applegarth J took the

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

¹⁴ [2008] QSC 2, pp 8 and 9.

¹⁵ [2005] NSWSC 753 [50].

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

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

Meeting 13 June 2013

- [49] In response to receipt of Trilogy's application, the administrators of the first respondent caused a meeting of members of the fund to take place.
- [50] Section 252B of the Act provides that the responsible entity of a registered scheme must hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution, if (inter alia) members with at least five per cent of the votes "that may be cast on the resolution" request it. It might be recalled that, in addition to being the responsible entity of FMIF, the first respondent is the responsible entity of two feeder funds which hold units in FMIF, and that one of the feeder funds is CPAIF. In fact the assets of CPAIF are held by a custodian trustee, the Trust Company. The administrators of the first respondent (as responsible entity of CPAIF) directed the Trust Company to request a meeting of members of FMIF pursuant to s 252B of the Act on the basis that it held 24 per cent of the issued units in FMIF. The Trust Company complied with that request without question, almost immediately, by sending the administrators (in their capacity as responsible entity for FMIF) a request in terms provided to the Trust Company by the administrators. The meeting request proposed two extraordinary, and interdependent, resolutions: (1) to remove the first respondent as the responsible entity of FMIF and (2) to appoint Trilogy in its stead. On this basis the administrators of the first respondent sent a notice convening a meeting.
- [51] The administrators' purpose in calling the meeting was made plain in the notice of meeting. They wished to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application. The introductory words of the covering letter to the notice of meeting are:
- "A Meeting is being called for the Fund by LM, the current manager.
LM decided to call the Meeting because a unitholder has made an

¹⁶ [2009] VSC 33 [132]-[133].

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

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

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

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

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

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

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

- (a) “LM expects that if it remains as manager investors will recover distributions faster and in a greater amount.”
- (b) “LM also notes that Trilogy (unlike LM) does not hold the correct Corporations Act licence in order to be able to manage your Fund” and “LM has taken legal advice on the adequacy of Trilogy’s AFSL. LM is confident that Trilogy’s AFSL does not authorise it to operate the Fund.”¹⁸
- (c) “Further, in a recent court action involving another Fund managed by LM where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the

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

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

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

- (d) Under the heading “Does LM have the licence to manage the fund?”:

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

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

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

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

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

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

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

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

- [54] Other less controversial arguments were made, for example, that LM had more familiarity with the assets of the fund than Trilogy, and that changing responsible entities might be expected to slow the process of recovery of assets in the fund. The administrators, using existing LM staff, it was said, were more familiar with the affairs of the fund and less likely to be taken advantage of by those owing money to the fund.
- [55] The notice of meeting stated that Trilogy had been invited to participate in the process leading up to the meeting and provide information about itself to members.
- [56] The above statements all come from the initial notice of meeting and covering letter dated 26 April 2013. That contemplated a meeting being held on 30 May 2013. However, there intervened correspondence between the first respondent and ASIC, and correspondence between the first respondent and Trilogy, regarding the information given to members, and the validity of the meeting. ASIC and Trilogy rely upon this as further showing that the first respondent, by its administrators, is unsuitable to wind up the FMIF. I deal with that correspondence now. As to the calling of the meeting, it is sufficient to note that the process was technical and somewhat artificial, and that the administrators (in effect) called a meeting to consider two resolutions they opposed.

Dealings with ASIC

- [57] The ASIC correspondence needs to be read against a particular background. On 19 April 2013 ASIC became aware of the Trilogy application and was concerned as to the impact that might have on the “efficient resolution of the future of the various funds” of which the first respondent was responsible entity. On 23 April 2013 ASIC met with one of the administrators and the administrators’ solicitors. At that meeting the administrators’ solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity. He said that given a choice between the first respondent and Trilogy, “the first respondent would win”.
- [58] ASIC too said it preferred a solution not involving litigation and suggested the use of an enforceable undertaking issued by ASIC which obliged the administrators to call a meeting to vote on “resolutions for the appointment of a new responsible entity or that the funds be wound up”. There was discussion as to how quickly the administrators could call a meeting and make a final decision as to winding-up. ASIC was concerned that if the enforceable undertaking solution was to be of utility to members it would need to occur sooner rather than later in order to save costs in the litigation, and associated with the appointment of a temporary responsible entity. As part of its discussions with the first respondent on 23 April, ASIC had informed the first respondent that it planned to intervene in the Court proceeding and that if ASIC and the first respondent could agree on the terms of an enforceable undertaking, ASIC would take the position in the litigation that it was preferable for the first respondent to remain as responsible entity.

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

"At the meetings referred to in subparagraphs (a) and (b) above, the resolutions put to the unitholders for determination will include resolutions for:

- (i) the appointment of a responsible entity over each of the funds;
and
- (ii) whether the fund should be wound-up and, if so, by whom."

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

- [60] On 26 April 2013 the first respondent issued the notice of meeting and covering letter discussed above. It informed ASIC of this briefly. It did not give ASIC the material sent to members. The meeting actually convened would not, as ASIC had wanted, deal with the question of winding-up, and it dealt with the question of who would be the responsible entity in a much more specific way than ASIC had proposed. Plainly enough it contradicted ASIC's expectation that the administrators would work with ASIC as to what would be put at the meeting. It also contradicted their solicitor saying to an ASIC solicitor earlier on 26 April that he would send a re-drafted version of the enforceable undertaking – affidavit Gubbins filed 15 July 2013, paragraph 6. As well, when ASIC received the notice of meeting it had concerns it was misleading.
- [61] On 29 April 2013 the first respondent informed ASIC that it was not willing to enter into an enforceable undertaking and not willing to seek a resolution as to wind up the FMIF – affidavit Hayden filed 15 July 2013, paragraph 31(a). When asked to explain, the administrators said there would be negative connotations for them in entering into an enforceable undertaking and that they did not think it appropriate to seek a resolution from the meeting as to winding-up of the FMIF before a vote on who the FMIF desired as responsible entity. They said that if the meeting rejected Trilogy they would convene another meeting "promptly" to consider and approve any decision they might make to wind up the fund. These decisions were said to have been taken by the administrators after "two days of intensive consultation" with two firms of solicitors and with "other expert advisors".
- [62] In an affidavit filed 2 May 2013 the administrator, Ms Muller, swears to a desire to "ensure that our conduct of the [first respondent] was to the extent possible, satisfactory to ASIC ..." – Court Document 46, paragraph 12. And further, "... Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any 'bona fide' (concerns) of members in relation to the conduct of the fund", paragraph 16. I find it difficult to see this as consistent with the reality of the first respondent's interactions with ASIC. On 21 May 2013, solicitors for the administrators sent an amended draft enforceable undertaking to ASIC. The time for a co-operative solution had well since passed.

Correspondence Prior to 13 June Meeting

- [63] To return to correspondence dealing with the proposed meeting, on 8 May 2013 ASIC wrote to the administrators' solicitors calling for an explanation as to various matters raised in the notice of meeting including, as to those matters I have summarised above, how it was that the first respondent thought calling a meeting would save legal costs in relation to the Trilogy application and how the ability of the first respondent to use Part 5.7B of the Act (clawback provisions) was a genuine point of differentiation between the first respondent and Trilogy so far as the FMIF was concerned. The letter also objected to the first set of underlined words at [52] above, which it said implied that ASIC had approved the first respondent's calling the meeting.
- [64] As to the saving of costs point, no convincing explanation was provided by the first respondent. It pointed out that at the time of publishing the notice of meeting the Trilogy application had been made but the ASIC and Shotton applications had not. It was said against that background that:
- "It was our client's view that the court would adjourn the Original Proceedings until after the Meeting (at this time we understand that no party to the proceedings suggested that the proceedings were urgent). It was expected that the results of the vote at the Meeting would strongly inform the court proceedings. In addition, it was also thought possible that by convening the Meeting the two unitholders who had commenced the Original Proceedings might discontinue those proceedings and certainly would have if the meeting resolved to appoint Trilogy." – Norton Rose letter 10 May 2013, Court Document 73, p 35 exhibits.
- [65] The only realistic way that legal costs would have been saved by calling a meeting was if the meeting voted to appoint Trilogy as temporary responsible entity. The notice distinctly does not say this. Indeed, this is the very result which the first respondent strongly urged members to reject. I think the notice was misleading about cost savings initially and became more so as events unfolded – see the following discussion.
- [66] The letter of 10 May 2013 provided no convincing explanation in relation to the concern expressed by ASIC as to the clawback point and rejected ASIC's concern as to the notice implying that the first respondent had ASIC's sanction for its calling the meeting.
- [67] ASIC was unconvinced and called upon the first respondent to issue an amended notice addressing its concerns. The first respondent proposed to put further information about the meeting on its website. It provided a draft of the further information it proposed to use to ASIC. By that stage concerns had been raised as to the legal basis on which a meeting seeking to change the responsible entity could be convened. Solicitors acting for the first respondent relied upon ss 601FL and 601FM of the Act.
- [68] On 21 May 2013 ASIC called on solicitors acting for the first respondent to either adjourn their meeting until after the date (then) allocated to hear both the Trilogy application and the ASIC and Shotton applications, or alternatively cancel the meeting altogether. ASIC made its request on the basis that the vote of the meeting

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

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

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

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

- [70] From 6 May 2013 solicitors for Trilogy raised matters which went to the validity of the proposed meeting organised by the first respondent – see exhibits 4ff to Court Document 91. Their letters set out clearly, succinctly, and in my view correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting (see below). Solicitors for the first respondent made little attempt to meet the legal substance of the points advanced against them, but would not concede the point.
- [71] From 6 May 2013 Trilogy actively encouraged members of the feeder fund of which it was responsible entity (around 20 per cent of membership of FMIF) not to participate in the proposed meeting. Further, on 23 May 2013 Trilogy adopted the position that it did not consent to being appointed by any meeting held as a consequence of the first respondent’s notice, and called on the administrators to abandon the meeting which it said was not validly called, inutile and an attempted circumvention of Trilogy’s court proceedings.
- [72] Supplementary information was posted by the first respondent on the FMIF website in the form of a question and answer document dated 27 May 2013. As to the costs and utility of the proposed meeting, the additional information, at question one, rather seems to concede the point that there was little chance that the meeting would, at that stage, save costs or avoid litigation, but a further justification – informing the Court as to the wishes of the members – was raised. For the first time it was stated that the main cost saving would result if the meeting appointed Trilogy as responsible entity. It was still not plainly acknowledged that this was the only realistic scenario in which cost savings could ever have been made. Although Trilogy’s lack of consent to being appointed at the meeting was raised, nothing

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

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

- [73] While submissions were apparently made on behalf of the first respondent at an interlocutory stage, that the proceeding ought to be adjourned to allow the proposed meeting to occur, I have not seen anything to show that the Court granted an adjournment of the proceeding for this purpose. In fact, counsel for the first respondent conceded it did not.¹⁹
- [74] For the first time, at question six of the 27 May 2013 document, the first respondent clearly stated the limited nature of the licence granted to it by ASIC – i.e., to investigate and preserve, in train of either winding-up the scheme or transferring to a new responsible entity. Until then the information given to members was, in my view, misleading because it implied that the first respondent had a licence which enabled it to continue to manage the FMIF short of a winding-up – see [53(d)] above – and nowhere stated that unless the first respondent wound up FMIF it was obliged to appoint another responsible entity. These were very relevant matters for members to know prior to a vote on the appointment of a new responsible entity.²⁰
- [75] I assume, in response to ASIC's complaint that the notice of meeting implied ASIC had approved the course, material at question nine of this document stated that the first respondent was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." That may (or may not) have been apt to dispel the implication of which ASIC originally complained. By the time this statement was published ASIC disapproved in the plainest terms of the meeting and had called upon the first respondent to cancel it. The new statement did not reveal the true position regarding ASIC's attitude to the meeting.
- [76] No reference was made to either Trilogy or ASIC's questioning the statutory basis for the meeting. Earlier in the document (at question two) it was stated, "The reason that Trilogy has provided for not consenting is that they believe that the matter should be determined by the Court". In fact Trilogy relied upon its assertions of invalidity as well.
- [77] Some information was provided as to the clawback provisions and moderated the statements made in the notice of meeting which claimed that members would be advantaged if the first respondent remained as responsible entity. I note however that the information was not as frank as the view provided to ASIC about this on 1 May 2003, "It is at least hypothetically possible ...". Why the members were being given information about a legally novel, hypothetical advantage is not clear. I

¹⁹ t 1-25.

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

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

- [78] On 28 May 2013 ASIC again called upon the first respondent to cancel the proposed meeting. It called for more information in train of enquiries as to whether or not the meeting could validly have been called having regard to ss 252B, 601FL and 601FM of the Act.
- [79] The meeting was held on 13 June 2013.

Validity of Meeting

- [80] The first respondent relied upon two sections of the Act as allowing the meeting of 13 June 2013. Section 601FL(1) provides:
- “If the responsible entity of a registered scheme wants to retire, it must call a members’ meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. ...”
- [81] Section 601FM provides:
- “If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members’ meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity.”
- [82] Neither s 601FL or 601FM allowed the meeting which took place on 13 June 2013. The opening words of each of those sections describe a circumstance which did not exist. Section 601FL allows a meeting, “if the responsible entity of a registered scheme wants to retire”. The first respondent did not want to retire as responsible entity, it wanted to test, or defeat, Trilogy’s application to the Court to be appointed as new responsible entity. Section 601FM allows a meeting “if members of a registered scheme want to remove the responsible entity”. Here no members of the registered scheme who wished to remove the responsible entity called the meeting. Insofar as there was any relevant state of mind of any member of this scheme, it was the state of mind of the administrators of the first respondent in their capacity as responsible entity of the CPIAL feeder fund, expressed on their behalf by the Trust Company. The desire of the administrators was to remain as responsible entity.
- [83] Counsel for the first respondent argued that these introductory words in ss 601FL(1) and 601FM(1) could not possibly be read as a real requirement that there be a subjective intention in terms of the literal meaning of the words. He asked rhetorically how the subjective intention of numerous members who purported to act pursuant to s 601FM(1) might be determined, and what might occur if the intention of some members was different from the intention of others. In terms of s 601FL(1), I think it is quite clear that a subjective intention on the part of the responsible entity is required, for the responsible entity must explain to the members’ meeting the reason for its wanting to retire.²¹ I do not see any reason for interpreting the introductory words at s 601FM(1) differently.

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

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

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

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

Conclusions as to Meeting and Related Conduct

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

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

²³ [2010] NSWSC 231 [77]ff.

²⁴ [89]ff above.

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

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

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

Conduct of the Litigation

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

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

²⁷ t 1-54.

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

²⁹ [1893] 1 Ch 547.

- [90] The affidavit of Hellen (Court Document 40) was relied upon by ASIC as an illustration of the attitude it complains of. It was said that the affidavit was at no time likely to provide much assistance to the Court. Mr Hellen gives expert evidence as a forensic accounting specialist, with extensive experience as a liquidator. He was briefed to prepare a report regarding Trilogy's financial position. From Mr Hellen's recitation of his instructions, it appears that solicitors acting for the administrators of the first respondent were concerned about a contingent liability in the amount of \$81 million in Trilogy's accounts, and were concerned otherwise to have Mr Hellen identify avenues of further investigation, either in relation to that matter or otherwise, as to whether Trilogy had a sound financial position. Mr Hellen was briefed "on the evening of 29 April 2013" and expresses reservation that he has had "very limited time" to undertake his assessment. His affidavit was filed on 2 May 2013. He heavily qualifies his report saying that it is based on interim and annual financial reports but he has seen few underlying documents.
- [91] Mr Hellen comes to the unremarkable conclusion that if litigation against Trilogy, in which an amount of \$81 million was claimed, were to go against Trilogy, Trilogy would be driven either to rely upon insurance or seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist with an opinion as to whether those sources would allow Trilogy to pay a judgment of \$81 million. Nor could he give any further useful information about Trilogy's financial position: it had an excess of assets over liabilities and made a small operating profit.
- [92] Before the conclusion of the hearing before me, judgment was given in Trilogy's favour in the litigation concerned and an appeal against that judgment was lodged and then withdrawn, so the substance of Trilogy's financial position did not concern me. Had it concerned me, Mr Hellen's report would not have been any more use to me than my own examination of the financial accounts with which he was briefed. Nor really could it have been expected to be. It seems an extravagant use of members' funds.
- [93] An associated point is that in contrast to the highly qualified and inconclusive report by Mr Hellen, one of the administrators, Muller, swears at Court Document 46, paragraph 74, that Trilogy will not be able to pay the judgment debt if it loses the relevant litigation. It is hard to see this statement as anything other than unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions. It is significant that it is a statement squarely within Ms Muller's area of professional expertise as a liquidator. Not only that, it is in a part of her affidavit where she swears that material published by Trilogy and its solicitors contains "numerous statements" that are "either false or misleading" – Court Document 46, paragraph 68. There was no argument before me that Trilogy and its solicitors have published false or misleading statements. These are serious allegations, especially when made against professional people. More material of similar flavour is found in the same affidavit at paragraph 77.
- [94] Solicitors acting for the first respondent filed an affidavit of over 800 pages – Court Documents 16, 17 and 18 – which was of such marginal relevance that it was not referred to in either written or oral submissions by any party. Further, Court Document 52, which itself has over 100 pages of exhibits, is a solicitor's affidavit which was read on the hearing before me but was little more than combative and querulous commentary on the litigation. Separately, the description in this affidavit of the enormous amount of affidavit material exchanged and the late hours and

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

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

Conflicts and Potential Conflicts of Interest

- [97] In *Re Stewden Nominees No 4 Pty Ltd*³⁰ Bowen CJ in Eq rejected the appointment of a liquidator who was a member of a firm which had audited the company's accounts in the past. He said that there was the potential for conflict if, for example, the liquidator had to take action which called into question the prior accounts of the company. He said, "It is important that a liquidator should be independent, and should be seen to be independent (*Re Allebart Pty Ltd* [1971] 1 NSWLR 24, at p 30)."
- [98] Similarly in *Re Giant Resources Limited*³¹ Ryan J said:
 "... a liquidator should not be put in a position where his independence might be open to challenge. It is of the greatest importance that there should be no possibility of criticism attaching to one of the Court's own officers on the ground of a conflict of interest. The liquidator needs to be seen to be independent in any matter which his duties as liquidator may require him to investigate."
- [99] Lastly, in *Handberg v Cant*³² Finkelstein J said:
 "If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator then as a general rule different persons should be appointed as liquidator to each company [authorities omitted]. This is not to say that it is inappropriate to appoint one person as a liquidator of a group of companies or companies that are closely connected [authorities omitted]. But once the likelihood of conflict becomes apparent it is necessary to take action."
- [100] Both Shotton and Trilogy advance a number of factual scenarios as illustrating that if the current administrators of the first respondent were to wind up FMIF they would face actual and potential conflicts of interest.

³⁰ [1975] 1 ACLR 185, 187.

³¹ [1991] 1 Qd R 107, 117.

³² [2006] FCA 17, [14].

- [101] Under the constitution of FMIF the responsible entity is entitled to a management fee of up to 5.5 per cent per annum of the value of the assets of the fund. The administrators swear that they will not pay the first respondent this management fee from FMIF. There would no doubt be difficulties and expense involved in valuing, and throughout the course of a winding-up, revaluing, the assets of FMIF in order to calculate the management fee, but it would not be impossible. In circumstances where both the first respondent and FMIF are being wound up and there is doubt as to the solvency of both, there is at least a potential conflict to be resolved between the desire of the creditors of the first respondent and the interests of the FMIF.
- [102] The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented.³³ While the administrators say they have “agreed” not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the first respondent.
- [103] It has been mentioned that there are three feeder funds to FMIF, two controlled by the first respondent as responsible entity, and one by Trilogy as responsible entity. FMIF categorises its feeder fund members as a separate class of investors (class B investors), as it is entitled to do under its constitution. While the first respondent (before administration) suspended distributions to unit holders from 1 January 2011, there were distributions of nearly \$17 million to class B unit holders in the year ending 30 June 2012. From the evidence given before me,³⁴ it appears this was an accounting exercise, undertaken because the feeder funds accounts did not balance without such a distribution. This rather illustrates that the first respondent (before administrators were appointed) was facing a conflict between its duties as responsible entity of FMIF and as responsible entity of the feeder funds.
- [104] It is no criticism of the current administrators that they have not, in the short time available to them, formulated their position in relation to this distribution. The administrators concede that it may need to be investigated and that it may give rise to a claim on behalf of some unit holders of FMIF. “Undoing” the transaction would be difficult because almost \$16 million of the distribution has been reinvested into the FMIF on behalf of class B unit holders, diluting the interests of other members. This was conceded by Mr Park in cross-examination, though he swore to the contrary in his affidavit.³⁵
- [105] I think this issue of distribution to B class shareholders illustrates the potential for conflict between the interests of the feeder funds and the FMIF if one responsible entity has charge of all of them. There is potential for this type of conflict to arise again, including in attempts to undo the 2012 transaction should it be found necessary. In this respect, Trilogy is the responsible entity of one of the feeder funds owning 20 per cent or so of units in the FMIF and the potential for conflict would apply as much if Trilogy were the responsible entity of FMIF, or the liquidator of FMIF.
- [106] There are further issues which may arise as between FMIF and the first respondent. In both 2011 and 2012 the fund paid around \$5 million to the first respondent as

³³ tt 2-14 – 2-16.

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

³⁵ t 2-19.

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

- [107] Trilogy relies upon an affidavit read by the first respondent sworn by Mr Corbett. He swears that the first respondent had not obtained valuations for most of the properties over which FMIF had mortgage security “for at least two years preceding the appointment” of the current administrators. It may thus be that management fees have been based on valuations which are too high. Any claim to recover such overpayments may involve a conflict between duties to the creditors of the first respondent and duties to the members of FMIF if the person liquidating both the first respondent and FMIF is the same person.
- [108] Further Trilogy says that from 2002 there were changes made to the constitution of the FMIF without meetings of members, which increased the maximum loan to value ratio for lending by FMIF. It increased from 66 per cent in 2002 to 85 per cent in 2006. The power of the responsible entity to make changes to the constitution without a meeting of members was a limited one – it could only make changes which would not adversely affect unit holders’ rights. Trilogy points to this as a potential basis for a claim on behalf of members of the fund against the first respondent, or its directors.
- [109] With a broad brush, Trilogy identifies around \$168 million of related party transactions which it says, in a very general way, might give rise to the possibility of conflicts between the fund and the first respondent.
- [110] Trilogy also says that because of the spectacular collapse of the value of assets under management during 2008-2009 there may be legal claims, for example in negligence, which the FMIF has against the first respondent as responsible entity. On the material before me this seems quite speculative. No proper investigations have been undertaken by any party at this stage. Obviously there is the potential for conflict if such a claim were to be made because it appears that the current administrators will be the liquidators of the first respondent and will have to adjudicate on any proof of debt lodged by or on behalf of investors in FMIF. Were there to be litigation, they would be on both sides of the record. In that regard I note that the Trilogy interests have been active in lodging proofs in the administration but cannot give any idea as to the quantum of the amounts claimed, or the basis upon which they are said to be owing.
- [111] On behalf of Shotton it was said that the responsible entity may have engaged in joint lending between FMIF and other funds controlled by the first respondent as responsible entity before administrators were appointed. On the material before me, this seemed a rather academic proposition.
- [112] Counsel for the first respondent emphasises the fact that in all the cases discussed above the conflict of interest identified is potential only, and in some of the cases very little material can be put before the Court. That may be accepted, but I am not

³⁶

t 2-21.

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

- [113] The administrators say that if it became necessary, because of a conflict, various measures could be put in place to deal with any conflict which actually arose. If a conflict were identified by the administrators, they swear that they would seek legal advice. They swear that an option would be to approach the Court. They swear that a special purpose liquidator could be appointed to the first respondent company if that became necessary. Counsel for the first respondent said that if there were to be litigation between the feeder funds and the first respondent, Trilogy could be appointed as a representative defendant for the feeder funds so that the litigation could continue with an independent contradictor. In any given scenario the administrators postulate solutions involving their preferring to continue as liquidators of the FMIF and jettisoning any other role.
- [114] The solicitor appearing for Mr Shotton points out this is consistent with the administrators' desire to retain control of the FMIF. The endeavours of the first respondent do have this flavour about them. At the conclusion of the hearing one of the alternative draft orders they proposed was that the ASIC and Shotton applications be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the first respondent company and to Administration. No notice of any such thing had been given at any prior time during the proceeding, and I was not convinced that there had been any consideration of the separate interests of the first respondent company or Administration,³⁷ and the effect that such a proposed order would have on those companies in terms, for example, of wasted costs to date. It may be that those companies have less assets than the fund, but I was told that the first respondent company had assets of around \$7 million. I had no basis to assess how much of the administrators' planned charges related to the first respondent company and to Administration; what proportion of that would be wasted if new administrators or liquidators were appointed to those companies, and what proportion that waste of cost would bear to the overall picture of those companies' liquidations. It seemed to me that the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of FMIF.
- [115] Counsel for the first respondent made a submission that it is a fundamental part of any liquidator's task to deal with conflicts of interest which may arise from time to time, including on the adjudication of claims, and in that respect, a liquidator's role can involve adjudication. That is right no doubt as a general proposition. I note that in *Shephard v Downey*³⁸ Judd J preferred to appoint an independent liquidator rather than a liquidator with similar potential conflicts as raised here. He made the point that, even though it might be possible to manage potential conflicts through undertakings and directions in the future should they arise, his preference was to forestall such a process by having the appointment of someone independent from the start.³⁹

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

³⁸ [2009] VSC 33 [134].

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

- [116] The first respondent submitted that the administrators would have a statutory duty as liquidators of the fund to properly investigate and pursue claims against the first respondent and that there was no basis for thinking they would not pursue this duty “independently, professionally and with due care”.⁴⁰ In my view, the material discussed as to the conduct of the members meeting on 13 June 2013; interaction with ASIC, and the conduct of this litigation do give a basis for thinking otherwise. At paragraph 33 of Court Document 79 Ms Muller swears that she is aware of the need to, “remain astute to ensure that, as the administration continues, no conflicts arise, whether potential or actual. We intend to seek advice from solicitors ...” She names the two firms of solicitors who had charge of the correspondence relating to the 13 June 2013 meeting. At paragraph 34 of that affidavit Ms Muller says, “As I have explained in paragraphs 12-30 above, my and Mr Park’s current understanding is there are no such conflicts exist or are likely to arise”. I do not think it can be said on any objective view of the evidence that conflicts are not likely to arise. I do not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise.
- [117] Were it just that there was a real potential for conflicts of interest to arise in the future, I like Judd J in *Shephard v Downey* – see [115] above – would prefer an independent liquidator for the fund. Like Fryberg J in *Re Orchard Aginvest Ltd* (above), I would see this as desirable. But I would accept, as he did in that case, that that would not be enough to give me power to make an order pursuant to s 601NF(1). It would not be necessary. In this case there is more. The administrators of the first respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*. My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct with this litigation. It extends to the point where both administrators have sworn to matters which they either conceded were wrong in cross-examination – [104] and [106] above – or in my view are not consonant with reality – [62], [88], [93] and [116] above. In a winding-up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interests of members of the fund in identifying those issues or in dealing with them. In my view, that makes it necessary that someone independent have charge of winding-up FMIF pursuant to s 601NF(1) of the Act.
- [118] In a submission alternative to his main submission on the hearing, counsel for the first respondent advanced a draft order which would provide for an independent person to have some oversight of the first respondent during the time that the first respondent as responsible entity wound up the FMIF. The idea was that the first respondent would consult with, and report to, that independent person and that the first respondent would not, without the consent of that independent person, bring or defend legal proceedings or dispose of any secured property. The independent person was to be given, “on receipt” any written claim or demand against the fund and have full power to inspect the books and records of the fund. The first

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

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Written submissions, paragraph 60.

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

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

Who Ought to be Appointed

- [120] There was some controversy as to who ought to be appointed. ASIC nominated liquidators who had the lowest schedule of rates of all those before me. That is certainly something in their favour. Although, when fees are charged on an hourly basis, efficiency and effectiveness in work practices will probably have more impact on the overall bill than rates alone. The costs of ASIC's nominee were not much less than the person put forward by Mr Shotton – David Whyte, liquidator. Trilogy, a major interested party, supported Mr Whyte in the event that it was not appointed, and I think that is of some significance. Mr Whyte, like all the proposed candidates, is well qualified for the job but I note that he has particular experience in a similar fund winding-up pursuant to s 601NF(1) – *Equititrust*. It was faintly suggested that he had a conflict which would prevent him acting but I do not accept that is so. In all the circumstances, I think he ought to be appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution pursuant to s 601NF(1).
- [121] The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust* that was the view of Applegarth J and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case. Trilogy said I ought not appoint a receiver because to do so would damage the way the fund was perceived by creditors and by those who might potentially buy its assets. In circumstances where Deutsch Bank has already been appointed as receiver and where the responsible entity of the fund is itself in administration, and likely to be in liquidation, I am not deterred by this consideration. The fact of the matter is that the fund has reached a point where it

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

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

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

Wishes of the Members

- [124] It is uncontroversial that the Court should have regard to the wishes of members of a scheme such as this when deciding its fate. In this regard the first respondent urged that I should interpret the results of the vote of the meeting of 13 June 2013 as indicating that the members did not want Trilogy as responsible entity. Only about 45 per cent of those eligible to vote at the meeting participated in it. Of that group 20 per cent abstained (almost entirely the feeder funds). Of the 25 per cent of members who voted, around 24 per cent voted against the motions. I find the result of the meeting of very limited assistance. Information given to the members by the first respondent before the meeting was misleading in several respects. As well, it was to the effect that Trilogy did not have the correct financial services licence required to run the fund. That was correct at the time but is no longer correct. The members voting at the meeting had been told that Trilogy did not consent to be appointed as responsible entity at the meeting. In those circumstances one wonders that any votes were cast in favour of Trilogy.
- [125] Some members of the fund appeared on the hearing. The Bruces have an investment of around \$144,000 in the fund. Mr Shotton also has a relatively small investment in the fund. Two additional members – Nunn and Byrne – have small investments in the fund. They supported the first respondent on the application. Mr Nunn apparently worked for the first respondent for eight or nine years.
- [126] As responsible entity of the wholesale mortgage income fund Trilogy has around 20 per cent of the total units in the fund, equating to around \$74 million worth of units. The balance of the fund (somewhat over 50 per cent) is held by individual investors with investments ranging between \$1,000 and \$8 million. Trilogy's views are therefore significant.⁴¹
- [127] While I have been astute to recognise the interests of members of the fund, it must be acknowledged that my decision is grounded more on substantive matters than on attempting to implement the wishes of any particular member or group of members.

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

Waste of Work

- [128] On behalf of the first respondent it is said that to charge any person other than the current administrators with the winding-up of FMIF would be to waste the cost of the work which the administrators have performed to date. Quite clearly when the nature of the work performed to date is considered, not all of it would be wasted.⁴² The current administrators say they would co-operate with anybody who is charged with responsibility of winding-up the fund, and indeed it would be absolutely extraordinary if they did not. The current administrators were appointed in March 2013. They have been restrained from commencing a winding-up pending the outcome of this proceeding. It appears that any winding-up will take some years,⁴³ so that while there may indeed be waste, the proportion is likely to be small in the overall cost of the winding-up. Fees to date have not been charged, but it is sworn that as at 27 June 2013 the administrators propose to charge the fund \$960,756 and an unspecified part of \$1,174,399 they have notionally charged to the first respondent company. There is nothing to show what has been achieved for those proposed charges. The administrators accept their charges must be approved by the company or the Court. I very much doubt that most of the costs of the 13 June 2013 meeting would be approved as necessary and appropriate and I have doubts as to some of the costs of this litigation.
- [129] Bearing all these points in mind, I cannot see that the potential for some wasted fees would deter me from making an appointment under s 601NF(1).
- [130] I will ask the parties to bring in minutes of order. I will hear submissions on costs.

⁴² See cross-examination, tt 2-23ff.

⁴³ Ms Muller swears an estimate of three years.

SUPREME COURT OF QUEENSLAND

CITATION: *RE Bruce & Anor v LM Investment Management Limited & Ors (No 2)* [2013] QSC 347

PARTIES: **RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE**
(Applicants)
v
LM INVESTMENT MANAGEMENT LIMITED
(ADMINISTRATORS APPOINTED)
ACN 077 208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND
(First Respondent)
and
THE MEMBERS OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288
(Second Respondent)
and
ROGER SHOTTON
(Third Respondent)
and
AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION
(Intervener)

FILE NO/S: BS 3383 of 2013

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 6 September 2013

JUDGE: Dalton J

ORDER: **UPON THE UNDERTAKING of the first respondent that it will not seek from the FMIF any remuneration, costs or expenses (including legal fees) of or incidental to the meeting convened by notice dated 26 April 2013 (including the adjournment thereof):**

1. I vacate the order made at paragraph 2 of the orders of Justice P Lyons of 7 May 2013.

2. Trilogy Funds Management Ltd is to pay 7 per cent of the first respondent's costs (excluding reserved costs) of this proceeding on a standard basis to be assessed or agreed.
3. The first respondent is to be indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to this proceeding, excluding any reserved costs.

COUNSEL: B O'Donnell QC, with P Ahern, for the applicants
 D Savage QC, with S Cooper, for the first respondent
 GJ Litster (Solicitor) for a member of the second respondent
 DR Tucker (Solicitor) for the third respondent
 SJ Forrest for the intervener

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

- [1] This is a decision on applications for costs made consequent on a judgment I delivered on 8 August 2013 in this matter. The substantive proceedings were three applications together over three days in the civil list. Each concerned who ought to manage the affairs of the financially stricken first respondent. The contest was between (i) the then administrators of the first respondent; (ii) Trilogy Funds Management Ltd (Trilogy), and (iii) a member, Shotton, and ASIC, intervening, who both contended for an independent liquidator. There were no pleadings, but the various issues were well enough defined, and success on them was somewhat scattered amongst the various parties.
- [2] The normal rule is that costs follow the event – r 681. Even before the introduction of r 684, the approach of the Courts was, in appropriate cases, to make costs orders which reflected parties' success or failure on various parts of litigation.¹ The fairest way of determining the costs issues falling out of this litigation seems to me to make orders in accordance with r 684 as to particular parts of the litigation. In doing so the Court takes an impressionistic and pragmatic view as to what were the real heads of controversy in the litigation, and strives to avoid assessment in a complicated form according to issues in the technical sense.² The general purpose of an award of costs – indemnity to the successful party – and the effect of the costs orders made, as compared to the extent of the parties' success in litigation, must be borne in mind.
- [3] In litigation of any complexity, there will be various alternative possible ways to divide the litigation into units for the purpose of allocating costs – see eg., the various alternatives discussed in *Thiess*, a defamation case: imputations found

¹ *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156, 207-208.

² *Thiess* (above) pp 208-210; *Coomera Resort Pty Ltd v Kolback Securities Ltd & Ors* [1998] QSC 296; *BHP Coal Pty Ltd v O & K Orenstein & Koppel AG (No 2)* [2009] QSC 64.

proved; occasions of publication, etc. Following the approach in *Thiess*, I have looked to find a division which fairly represents "the true emphases of the litigation" or "discrete areas of dispute" (p 208). In substance, there were three heads of controversy³ in the substantive hearing before me:

- (a) The legal point as to the competence of the originating application filed 15 April 2013. This was an application for Trilogy to be appointed as temporary responsible entity of a managed investment scheme, FMIF, with a view to its appointment as the responsible entity in the long term. Under the *Corporations Act* 2001 (the Act), such an application was not available to anyone but ASIC or a member of the scheme, so the Bruces were named as applicants, but took on the litigation with an indemnity from Trilogy, and Trilogy's counsel at the hearing told me that he expressed Trilogy's views to the Court.⁴

There was a legal argument as to the competence of this application pursuant to s 601FA of the Act or reg 5C.2.02 of the *Corporations Regulations*. I found that the application was not competent – see my judgment [9]-[20]. This legal point was a distinct part of the hearing. I think it is fair to assume that while it may have accounted for say 15 per cent of the hearing time, it accounted for a significantly less percentage of overall costs incurred, for it was not the subject of factual dispute and did not require lengthy affidavits or cross-examination of witnesses. In terms of estimating what percentage of costs of the first respondent attached to this separate part of the application, I put it at 7 per cent.

- (b) On the assumption that the application referred to at (a) was competent in law, there were discretionary arguments as to whether or not Trilogy ought be appointed temporary responsible entity. These arguments were factual and based on the suitability of Trilogy to have conduct of the affairs of FMIF, and the unsuitability of the first respondent.

Associated with, and very similar to, the factual matters raised in support of this discretionary argument, were arguments advanced by Trilogy resisting both a winding-up order in relation to the first respondent and an order to appoint an independent liquidator to supervise the winding-up and as receiver of FMIF. These orders were sought by Shotton and ASIC by separate applications filed 29 April 2013 and 3 May 2013 respectively. Trilogy's arguments were based on the asserted superiority of Trilogy as a manager of the affairs of FMIF over a liquidator and receiver.

These two associated points were substantial factual disputes which took Court time and involved considerable affidavit material and cross-examination.

My judgment was that even if the application by Trilogy were competent, I would not, for discretionary reasons, appoint it as temporary responsible entity – [21]-[31] of my judgment. The applicant (Trilogy) was the only party before me who contended that a winding-up order ought not be made. It lost on that point. Trilogy and the first respondent both lost on the issue about independent supervision by a liquidator and receiver.

³ This term is used in *Thiess* (above), p 208.

⁴ In my judgment of 8 August I call this the Trilogy application. I continue that reference here, and refer to the applicants as Trilogy, rather than the Bruces.

- (c) The issue raised on the Shotton and ASIC applications was the subject of considerable factual dispute entailing the need for affidavit material and cross-examination of witnesses, as ASIC and Shotton demonstrated that the then current administrators of the first respondent, Ms Muller and Mr Park, were unsuitable to wind-up the managed investment scheme without independent supervision. On this issue ASIC and Shotton were successful and the first respondent unsuccessful.

As noted, Trilogy opposed any one other than itself controlling the affairs of the first respondent. However, factual material and argument by Trilogy as to why the first respondent was unsuitable to control the affairs of the FMIF was substantial. It coincided with the interests ASIC and Shotton had in demonstrating that same unsuitability.

- [4] Dealing with costs according to the above division means that I will not deal with the three separate applications *qua* application. But the above division better reflects the reality of the way the litigation was conducted.⁵ Because Trilogy was wholly unsuccessful on its application, there is an attraction in dealing with it separately, and dealing with the ASIC and Shotton applications as representing the remainder of the litigation. Like the approach taken by the primary judge in *Thiess* (division according to occasions of publication), division of this litigation along the lines of Trilogy application on the one hand, and ASIC/Shotton applications on the other, has an initial simplicity and attraction but does not allow an allocation of costs which fairly reflects the emphases and successes in the litigation.
- [5] Dealing with the three heads of controversy identified at paragraph [3] above allows a more nuanced approach which reflects the reality that much of the factual material led by Trilogy was relevant to the questions on the ASIC and Shotton applications and was important to my understanding of the conduct of the then administrators appointed to the first respondent, and thus my decision. In particular, the issue as to the propriety of those administrators' actions in relation to the meeting of 13 June 2013 was one carried largely, although not exclusively, by Trilogy. A smaller, but significant issue, about which the same observation can be made, is the behaviour of the administrators in the conduct of the litigation about Trilogy's financial worth and the propriety of Trilogy's conduct during the period of contention between it and the first respondent surrounding this litigation.
- [6] There were three uncontroversial matters. ASIC did not seek an order for its costs. All parties agreed that Shotton should have his costs out of the managed investment scheme, and I have already made an order in his favour. The first respondent offered an undertaking not to charge FMIF with the costs of a meeting which it held on 13 June 2013 and which I found was invalid. These were not strictly litigation costs. The undertaking should nonetheless be recorded in the order.
- [7] It seems to me that Trilogy ought to pay the costs of the first respondent of and incidental to the legal point I identify at paragraph [3](a) above. I fix these at 7 per cent of the first respondent's costs of the proceeding. There were reserved costs; it is not appropriate that they are included in this order.
- [8] Next, as to the factual matters raised by the two associated points at [3](b) above, Trilogy's exposition of the conduct of the first respondent had a significant bearing

⁵ cf *West & Ors v Blackgrove & Anor* [2012] QCA 321 [52].

on the making of the orders sought by ASIC and Shotton. Not only that, but as far as the hearing was concerned, there was certainly an economy as, by and large, counsel sensibly adopted an approach whereby Trilogy had primary carriage of the 13 June meeting issue; ASIC had primary carriage of points about conduct of the litigation and interaction with ASIC, and Shotton of the conflict points. Trilogy was ultimately unsuccessful on both its argument that it was the most suitable candidate to take charge of the first respondent, and its argument that a liquidator and receiver ought not be appointed to the first respondent. And there was no mistaking that any support it had for an independent liquidator and receiver was a distant alternative to its main position.⁶

- [9] All things considered, it would be fairest to both Trilogy and the first respondent to make no costs order as to this second head of controversy. Trilogy will bear its own costs of that part of the litigation, but given the importance of the matters ventilated to the orders I made, I do not think it should bear the first respondent's costs as well. The first respondent did succeed so far as the result of the Trilogy application was concerned. However, in substance it lost the factual battle: the matters demonstrated by Trilogy went a significant way to persuading me that the conduct of the administrators of the first respondent was such that I ought to make the orders sought by ASIC and Shotton.
- [10] I turn to the third head of controversy, the ASIC/Shotton applications. As noted, they were made individually some four or five days apart. They sought very similar relief. In terms of both submissions at the hearing, and in affidavit material filed in support of their applications, there was a difference in emphasis. ASIC relied particularly on the conduct of the administrators of the first respondent in dealing with ASIC, and in the litigation, whereas the Shotton interests put more emphasis on the potential financial conflicts which the administrators of the first respondent would face, were they to continue in control of the affairs of the first respondent.
- [11] ASIC relied upon s.1101B of the Act to support its application. I did not act pursuant to that section and did not think it appropriate to do so. Nonetheless, I had power to act otherwise, and argument as to that legal point formed a very small part of the hearing and, I would have thought, almost no part of the preparation. It is not a point substantial enough to affect the costs orders I make. ASIC and Shotton contended for different persons to be appointed as liquidator and receiver to the first respondent. There was little in this point. Again, only a small fraction of the material and the hearing time could be said to have been taken up with this issue. The main controversy was whether or not someone independent ought to be appointed.
- [12] The first respondent was unsuccessful in relation to the substance of both applications. ASIC does not seek its costs and Shotton's costs are not opposed. The only issue is that the first respondent contends it ought to have its costs of the ASIC application. This was put on four different bases. The first was that ASIC's application was unnecessary because Mr Shotton had filed his some four or five days earlier. As noted, there was a great similarity between the relief sought in the applications. Nonetheless, in circumstances where the regulator had intervened to revoke almost entirely the first respondent's Australian Financial Services Licence; had tried unsuccessfully to engage the administrators of the first respondent in a

⁶ See ¶ 3-16.30-3-18.10.

co-operative effort to resolve the issues facing the first respondent short of litigation and failed, and in circumstances where ASIC had intervened in this litigation, it seems to me appropriate that ASIC made its own application. As discussed, Shotton was a very small percentage unit-holder. He acted no doubt in his own interests, rather than the public interest, and ASIC could have no assurance as to how he might choose to conduct his application.

- [13] The second point put forward by the first respondent as to why it should have its costs of the ASIC application was that I appointed the liquidator advocated for by Mr Shotton, rather than the liquidator advocated for by ASIC. As explained, there was not sufficient in this point to warrant any effect on the costs orders I make. The third point was the s 1101B point, again, I am not persuaded that ought to influence my costs orders.
- [14] The last point made by the first respondent was that ASIC did not identify the fact that it relied on the first respondent's conduct of these proceedings as a reason to demonstrate that the administrators of the first respondent could not be relied upon to act properly. The point was raised in submissions which were delivered in a timely way. There were no pleadings. I think the point was a fair one and fairly taken in a timely enough fashion. There is no suggestion that the first respondent would have acted any differently had the point been taken earlier. It seemed oblivious to the very clear warning it was given by P Lyons J on 7 May 2013 (see below).
- [15] I am not persuaded that the first respondent should have its costs of the ASIC application.

Second Respondent

- [16] I make no orders as to the costs of the second respondent. The second respondent took the position that it supported the first respondent. It was clear enough on the material that there was some historical connection between the second respondent and the first respondent, and while I would not go so far as to say the second respondent was not independent of the first respondent, there was something of that flavour about the relationship. In any event, the submissions of the second respondent added nothing, except to indicate the view of a tiny percentage unit-holder in the FMIF. This could just as readily have been achieved by the second respondent's swearing an affidavit for the first respondent to read. The views of unit-holders are relevant to issues such as those before me. The unit-holder Shotton played a very significant role in the litigation, notwithstanding his tiny percentage holding. But I would not encourage participation as a party when there was no purpose but to indicate support for another party. For the same reasons the second respondent should not have its costs from the FMIF.

Trilogy

- [17] Trilogy was in substance, if not in name, a party to the litigation. As discussed, senior counsel for the Bruce applicants made submissions to the Court in which he expressed Trilogy's views. A great deal of the Bruces' evidence was sworn by officers of Trilogy, and it was clear throughout the entire hearing, and indeed it has been clear on the submissions made on this costs hearing, that the moving party on the originating application is Trilogy, rather than the Bruces. I was told that Trilogy

had given an indemnity to the Bruces as to their costs. At one point it became controversial in the proceedings as to what the terms of this indemnity were. So far as I am aware, it was never produced.

- [18] Trilogy had a clear commercial interest in the relief sought in the Bruces' name. Had it been successful it would have been appointed as temporary responsible entity of the first respondent with a view to becoming the responsible entity of the first respondent. Its position was that a formal liquidation was not necessary; that it would not operate the first respondent as a going concern, but wind its affairs up in as orderly and commercial manner as possible. No doubt it would have charged substantial fees for doing so.
- [19] I note that the Bruces are residents of New Zealand and there is no evidence at all that they have the means to pay any costs order made against them in this litigation.
- [20] It is true that Trilogy was, via one of the three wholesale funds, a unit-holder of about 20 per cent of the FMIF and thus its views were relevant and important to what ought to happen to the first respondent. And indeed I took them into account where appropriate. However, it would be wrong to characterise Trilogy's participation in the litigation as simply that of a concerned unit-holder expressing its views. Counsel acting for ASIC described Trilogy as conducting the Trilogy application as part of "an entrepreneurial frolic". I do not think that there was anything improper about Trilogy's conduct of the application and would thus reject the term "frolic". However, I do think that Trilogy, like the administrators of the first respondent, was engaged in this litigation in its own commercial interests, it participated in a partisan and robust way.
- [21] It seems to me that in accordance with the principles laid down in *Knight v FP Special Assets Ltd*,⁷ the order I make as to payment of these costs should be made against Trilogy. The first respondent made a formal application to this effect – Court document 113. There was no submission to the contrary. Trilogy appeared at the costs hearing, by the same counsel as the Bruces.⁸
- [22] It is not appropriate that any of Trilogy's costs be borne by the FMIF. It was unsuccessful, and indeed its own application was not competent at law. Further, as noted, it engaged in the litigation in its own commercial interests in my view.

First Respondent's Right to be Indemnified from FMIF

- [23] Rule 700 applies to a party who sues or is sued as a trustee. Rule 700(2) provides, "Unless the court orders otherwise, the party is entitled to have costs of the proceeding, that are not paid by someone else, paid out of the fund held by the trustee." The *Trusts Act* 1973, s 72, provides: "A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers."
- [24] This is in line with the common law rule that a trustee is entitled to be indemnified from the trust estate when acting properly for the purposes of the trust. The rule is stated by King CJ in *In re Suco Gold Pty Ltd (in liq)*:⁹

⁷ (1992) 174 CLR 178.

⁸ See p 8-9 of the written submissions for the applicants and t 1-2.

⁹ (1983) 7 ACLR 873, 878-879.

"The right of indemnity which a trustee possesses is therefore in essence a right to resort to the trust property for the protection and preservation of his personal estate against liabilities which he has incurred in the proper performance of the trust.

... A trustee, however, has no legal right to use or apply the trust property other than for the authorized purposes of the trust. In particular he has no legal right to apply the trust property for his own benefit or for the benefit of third parties, *Keech v Sandford* (1726) Eq Cas Abr 741."

- [25] Bearing on the first respondent's rights here are the terms of the constitution of FMIF. At cl 18.5 it provides a right to be indemnified for liabilities or expenses in relation to the performance of the responsible entity's duties including legal fees, and at cl 19:

"19.1 The following clauses apply to the extent permitted by law:

...

- (c) In addition to any indemnity under any Law, the RE has a right of indemnity out of the 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."

- [26] Bearing on the interpretation of cl 19.1 is s 601GA of the Act which makes provision for the contents of the constitution of a registered scheme and provides:

"(2) [Responsible entity rights in constitution] If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:

- (a) must be specified in the scheme's constitution; and
(b) must be available only in relation to the proper performance of those duties;

and any other agreement or arrangement has no effect to the extent that it purports to confer such a right."

- [27] If, and in so far as cl 19.1 purports to allow the responsible entity of the FMIF an indemnity in circumstances where, short of negligence, fraud or breach of trust, it has acted improperly, or not for the purpose of the trust,¹⁰ then my view is that clause of the constitution does not so operate by reason of the provision at s 601GA(2)(b).

- [28] The words of s 601GA(2)(b) very much reflect the common law formulation of costs being recovered when they are "proper", or "not improper" – see Lindley LJ in *Re Beddoe*.¹¹ Costs will be improperly incurred if they are in furtherance of the trustee's own interests rather than in furtherance of the interests of the members: *Miller v Cameron*.¹² In *Adsett v Berlouis*¹³ the Full Court of the Federal Court said, "In this context, [of a trustee's indemnity] 'properly' means work reasonably and

¹⁰ As seemed to be implied by the written submissions on behalf of the first respondent at paragraph 21ff.

¹¹ [1893] 1 Ch 547, 558.

¹² (1936) 54 CLR 572.

¹³ (1992) 37 FCR 201.

bona fide undertaken for the purpose of administering the estate or performing any public duty imposed by the [*Bankruptcy Act*], conformably with the trustee's duty to perform the work with reasonable care and skill and in an efficient and economic way."

- [29] In examining the propriety or otherwise of a trustee's conduct it is relevant to have regard to the nature of the trust, and trustee, in question. See for example the Full Court in *Adsett* at the paragraph beginning, "A number of observations must be made about these submissions." The Court examined the nature and obligations attaching to a trustee appointed to a bankrupt estate, contrasting that, for example, with the duties of a gratuitous trustee, and referring to the public nature of the duty of a trustee in bankruptcy.

- [30] In my opinion, the administrators of the first respondent occupied a position of trust which was distinct from a traditional trustee at general law because first, the trust of which the responsible entity was trustee was established by the *Corporations Act* in respect of a managed investment scheme that was essentially a vehicle for commercial investment; second, because the responsible entity was well-remunerated for its skill in performing the duties which amounted to performing the trust, and thirdly, because the administrators appointed to this responsible entity trustee were appointed to a fund which was financially stricken and which is now being wound up. In *Adsett* the Court referred to the general law duty that a trustee has to exercise judgment so as to save the estate unnecessary expenditure of money and, in terms of the role of a trustee in bankruptcy, emphasised that that duty was one to administer the estate in such a manner as to maximise the return from estate assets. In my view that is very much applicable to the current case. The FMIF differs from many other failed investment schemes in that there does remain a large surplus of assets to be administered. The administrators of the trustee responsible entity here should have squarely understood that their role was to maximise the amount of assets available to investors and creditors. Instead I found that, "the conduct of the first respondent in this litigation was combative and partisan in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the FMIF, rather than acting in the interests of the members," – [89] and see also [82], [86], [88], [92], [93], [94], [95], [114], [117] of my judgment.

- [31] It was said on behalf of the first respondent that it acted on legal advice, but if costs are otherwise improper, that is no excuse – see the statements in *Re Beddoe* at p 562, extracted at *Adsett*.

- [32] Counsel for Trilogy submitted that the first respondent's resistance of the Trilogy application (and I would add the ASIC and Shotton applications) went above and beyond what would have been required had the administrators been acting solely in the interests of the fund. I accept this submission. However, it entails a proposition that some level of expenditure, and some level of representation in the litigation, was justifiable and proper within the meaning of the cases. It seems to me that what was reasonable and proper was well less than half of the costs incurred. I have in mind matters such as the issuance of subpoenas and the applications and antagonism between the first respondent and Trilogy concerning these; the expert report of Mr Hellen; the extensive material that seemed irrelevant (or almost so) at the hearing – for example [93]-[96] of my reasons for judgment; the unusual and partisan attack on Trilogy's solicitors both in correspondence and in affidavit

material; challenges to Trilogy's solvency; the refusal to co-operate with ASIC which is detailed at [57] ff of my judgment in circumstances where ASIC was trying to limit costs to the FMIF, and the linking of the 13 June 2013 meeting with the litigation and the refusal to meaningfully respond to serious (and ultimately well-founded) complaints that this meeting was invalid.

- [33] That some costs incurred by the first respondent might have been reasonable and proper was acknowledged in the submissions of ASIC. ASIC proposed that I order that the first respondent not be indemnified from the assets of FMIF save with the consent of the unit-holders. The difficulty with that is that the unit-holders are never going to be informed in appropriate detail of the facts relevant to such an apportionment. I think that a fair percentage of the first respondent's own costs to be paid out of the FMIF is 20 per cent, bearing in mind 7 per cent of its costs will be paid by Trilogy, albeit on a standard basis. On the costs application the first respondent pointed to its undertaking not to claim costs of the 13 June 2013 meeting from the funds of the FMIF. That concession is appropriate, but does not go far enough in my opinion.
- [34] There were reserved costs from 7 May 2013. The matter was adjourned on that date at the behest of the first respondent who sought an adjournment principally so that the proceeding could be determined after the meeting of 13 May 2013. As I explain in my reasons for judgment on the substantive matter, the first respondent's thinking in relation to that meeting was quite wrong-headed. For this reason I do not think that the first respondent is entitled to any reserved costs and this is reflected in the order I make as to indemnity from the FMIF.

Order Justice P Lyons 7 May 2013

- [35] This matter came before Justice Peter Lyons on 7 May 2013. He was asked to adjourn the matter to the civil list. There was discussion before Justice Lyons as to the propriety of the administrators' conduct of the litigation to that point and Justice Lyons made an order that the "administrators not seek to exercise any right to be indemnified out of the assets of [FMIF] for costs in relation to these proceedings without leave of the Court, to be sought at the hearing." The transcript shows that his concerns were along the lines which came to be realised in my judgment after the hearing. Justice Lyons said:
- "I have a bit of a general impression that at this stage, that your fight is about who's going to control the fund after orders are made at this hearing and who will earn the fees from it. Now, I could be wrong about that. The judge who hears the matter may have a clearer view about what's really behind all this. That person may think my suspicion is well-grounded and that might be a reason why the ordinary right [to indemnity from the trust fund] shouldn't be exercised. In other words, the actions of the administrators aren't really to further the interests of the members of the fund but for some other reason."
- [36] I will vacate Justice Lyons' order as part of my orders dealing with costs.
- [37] The orders I make are:
- UPON THE UNDERTAKING of the first respondent that it will not seek from the FMIF any remuneration, costs or expenses (including legal fees) of or incidental to

the meeting convened by notice dated 26 April 2013 (including the adjournment thereof):

1. I vacate the order made at paragraph 2 of the orders of Justice P Lyons of 7 May 2013.
2. Trilogy Funds Management Ltd is to pay 7 per cent of the first respondent's costs (excluding reserved costs) of this proceeding on a standard basis to be assessed or agreed.
3. The first respondent is to be indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to this proceeding, excluding any reserved costs.

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER: 8895 of 2013

APPELLANT:	LM INVESTMENTS MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND (FIRST RESPONDENT)
	AND
FIRST RESPONDENTS	RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE (APPLICANTS)
	AND
SECOND RESPONDENT	ROGER SHOTTON (THIRD RESPONDENT)
	AND
THIRD RESPONDENTS	DAVID NUNN AND ANITA JEAN BYRNES (FOURTH RESPONDENTS)
	AND
FOURTH RESPONDENT	AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION (INTERVENER)

NOTICE OF APPEAL

TO: The Respondents

AND TO: The Registrar, Supreme Court of Queensland

TAKE NOTICE that the Appellant appeals to the Court of Appeal against the whole of the Order of the Supreme Court of Queensland

NOTICE OF APPEAL

Filed on behalf of the Appellant

Form 64 Rule 747(1)

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

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1. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE:-

Date of Judgment: 26 August, 2013

Description of Proceedings: BS3383 of 2013

Description of parties involved in the proceedings: Raymond Edward Bruce and Vicki Patricia Bruce (as Applicants)

and

LM Investments Management Limited (In Liquidation) (Receivers and Managers appointed) ACN 077 208 461, as responsible entity of the LM First Mortgage Income Fund (as First Respondent)

and

The Members Of The LM First Mortgage Income Fund ARSN 089 343 288 (as Second Respondents)

and

Roger Shotton (as Third Respondent)

and

David Nunn and Anita Jean Byrnes (as Fourth Respondents)

and

Australian Securities and Investments Commission (as Intervener)

Name of Primary Court Judge: Dalton J

Location of Primary Court: Brisbane

2. GROUNDS

1. The learned trial judge erred in finding at paragraph 117 of the judgment that:
 - (a) the administrators of the appellant had demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the Corporations Act;
 - (b) the administrators had preferred their own commercial interests to the interests of the LM First Mortgage Income Fund;

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- (c) the court could not be assured that the administrators would act properly in the interests of members of the LM First Mortgage Income Fund in identifying conflicts during the course of the winding up or in dealing with those conflicts; and
- (d) the conduct of the administrators of the appellant made it necessary that the court appoint someone independent to have charge of the winding up of the LM First Mortgage Income Fund pursuant to s.601NF(1) of the Act,
- (together, *the paragraph 117 findings*) because:
- (e) The findings of misconduct in (a) and (b) were not put to either of the administrators in cross-examination;
- (f) the paragraph 117 findings did not take account of:
- (i) uncontradicted evidence that the administrators believed that it was in the best interests of the members of the LM First Mortgage Income Fund that the appellant remain the responsible entity;
 - (ii) uncontradicted evidence that the administrators believed that the appointment of Trilogy as responsible entity of the LM First Mortgage Income Fund was not in the best interests of members (a finding which was made by the learned trial judge in her judgment);
 - (iii) the existence of a reasonable basis for the beliefs in (i) and (ii) in that:
 - A. the trial judge found that it was not in the interests of the members of the Fund that Trilogy be appointed as temporary responsible entity (Paragraph [31]);
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- B. there was uncontradicted evidence of the time and costs incurred by staff of the appellant and the administrators in becoming familiar with the assets of the LM First Mortgage Income Fund and in developing strategies designed to sell those assets in the way which achieved the greatest return for members, over the shortest period of time, with periodic returns of capital;
- C. there was uncontradicted evidence of a sound working relationship between the administrators and the secured creditor of the LM First Mortgage Income Fund, Deutsche Bank AG ("Deutsche"); and
- D. there was uncontradicted evidence of a substantial risk that the proceedings would prompt Deutsche to appoint receivers, which it did shortly prior to the trial (Paragraph [7]);
- (g) the paragraph 117 findings were not the proper inferences to be drawn from the evidence.
2. The learned trial judge erred in making the paragraph 117 findings on the basis of the "conduct ... in relation to the 13 June 2013 meeting" because:
- (a) the learned trial judge's findings in relation to the 13 June 2013 meeting proceeded upon a basis, namely, as set out in paragraphs 51 and 86 of the judgment, that the administrators' purpose in calling a meeting of members of the LM First Mortgage Income Fund was to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application, which was not the proper inference to be drawn from all of the evidence;
- (b) the learned trial judge's finding at paragraph 86 of the judgment that the appellant was pursuing its continuing control of the LM First Mortgage Income Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in
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- cross-examination and was not the proper inference to be drawn from all of the evidence;
- (c) the learned trial judge's finding at paragraph 86 of the judgment that the appellant's choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding-up at the same time as resolutions as to the responsible entity meant that the appellant was pursuing its continuing control of the LM First Mortgage Income Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in cross-examination and was not the proper inference to be drawn from all of the evidence;
- (d) the learned trial judge's finding at paragraph 88 of the judgment that evidence of Ms Muller, one of the administrators of the appellant, as to there being "an appreciable chance" that Trilogy might be elected responsible entity at the 13 June 2013 meeting did not reflect Ms Muller's genuine belief was not the proper inference to be drawn from all of the evidence in circumstances where:
- (i) Ms Muller was not cross-examined on the facts about which she gave evidence as the basis for her belief; and
 - (ii) There was no evidence controverting those facts, which were not inherently unlikely;
- (e) the learned trial judge's finding in paragraph 88 of the judgment that the appellant's position in relation to the meeting of members demonstrated that the interests of members were not at the forefront of the thinking of those making the decisions (the administrators of the appellant) was not put to either of the administrators in cross-examination and was not the proper inference to be drawn from all of the evidence;
- (f) the learned trial judge's findings in relation to the 13 June 2013 meeting failed to have sufficient regard to the desirability of ascertaining the views
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of the members of that LM First Mortgage Income Fund as to which entity they wished to act as responsible entity;

- (g) the learned trial judge erred in failing to have regard to the consideration that once a meeting was called the responsible entity had no power to cancel a meeting of members;
- (h) the learned trial judge failed to have regard to the active role of two firms of experienced solicitors in relation to issues concerning the 13 June meeting (compare paragraph [116]).

3. The learned trial judge erred in making the paragraph 117 findings on the basis of the appellant's (and its administrators') "dealings with ASIC" because:

- (a) the learned trial judge's finding at paragraph 61 of the judgment that on 29 April 2013, the appellant informed ASIC that it was not willing to enter into an enforceable undertaking was contrary to the evidence;
- (b) the learned trial judge's finding at paragraph 62 of the judgment that a statement in an affidavit of Ms Muller was not consonant with the reality of the appellant's interactions with ASIC was not put to Ms Muller in cross-examination, was not the proper inference to be drawn from the evidence and was vitiated by the erroneous finding in paragraph [61];
- (c) the learned trial judge's findings in relation to the appellant's dealings with ASIC were dependent upon the findings in relation to the 13 June 2013 meeting which were affected by the errors identified in paragraph 1 above.

4. The learned trial judge erred in making the paragraph 117 findings on the basis of the appellant's "conduct of the litigation" because:

- (a) the learned trial judge's finding at paragraph 89 of the judgment that the appellant's conduct of the litigation was combative and partisan in a way which was reflective of the administrators acting in their own interests to keep control of the winding up of the LM First Mortgage Income Fund rather than acting in the interests of members was not put to either of the

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- administrators or any other witness in cross-examination, did not have regard to the matters in 1(h) above, and was not the proper inference to be drawn from the evidence;
- (b) the learned trial judge's finding at paragraph 93 of the judgment that there had been no argument that Trilogy had published false and misleading statements was incorrect in circumstances where:
- (i) the appellant adduced evidence of such statements;
 - (ii) the appellant had made such submissions at trial;
- (c) the learned trial judge's finding at paragraph 93 of the judgment that part of an affidavit of Ms Muller was unprofessionally robust and partisan was not put to Ms Muller in cross-examination and was not the proper characterisation of Ms Muller's evidence;
- (d) the learned trial judge's finding at paragraph 94 of the judgment that an affidavit sworn by the solicitor for the appellant consisted of little more than combative and querulous commentary on the litigation was not put to the solicitor in cross-examination and was not the proper characterisation of the affidavit evidence in the light of the application in support of which it was sworn;
- (e) the learned trial judge's finding at paragraph 95 of the judgment that an affidavit sworn by Ms Muller contained sniping and argumentative passages was not put to Ms Muller in cross-examination, was not the proper characterisation of Ms Muller's evidence and was in any event irrelevant;
- (f) the learned trial judge's finding at paragraph 114 of the judgment that the appellant gave no notice of a proposal that the administrators would do all things necessary to secure the appointment of independent liquidators to the appellant and to LM Administration Pty Ltd was contrary to the
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evidence and, in any event, the conclusion does not follow from the premise.

5. The learned trial judge erred in making the paragraph 117 findings on the basis that the administrators had sworn to matters which they conceded were wrong in cross-examination because:

- (a) the learned trial judge's finding at paragraph 104 of the judgment concerning an apparent concession by Mr Park, one of the administrators of the appellant, was incorrect because the matter on which Mr Park was cross-examined did not properly reflect the content of his affidavit evidence, and it was not put to him that he had contradicted his affidavit evidence;
- (b) the learned trial judge's finding at paragraph 106 of the judgment concerning an apparent concession by Mr Park was not the proper inference to be drawn from the evidence and the trial judge did not take into account his evidence in re-examination and the otherwise uncontradicted documentary evidence to which it referred.

6. The learned trial judge erred in making the paragraph 117 findings on the basis that the administrators had sworn to matters which they conceded were not consonant with reality because:

- (a) the learned trial judge's finding at paragraph 62 of the judgment was affected by the errors identified in paragraph 3(a) above;
- (b) the learned trial judge's finding at paragraph 88 of the judgment was affected by the errors identified in paragraph 2(c) and 2(d)(ii) above;
- (c) the learned trial judge's finding at paragraph 93 of the judgment was affected by the errors identified in paragraph 4(a) and 4(b)(ii) above;
- (d) the learned trial judge's finding at paragraph 116 of the judgment that a statement in an affidavit of Ms Muller about her current understanding as to the likelihood that conflicts existed or were likely to arise could not be

objectively held was not put to Ms Muller in cross-examination and ignored the balance of Ms Muller's evidence as to how the administrators intended to monitor the potential for conflicts (which they acknowledged) and to deal with conflicts in the event they arose;

(e) the learned trial judge's finding at paragraph 116 of the judgment that the conduct of the 13 June 2013 meeting, the appellant's interactions with ASIC and the appellant's conduct of the litigation gave a basis for thinking that the administrators of the appellant would pursue their duties otherwise than independently, professionally and with due care was not put to either of the administrators in cross-examination, was not the proper inference to be drawn from all of the evidence and, in any event, the conclusion does not follow from the premise;

(f) the learned trial judge's finding at paragraph 116 of the judgment that the court could not have confidence that the administrators would adequately identify and deal fairly with conflicts if they were to arise was not put to either of the administrators in cross-examination, was not the proper inference to be drawn from all of the evidence and, in any event, the conclusion does not follow from the premise.

7. The learned trial judge erred in appointing Mr Whyte to take control of the winding up of the LM First Mortgage Income Fund because the evidence established that Mr Whyte was a liquidator of a company which was a debtor of the Fund so that his appointment placed him immediately in a position where his duties were in conflict.

3. ORDERS SOUGHT

- (a) That the appeal be allowed;
- (b) That the orders made on 26 August, 2013 be set aside save for order 1, but deleting the words "subject to the orders below";

-
- (c) That the Respondents pay the Appellant's costs of and incidental to this appeal and to the proceedings below.

4. RECORD PREPARATION

We undertake to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and Practice Directions and any Order or Direction in the proceedings.

PARTICULARS OF THE APPELLANT

Name:	LM Investments Management Limited (In Liquidation) (Receivers and Managers appointed) ACN 077 208 461, as responsible entity of the LM First Mortgage Income Fund
Appellant's Address:	C/- FTI Consulting (Australia) Pty Ltd, 22 Market Street, Brisbane, Queensland,
Solicitor's Name	Stephen Charles Russell
and firm name:	Russells
Solicitor's business address:	GPO Box 1402, Brisbane, Queensland, 4001
Address for service:	Level 21, 300 Queen Street, Brisbane, Queensland, 4000
Telephone:	07 3004 8888
Fax:	07 3004 8899
Email:	srussell@russellslaw.com.au

PARTICULARS OF THE FIRST RESPONDENTS

Name:	Raymond Edward Bruce and Vicki Patricia Bruce as First Respondents
Residential Address	167 Foreshore Road RDI, Kaitia New Zealand
Solicitor's name	Amanda Banton
and firm name:	Piper Alderman

Solicitor's business address: Level 36
123 Eagle Street
Brisbane, Queensland

Address for service: Level 36
123 Eagle Street
Brisbane, Queensland

Telephone: 07 3220 7777

Fax: -

Email: abanton@piperalderman.com.au

PARTICULARS OF THE SECOND RESPONDENT

Name: Roger Shotton

Residential Address: Phirom Gardens – Flat 9A
11, Sukhumvit Road
Wattana
Bangkok 10110
Thailand

Solicitor's name and firm name: David Robert Walter Tucker
Tucker Cowen

Solicitor's business address: Level 15
15 Adelaide Street
Brisbane, Queensland

Address for service: Level 15
15 Adelaide Street
Brisbane, Queensland

Telephone: 07 3003 0000

Fax: 07 3003 0033

Email: dtucker@tuckercowen.com.au

PARTICULARS OF THE THIRD RESPONDENTS

Name: David Nunn and Anita Jean Byrnes


Residential Address: David Nunn:
~~29 Ocean Street~~ c/- his solicitors Synkronos Legal
~~Kogarah~~ 8 Masters Street
~~Sydney~~ Newstead
~~New South Wales~~ Brisbane, Queensland

Residential or Business Address: Anita Jean Byrnes
c/- her solicitors Synkronos Legal
8 Masters Street
Newstead
Brisbane, Queensland

Solicitor's name Gregory John Litster
and firm name: Synkronos Legal
Solicitor's business address: 8 Masters Street
 Newstead
 Brisbane, Queensland
Address for service: 8 Masters Street
 Newstead
 Brisbane, Queensland
Telephone: 07 3251 7930
Fax: 07 3252 7147
Email: GregLitster@synkronos.com

PARTICULARS OF THE FOURTH RESPONDENT

Name: Australian Securities & Investments Commission as
 Fourth Respondent.
Business Address Level 20, 240 Queen Street, Brisbane. Queensland
Solicitor's name Hugh Copley
and firm name: Australian Securities & Investments Commission
Solicitor's business address: Level 20, 240 Queen Street, Brisbane, Queensland
Address for service: Level 20, 240 Queen Street, Brisbane, Queensland
Telephone: 07 3867 4892
Fax: 07 3867 4790
Email: hugh.copley@asic.gov.au

Signed: 
 Russells
Description: Solicitors for the Appellant
Dated: 23 September, 2013

This Notice of Appeal is to be served on:-

The First Respondents,

Raymond Edward Bruce and Vicki Patricia Bruce

c/- Their Solicitors, Piper Alderman

And on:

The Second Respondent,

Roger Shotton

c/- his Solicitors, Tucker Cowen

And on:

The Third Respondents,

David Nunn and Anita Jean Byrnes

c/- their solicitors Synkronos Legal

And on:

The Fourth Respondent,

Australian Securities & Investments Commission

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited (in liq) v Bruce & Ors*
[2014] QCA 136

PARTIES: **LM INVESTMENT MANAGEMENT LIMITED**
(IN LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND
(appellant)
v
RAYMOND EDWARD BRUCE
VICKI PATRICIA BRUCE
(first respondents)
ROGER SHOTTON
(second respondent)
DAVID NUNN
ANITA JEAN BYRNES
(third respondents)
AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION
(fourth respondent)

FILE NO/S: Appeal No 8895 of 2013
SC No 3383 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 28 November 2013

JUDGES: Fraser and Gotterson JJA and Daubney J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Appeal dismissed.**
2. Appellant to pay the respondents' costs of the appeal.

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS –
WINDING UP – where the appellant is the responsible entity
of the LM First Mortgage Income Fund (“the Fund”) – where
the primary judge concluded it was necessary to appoint
a person independent of the appellant to take responsibility
for ensuring the Fund is wound up in accordance with its
Constitution pursuant to s 601NF(1) of the *Corporations Act*

2001 (Cth) (“the Act”) – where the primary judge made that appointment upon finding that given the complexity of the winding up, the administrators of the appellant (“the administrators”) would not act properly in the interests of members in identifying and dealing with potential issues of conflict – where the primary judge found the appellants had conducted the litigation in a partisan and combative manner, and the administrators had preferred their own interests to those of the Fund – whether those findings and other supporting findings were reasonably open on the evidence – whether setting aside any of those findings vitiates the primary judge’s ultimate conclusions

CORPORATIONS – MANAGED INVESTMENTS – RESPONSIBLE ENTITY – where the primary judge found the administrators had acted in a way inconsistent with those owing duties as responsible entity and trustee under the Act, conducted the litigation in a partisan and combative manner, and had preferred their own interests to the interests of the Fund – where the appellant argues those conclusions and supporting findings were not open because they were not put to appropriate witnesses in cross-examination or the appellant was not otherwise given adequate notice to meet those imputations – whether the administrators were cross-examined about those imputations or were otherwise given sufficient notice – whether there was a breach of the rule in *Browne v Dunn* so as to require those findings be set aside – whether setting aside any of those findings vitiates the primary judge’s ultimate conclusions

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the primary judge found that if the administrators were permitted to wind up the Fund, there would be a real potential for conflicts of interest to arise – where the second respondent argued there would arise actual and not merely potential conflicts of interest – whether the primary judge erred on that basis – where the primary judge concluded that the real potential for conflicts of interest to arise did not of itself make it “necessary” to appoint an independent person to wind up the Fund under s 601NF(1) of the Act – where the second respondent argued the primary judge misconstrued s 601NF(1) and that those potential conflicts did make it “necessary” to appoint an independent person – whether the primary judge erred on those bases

Corporations Act 2001 (Cth), s 253E, s 601FL, s 601FM, Pt 5C.9, s 601NE(1)(d), s 601NF(1)

Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1, cited

Browne v Dunn (1894) 6 R 67, applied

MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, considered

Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110, cited
*Re Association of Architects of Australia; Ex parte Municipal
 Officers Association of Australia* (1989) 63 ALJR 298;
 [1989] HCA 13, cited
Re Orchard Aginvest Ltd [2008] QSC 2, considered
Smith v Advanced Electrics Pty Ltd [2005] 1 Qd R 65; [2003]
QCA 432, cited
West v Mead (2003) 13 BPR 24,431; [2003] NSWSC 161, cited

COUNSEL: J C Sheahan QC, with S R Cooper, for the appellant
 No appearance for the first respondents
 D Clothier QC, with G W Dietz, for the second respondent
 G J Litster (*sol*) for the third respondents
 W Sofronoff QC SG, with S J Forrest, for the fourth respondent

SOLICITORS: Russells for the appellant
 No appearance for the first respondents
 Tucker & Cowen solicitors for the second respondent
 Synkronos Legal for the third respondents
 Australian Securities and Investments Commission for the
 fourth respondent

- [1] **FRASER JA: Introduction** The appellant is the responsible entity of the LM First Mortgage Income Fund (“the Fund”). It challenges an order made in the Trial Division pursuant to s 601NF(1) of the *Corporations Act* 2001 appointing a person independent of the appellant to take responsibility for ensuring that the Fund is wound up in accordance with its constitution, and related orders.
- [2] The business of the Fund was to invest by lending on the security of mortgages to borrowers who developed real property. There were three “feeder funds” to the Fund, one controlled by Trilogy Pty Ltd (“Trilogy”) as responsible entity and two controlled by the appellant as responsible entity. One of the latter two feeder funds was called Currency Protected Australia Income Fund (“CPAIF”). There was also a service company to the funds, LM Administration Pty Ltd (“Administration”). The Fund was established in 1999 and by February 2008 it was apparently worth more than \$700,000,000. Its fortunes subsequently waned. By the end of 2012 its assets had declined to \$320,000,000. The assets were loans made to borrowers. All of the loans were in default. The net loss attributable to unit holders was then \$88,000,000. The appellant, as responsible entity of the Fund, had embarked upon an orderly sale of Fund assets and a pro rata distribution of the net proceeds to unit holders. Deutsche Bank AG appointed receivers over the assets and undertakings of the scheme in July 2013. It was expected that Deutsche Bank would recover the money owing to it (about \$30,000,000) leaving significant assets still in the scheme.
- [3] The appellant suspended redemptions in 2009. The present voluntary administrators of the appellant, Ms Muller and Mr Park, were appointed to the appellant as responsible entity of the Fund on 19 March 2013. By the time of the hearing in the Trial Division it was anticipated, as subsequently occurred, that the appellant would be placed in liquidation with Ms Muller and Mr Park as liquidators. The primary judge accepted that the administrators were independent of the appellant’s previous directors. Ms Muller and Mr Park were also appointed as voluntary administrators to Administration, but on 26 July 2013 liquidators unconnected with them were appointed to Administration at a meeting of its creditors.

- [4] The proceeding in the Trial Division was commenced by an originating application in the name of the first respondents, Mr and Mrs Bruce. They were nominal applicants, the real applicant being Trilogy. The order sought was that Trilogy be appointed as a temporary responsible entity of the Fund in place of the appellant, pursuant to ss 601N and 601FP of the *Corporations Act* 2001 and a regulation. The primary judge dismissed that application on the ground that it was incompetent and also held that it would in any event have been inappropriate to make the order sought by Trilogy. No party challenges that order.
- [5] The second respondent, Mr Shotton (a unit holder in the Fund), and the fourth respondent, ASIC, applied for orders winding up the Fund and for the appointment of a person under s 601NF(1) to take responsibility for ensuring that the Fund was wound up in accordance with its constitution.
- [6] The hearing occupied three days. Subsequently, the primary judge ordered that, subject to further orders, the appellant in its capacity as a responsible entity for the Fund wind up the Fund. The winding up order is not contentious. The appellant's challenge is to the order made by the primary judge under s 601NF(1) that Mr David Whyte be appointed to take responsibility for ensuring that the Fund is wound up in accordance with its constitution, and the further orders made under s 601NF(2) on the application of ASIC appointing Mr Whyte as the receiver of the property of the Fund and conferring broad powers upon him as receiver to ensure the realisation of the property of the Fund.
- [7] Mr Shotton and ASIC resisted the appeal. The other respondents did not play an active part in the appeal. No separate argument was directed to the appropriateness of the orders under s 601NF(2). The fate of those orders turns upon the fate of the order under s 601NF(1). Accordingly, these reasons concern only the order made under s 601NF(1).

Statutory context

- [8] Part 5C.9 of the *Corporations Act* 2001 regulates the winding up of registered schemes. Provisions are made for winding up of a registered scheme where that is required by the scheme's constitution (s 601NA), where the members of the scheme want it to be wound up (s 601NB), and where the responsible entity of the registered scheme considers that a purpose of the scheme has been or cannot be accomplished (s 601NC). Provisions are also made for winding up by order of the Court where the Court thinks it is just and equitable to make the order or where execution or other process on a judgment, decree or order of a Court in favour of a creditor against the responsible entity of the scheme in that capacity has been returned unsatisfied (s 601ND). (In this case the winding up order was made on the just and equitable ground). Where the scheme must be wound up, s 601NE(1) requires that the responsible entity of the registered scheme "must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2)...".
- [9] The critical provision for the purposes of this appeal is s 601NF(1). Section 601NF provides:
 - "(1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if

the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).

- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).
- (3) An order under subsection (1) or (2) may be made on the application of:
 - (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC."

The primary judge's conclusions

- [10] The primary judge accepted that under Pt 5C.9 of the Act, it is generally the responsible entity which will be responsible for winding up the scheme in accordance with its constitution. Taking that into account, the primary judge held that the power conferred upon the Court to appoint a person other than the responsible entity to take responsibility for the winding up of a scheme "if the Court thinks it necessary to do so" was "more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so."¹
- [11] Before the primary judge, Mr Shotton and Trilogy argued that if the present administrators of the appellant were to wind up the fund they would face actual and potential conflicts of interest. The primary judge did not find any actual conflict of interest but found that there was real potential for conflicts of interest to arise. The primary judge held that although the potential conflicts made it preferable and "desirable" for an independent liquidator to be appointed, there was no power to make an order under s 601NF(1) because such an appointment was not necessary on that basis.²
- [12] The primary judge concluded that what did make such an order necessary was that in this winding up of some complexity where conflicts might well arise, the administrators might not act properly in the interests of members of the Fund in identifying the issues or in dealing with them. That conclusion was based upon findings that, by the administrators' conduct in relation to a meeting of members, their dealings with ASIC, and their conduct in the litigation, they had "demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*" and had "preferred their own commercial interests to the interests of the fund".³

Issues in the appeal

- [13] The main arguments advanced by the appellant are that the primary judge erred in making those findings because the administrators were not confronted with the

¹ *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192 at [47].

² [2013] QSC 192 at [117].

³ [2013] QSC 192 at [117].

imputations in cross-examination and the findings were in any event not supported by the evidence. Pursuant to a notice of contention Mr Shotton argued that, contrary to the primary judge's conclusion, the power to make an order under s 601NF(1) was enlivened by conflicts of interest which the appellant would or might face in the winding up and the power should have been exercised on that ground.

- [14] Before discussing those and the other issues it is convenient to summarise the primary judge's conclusions about the administrators' conduct.

Conduct of the administrators in relation to the 13 June 2013 meeting and their dealings with ASIC

- [15] The first respondents filed their originating application for the appointment of Trilogy as temporary responsible entity of the Fund on 15 April 2013. At a meeting on 23 April between ASIC and one of the administrators (Ms Muller) and the administrators' solicitors, the administrators' solicitors suggested that the administrators could call a meeting of members to consider the appointment of a new responsible entity, and that in a choice between the appellant and Trilogy, the appellant "would win".⁴ ASIC suggested the use of an enforceable undertaking issued by ASIC to oblige the administrators to call a meeting to vote on resolutions for the appointment of a new responsible entity or that the funds be wound up. ASIC told the appellant that it planned to intervene in the proceedings and that, if there were agreement upon the terms of an enforceable undertaking, ASIC would support the appellant remaining as responsible entity.⁵ On the following day, 24 April 2013, ASIC forwarded a draft enforceable undertaking to the administrators' solicitors for the purpose of discussion. The draft provided for the administrators to undertake to call meetings of the members of the Fund and to put to the unit holders for determination resolutions for the appointment of a responsible entity over each fund, whether the Fund should be wound up, and if so, by whom. ASIC sought the appellant's comments and any proposed amendments.⁶ The administrators' solicitor told an ASIC solicitor that he would send a re-drafted version of the undertaking to ASIC.⁷
- [16] Also on 24 April, the first respondents' solicitor informed the administrators that the first respondents would seek to have their application for the appointment of Trilogy heard on 29 April 2013. The appellant then issued a notice of meeting of members and a covering letter on 26 April 2013. It informed ASIC of this but it did not give ASIC the material sent to the members. The notice of meeting proposed resolutions as extraordinary resolutions which differed from those in ASIC's draft:

"Resolution 1...

...

"That, subject to the passage of Resolution 2, LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 be removed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288."

Resolution 2...

...

⁴ [2013] QSC 192 at [57].

⁵ [2013] QSC 192 at [58].

⁶ [2013] QSC 192 at [59].

⁷ [2013] QSC 192 at [60].

“That, subject to the passage of Resolution 1, Trilogy Funds Management Limited ACN 080 383 679 be appointed as the responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288.”⁸

- [17] The primary judge pointed out that the notice did not deal with the question of winding up as had been sought by ASIC and dealt with the question of who would be the responsible entity much more specifically than had been proposed by ASIC. The primary judge found that the administrators’ conduct contradicted ASIC’s expectation that the administrators would work with ASIC about what would be put to the meeting and the statement by the administrators’ solicitors to ASIC’s solicitor on 26 April that he would send a re-drafted version of the enforceable undertaking to ASIC.⁹ The primary judge also found that on 29 April 2013 the appellant informed ASIC that it was not willing to enter into an enforceable undertaking.¹⁰

Misleading representations by the administrators

- [18] On 8 May 2013 ASIC sought from the appellant’s solicitor an explanation about various matters raised in the notice of meeting and associated documents. Three matters assumed significance at the hearing in the Trial Division.
- [19] First, the appellant represented that holding a meeting would save legal costs in relation to the Trilogy application. The introduction to the notice of meeting referred to the application and stated that the appellant “wishes to avoid the costs and delay of multiple court appearances, perhaps appeals, and multiple meetings which are the practically inevitable result of Trilogy’s Court application”. In addition, material which the appellant distributed to members of the scheme included a statement that:
- “... in a recent court action involving another Fund managed by [the appellant] where there was a proposal to change the Trustee, the court ordered that the full legal costs of each party to the court proceedings should be met from the assets of the underlying Fund (even though the lawyers had promised they would not charge their clients). Thus by calling a meeting to vote on the appointment of Trilogy as a replacement Responsible Entity, [the appellant] is also cognisant that such a move is likely to save significant legal costs for the Fund.”
- [20] The primary judge found that no convincing explanation was provided by the appellant in its solicitor’s letter of 10 May 2013 in response to ASIC’s detailed letter of 8 May 2013 asking for an explanation. (I interpolate that the appellant argued that when it published the notice of meeting, the Trilogy application had been made but the applications by ASIC and Mr Shotton had not been made; it was expected that the Court would adjourn Trilogy’s proceedings until after the meeting and that the results of the vote at the meeting would inform the proceedings; and it was thought possible that the first respondents might discontinue the application for the appointment of Trilogy and that certainly would occur if the meeting resolved to appoint Trilogy. However, as the primary judge pointed out, legal costs would have been saved by calling a meeting only if the meeting voted to appoint Trilogy as

⁸ AB 2308.

⁹ [2013] QSC 192 at [60].

¹⁰ [2013] QSC 192 at [61].

a temporary responsible entity, the notice did not say that, and the appellant strongly urged the members against such a result. In this respect the notice was misleading, as the primary judge found.)

- [21] Secondly, the appellant represented that its ability to use “claw-back provisions” in Pt 5.7B of the *Corporations Act* 2001 was a point which differentiated it from Trilogy in relation to the Fund. In material distributed to the members the administrators referred to the prospect of a winding up and stated:

“If [the appellant] is wound up, its liquidators will have access to the claw-back provisions of the Act – for example, recovery of unreasonable director-related transactions etc. There is room for debate as to whether these provisions could be invoked for the benefit of the Fund; and the administrators have not yet completed the investigation as to any transactions which might be available for the benefit of Members. On 12 April, 2013, the Chief Justice extended the time for the administrators to convene a second meeting of creditors until 25 July, 2013.

While those matters are not clear, what is clear is that if Trilogy replaces LM as the Responsible Entity of the Fund, it will have no access at all to those provisions for the benefit of Members.”¹¹

- [22] The primary judge found that the notice was misleading in this respect and that the appellant’s solicitor’s 10 May letter provided no convincing explanation for the representation.¹²

- [23] Thirdly, the administrators represented that ASIC had approved the appellant’s calling of the meeting. The introduction to the notice of a meeting included the following statement:

“The Meeting is being called by LM Investment Management Limited (Administrators Appointed), the current Manager of the Fund (LM). LM decided to call the Meeting because, following receipt from two unitholders of an application to the Supreme Court of Queensland for Trilogy Funds Management Limited (Trilogy) to be appointed as the Manager of the Fund in replacement of LM, and immediate consultations with ASIC, LM wished to consult Members in the proper forum, with adequate notice.”¹³

- [24] The 10 May letter simply rejected ASIC’s concern about this. The implication that the appellant had ASIC’s sanction for holding a meeting was misleading.¹⁴

Continuing misrepresentations by the administrators

- [25] ASIC asked the appellant to issue an amended notice of meeting which addressed its concerns. On 21 May 2013 ASIC asked the appellant’s solicitor to adjourn the meeting until after the applications by Trilogy, ASIC, and Mr Shotton had been heard or to cancel the meeting. ASIC’s expressed view was that the vote at the meeting would not impact on most of the claims in the litigation so that the meeting would not result in savings in costs, delay or uncertainty. ASIC also questioned the applicability of s 601FL of the *Corporations Act* 2001 upon which the administrators relied as the legal basis for convening the meeting.

¹¹ [2013] QSC 192 at [53](f).

¹² [2013] QSC 192 at [66], [77].

¹³ [2013] QSC 192 at [52] (the underlining was in the judgment).

¹⁴ [2013] QSC 192 at [66], [75].

- [26] On 6 May 2013 Trilogy's solicitor sent a letter to the appellant's solicitor which "set out clearly, succinctly, and... correctly, the reasons why ss 601FL and 601FM of the Act do not allow the proposed meeting ...".¹⁵ The letter explained that s 601FL authorised a meeting only where the responsible entity wanted to retire (which was not the case) and s 601FM applied only where members of a registered scheme wanted to remove the responsible entity, and no scheme member sought a meeting for that purpose. Nevertheless, the appellant's solicitor's letters to Trilogy's solicitor on 8 May and to ASIC on 27 May confirmed that the appellant relied on those sections as the legal basis for calling the meeting.
- [27] The appellant declined to adjourn or cancel the meeting. The administrators emphasised the contention, repeatedly made to the scheme members, that the members had a democratic right to determine who should manage the Fund. The appellant's solicitor conveyed that the meeting would be adjourned only to permit further explanatory material to be considered by members. There were subsequent exchanges of correspondence but, although the appellant's solicitors denied that the statutory provisions upon which the appellant relied did not authorise it to call the meeting, no sensible explanation of that view was advanced. The primary judge observed that the appellant's solicitors "made little attempt to meet the legal substance of the points advanced against them, but would not concede the point".¹⁶ Thereafter, Trilogy unequivocally communicated its view that the meeting was not validly called. It communicated that it would not consent to be appointed at such a meeting. It encouraged members of the feeder fund of which it was the responsible entity, who comprised approximately 20 per cent of the membership of the Fund, not to participate in the meeting. It asked the administrators to abandon the meeting.
- [28] On 27 May 2013 the appellant posted supplementary information on the Fund website. It stated that the main cost saving would occur if Trilogy was appointed as responsible entity, but it again did not acknowledge this was the only case in which costs would be saved. The fact that Trilogy did not consent to being appointed at the meeting was mentioned but no explanation was given as to why there was any utility in the meeting in that context. Furthermore, Trilogy was criticised as being responsible for the significant costs associated with court proceedings instead of a meeting, "particularly so given the Court adjourned the proceedings till 15 July 2013 in part to allow the meeting to run its course".¹⁷ (At the hearing in the Trial Division the appellant conceded that the adjournment was not granted for that purpose.)
- [29] The supplementary information stated that the appellant was "solely responsible for the Notice of Meeting and the decision to call the meeting. ASIC was not provided a copy of the Notice of Meeting to review prior to its dispatch and, as such, ASIC did not approve the Notice of Meeting. Prior approval of such Notices by ASIC is not required." However, the supplementary information did not inform the members that by this time ASIC had disapproved of the meeting and had asked the appellant to cancel it. The primary judge therefore found that the new information again "did not reveal the true position regarding ASIC's attitude to the meeting".¹⁸
- [30] The 27 May 2013 supplementary information also stated that Trilogy had given the reason for not consenting to being appointed by the meeting as that it believed that

¹⁵ [2013] QSC 192 at [70].

¹⁶ [2013] QSC 192 at [70].

¹⁷ [2013] QSC 192 at [72].

¹⁸ [2013] QSC 192 at [75].

the matter should be determined by the Court, but there was no reference to Trilogy's reliance upon the invalidity of the notice of meeting on the basis that the sections of the Act relied upon by the appellant were inapplicable. The primary judge also found that whilst the 27 May 2013 supplementary information moderated the statements in the notice of meeting about the claw-back provisions, the information was "not as frank as the view provided to ASIC about this on 1 May 2013 [that] "it is at least hypothetically possible"". ¹⁹ The primary judge found that the implication that there was a real point of distinction between the appellant and Trilogy in relation to the claw-back provisions remained misleading.

- [31] In addition, the primary judge referred to the statement made for the first time in the 27 May 2013 supplementary information that the licence granted by ASIC to the appellant was limited to the provision of financial services "which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of ... LM First Mortgage Income Fund ...". ²⁰ The primary judge found that, until this time, the information given to members was misleading because it implied that the appellant had a licence to manage the Fund short of a winding up and did not state that, unless the appellant wound up the Fund, it was obliged to appoint another responsible entity. ²¹ (The statement found by the primary judge to be misleading was made in information originally distributed by the appellant with the notice of meeting:

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

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

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

The manner in which the administrators organised the meeting

- [32] The primary judge found that the process by which the meeting was called was "technical and somewhat artificial" and that the administrators organised for the meeting to be called to consider two resolutions which they opposed. ²² Section 252B of the *Corporations Act* 2001 requires a responsible entity of a registered scheme to hold a meeting of the scheme's members to vote on a proposed special or extraordinary resolution if, amongst other matters, members with at least five per cent of the votes "that may be cast on the resolution" requested it. However the

¹⁹ [2013] QSC 192 at [77].

²⁰ Notice by ASIC to the appellant under s 915B(3)(b) of the *Corporations Act* 2001.

²¹ [2013] QSC 192 at [74].

²² [2013] QSC 192 at [56].

administrators themselves initiated the meeting. Assuming to act in their capacity as administrators of the appellant as responsible entity of the feeder fund CPAIF, the administrators directed the custodian trustee of CPAIF's assets ("the Trust Company") to request the administrators, in their capacity as the administrators of the appellant as responsible entity of the Fund, to convene a meeting to consider the resolutions. The Trust Company immediately complied with that request by sending to the administrators a request in the terms which the administrators had given to the Trust Company. No underlying investor in the Fund sought the meeting. And the covering letter with the notice of the meeting, the notice of meeting itself, and other material which the appellant distributed to the scheme members about the meeting strenuously advocated against the resolutions proposed by the appellant.²³

- [33] On 28 May 2013 ASIC sought from the appellant's solicitor details of the 26 May 2013 request for a meeting signed for the Trust Company and pointed out that ss 12, 13, 15, 16 and 253 of the *Corporations Act* 2001 (dealing with "associates") might preclude the Trust Company promoting its interests at the proposed meeting. Section 253E precludes a responsible entity "and its associates" from voting their interest on a resolution at a meeting of the scheme's members if they have an interest in the resolution or matter "other than as a member". The appellant had an interest "other than as a member", as Ms Muller conceded.²⁴

- [34] On 4 June 2013, the appellant's solicitor acknowledged, amongst many other matters, that the meeting request was not made at the direction of an underlying investor but at the direction of the administrators in their capacity as administrators of the responsible entity of CPAIF. ASIC responded on 6 June 2013 expressing "grave concern".²⁵ ASIC contended, amongst other matters, that by operation of s 253E of the *Corporations Act* 2001 votes of the Trust Company would not satisfy the description in s 252B of the votes of members with at least five per cent of the votes "that may be cast on the resolution" so that the notice of meeting was void. ASIC also stated that:

"Aside from the technical arguments you have put forward, erroneously in ASIC's view, as to your clients' entitlement to orchestrate the requisition of the proposed meeting, ASIC is most concerned that your clients would seek to do so in circumstances in which there is no evidence that even a single underlying feeder fund investor was consulted.

The unavoidable inference that must be drawn is that Ms Muller and Mr Park coordinated the calling of the proposed meeting in order to achieve a forensic advantage in the Supreme Court proceeding and without any reference to underlying feeder fund investors.

It is ASIC's position that the notice of meeting is void, having been issued purportedly pursuant to s 252B of the Act in circumstances in which that provision was not invoked. [For the reasons set out in previous correspondence, the calling of the proposed meeting also does not accord with the requirements of s601FL of the Act. It is immaterial that the proposed resolution(s) might accord with a meeting convened in accordance with that provision. What is clear

²³ [2013] QSC 192 at [50] – [54].

²⁴ [2013] QSC 192 at [85].

²⁵ Letter from ASIC to appellant's solicitors, 6 June 2013, at 2, AB 2187.

is that the responsible entity of the FMIF does not “want to retire” nor has it set out, in any of the disclosure published either in or subsequent to the Notice of Meeting, “its reason for wanting to retire”].²⁶

- [35] The primary judge described ss 12, 15, and 16 of the *Corporations Act* 2001 as setting up a “horribly complex scheme for deciding who is an “associate”” and concluded, with reference to *Everest Capital Limited v Trust Company Ltd*,²⁷ that the Trust Company was not entitled to vote at the 13 June 2013 meeting because it was acting as agent of the appellant and that the appellant and the Trust Company were relevantly acting in concert.

The primary judge’s conclusions about the appellant’s conduct in relation to the meeting and in its meetings with ASIC

- [36] The primary judge expressed the following conclusions about the appellant’s conduct in relation to the meeting and its dealings with ASIC. The meeting was a “tactic” aimed at the appellant “seeing off its rival for control” of the Fund, although the primary judge did not interpret that in isolation “as a marker of self-interest”.²⁸ The misleading statements in information given to members raised real concerns. They indicated that the appellant was pursuing its continuing control of the Fund in a manner which was at odds with the interests of members. The choice to not work with ASIC and to not hold a meeting which allowed resolutions about winding up to be put at the same time as resolutions about the responsible entity should be seen in the same light, and the initial failure properly to disclose the true nature of the limited financial securities licence bore upon that point. That “the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions”²⁹ was demonstrated by conduct which was subsequent to the appellant’s initial failures. The appellant refused to moderate its position, except inadequately in the 27 May 2013 supplementary information after Trilogy’s lawyers explained why the statutory bases for the meeting upon which the appellant relied did not exist and when ASIC complained about misleading statements in the appellant’s material given to members. Where Trilogy did not have a licence to operate as responsible entity and did not consent to do so there was no utility in the meeting as a forum for considering whether Trilogy should be appointed as responsible entity. Ms Muller’s evidence in cross-examination about the justification for the meeting that there was an “appreciable chance” that Trilogy would be elected as responsible entity did not reflect her genuine belief once members had been informed that Trilogy did not have a licence to operate as responsible entity and did not consent to do so. In light of the misleading statements in the information provided to members, and the information that Trilogy was not licensed to perform as responsible entity and would not consent to perform as responsible entity if appointed at the meeting, “any objective observer must have doubted the meeting’s use even as a poll”.³⁰

The primary judge’s conclusions about the appellant’s conduct of the litigation

- [37] The primary judge also accepted ASIC’s submission that the appellant’s conduct of the proceedings had been over-zealous, finding that it was “combative and partisan

²⁶ AB 2187 – 2188.

²⁷ (2010) 238 FLR 246.

²⁸ [2013] QSC 192 at [86] and fn 25.

²⁹ [2013] QSC 192 at [88].

³⁰ [2013] QSC 192 at [87].

in a way which I see as reflective of the administrators acting in their own interests to keep control of the winding-up of the [Fund], rather than acting in the interests of the members.”³¹ The primary judge went on to give some examples of that conduct.³²

Browne v Dunn

[38] I referred earlier to the primary judge’s conclusions that, by that conduct of the administrators in relation to the members’ meeting held on 13 June 2013 and their dealing with ASIC, and by their conduct in the litigation, they had “demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act*” and “they have preferred their own commercial interests to the interests of the [F]und”.³³ Some of the numerous grounds of appeal include contentions that those conclusions and the findings from which they were derived should be set aside because they were not put to the administrators or other witnesses in cross-examination. After explaining my conclusions about those contentions in this section of the reasons, I will relate those conclusions to each ground of appeal.

[39] The appellant argued that in light of the seriousness of the imputations found against the administrators, the failure to put those imputations to the administrators in cross-examination contravened the rule in *Browne v Dunn*³⁴ and required that the findings and ultimate conclusion be set aside. In *MWJ v The Queen*³⁵ Gummow, Kirby and Callinan JJ described the essence of rule in *Browne v Dunn* as being that “a party is obliged to give appropriate notice to the other party, and any of that person’s witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party’s or a witness’ credit.” The appellant quoted from the following passage in the reasons:

“One corollary of the rule is that judges should in general abstain from making adverse findings about parties and witnesses in respect of whom there has been non-compliance with it. A further corollary of the rule is that not only will cross-examination of a witness who can speak to the conduct usually constitute sufficient notice, but also, that any witness whose conduct is to be impugned, should be given an opportunity in the cross-examination to deal with the imputation intended to be made against him or her.”³⁶

[40] The rule is a rule of practice designed to secure fairness to witnesses.³⁷ The purposes of the rule in *Browne v Dunne* which are significant in the present context are to ensure that the party calling the witness is alerted to any need to call evidence to corroborate the witness’s evidence and to give the witness the opportunity to rebut a challenge by the witness’s own evidence or by reference to the evidence upon which the challenge is based.³⁸

³¹ [2013] QSC 192 at [89].

³² [2013] QSC 192 at [90] – [96].

³³ [2013] QSC 192 at [117].

³⁴ (1894) 6 R 67.

³⁵ (2005) 80 ALJR 329 at 339 [38].

³⁶ (2005) 80 ALJR 329 at 339 [39].

³⁷ *Smith v Advanced Electrics Pty Ltd* [2005] 1 Qd R 65 at 81 – 82 [46], referring to *R v Birks* (1990) 19 NSWLR 677 at 688, 689.

³⁸ *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1 at 16, 22, 23; referred to in *Smith v Advanced Electrics Pty Ltd* [2005] 1 Qd R 65.

- [41] ASIC referred to Lord Herschel LC's observation in *Browne v Dunn* that the rule applied "upon a point which it is not otherwise perfectly clear that [the witness] has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling...there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it."³⁹ In *West v Mead*,⁴⁰ Campbell J referred to Lord Herschel LC's reasons and subsequent authority before concluding that "the circumstances in which *Browne v Dunn* will require matter to be put to a witness in cross-examination will depend upon the nature of the pre-trial preparation there has been, and whether that pre-trial preparation has been sufficient to give notice to a witness of the submission ultimately intended to be put to the court." ASIC and Mr Shotton argued that clear and detailed notice of the imputations was given in ASIC's outline of submissions delivered before the hearing, in opening submissions at the commencement of the hearing on behalf of ASIC and others, and in the cross-examination of Ms Muller. They also argued that the appellant did not object to the primary judge making the findings but instead acknowledged both in the opening and closing submissions on its behalf that the relevant matters were in issue and should be decided upon their merits.
- [42] The trial commenced on Monday 15 July 2013. ASIC served upon the appellant and the other parties an outline of submissions on the preceding Friday. The appellant accepted in its initial outline of argument in this appeal that ASIC's outline delivered on 12 July raised allegations of impropriety,⁴¹ but in the appellant's outline of argument in reply and in oral submissions the appellant argued that ASIC's outline was insufficient to satisfy the rule in *Browne v Dunn*. The appellant argued that ASIC's outline relevantly made the point only that the winding up of the Fund should be carried out by those nominated by ASIC because the zeal of the appellant in responding to the first respondents' application for the appointment of Trilogy distracted the appellant from its proper focus on the interests of the unit holders.⁴² The appellant acknowledged that other statements in ASIC's outline "raised issues concerning whether the meeting of members of the [F]und...was likely to be useful...[and] whether it had been properly called [and]...[w]hether they had responded appropriately or quickly enough to ASIC's indication of its position...". The appellant argued that there was no "plain statement that they had breached their duties as administrators or breached their duties as trustees or fiduciaries or officers" and the cross-examiner did not put to Ms Muller that the administrator had preferred their own interests to the interests of members.⁴³
- [43] The appellant's submissions substantially understated the nature and extent of the imputations of misconduct made against the administrators in ASIC's outline. The context in which that outline was delivered included a statement in a letter from ASIC to the administrators' solicitors of 6 June 2013 that the administrators had an interest in the proposed meeting in relation to Trilogy's application "that would effectively see Ms Muller and Mr Park, in their capacity as administrators of [the appellant], lose the opportunity of acting in the winding up of the [Fund] – a process

³⁹ (1894) 6 R 67 at 71.

⁴⁰ (2003) 13 BPR 24,431 at [96] – [98].

⁴¹ Appellant's outline of argument, at [8].

⁴² Transcript, 28 November 2013, at 1-8.

⁴³ Transcript, 28 November 2013, at 1-8, 1-9.

likely to generate significant professional fees for the persons or entity so involved.” Similarly, Trilogy’s solicitors wrote to the appellant’s solicitors on 3 June 2013 that their client was “concerned that your client is furthering its own interest in holding the Meeting, and not those of the members of the Fund...”⁴⁴ That the appellant appreciated that this allegation was in issue is suggested by Ms Muller’s statement in an affidavit she swore some weeks before the hearing (on 27 June 2013), in which she referred to ASIC’s letter and deposed that “...the matter of professional fees formed no part of [Mr Park’s] or my reasons in convening the meeting of members.”⁴⁵

- [44] ASIC’s outline delivered before the hearing then set out a series of contentions in support of its claim that it was appropriate to appoint a person independent of the appellant to be responsible for the winding up of the Fund.⁴⁶ Relating those contentions to the primary judge’s findings which are challenged in this appeal:

(a) The finding that the appellant’s conduct in issuing the notice of meeting contradicted ASIC’s known expectation that the administrators would work co-operatively with ASIC⁴⁷ was foreshadowed in ASIC’s outline:

“[20] Instead of providing the enforceable undertaking suggested by ASIC the administrators chose instead, on 26 April 2013, to issue a notice of meeting at which resolutions would be put that the First Respondent be removed as responsible entity and that Trilogy be appointed in its place ...”.

(b) The findings that the administrators adopted a technical and artificial process to call the meeting,⁴⁸ that calling the meeting was a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund],⁴⁹ and that the appellant pursued its continuing control of the Fund “in a manner which was at odds with the interests of the members”⁵⁰ were foreshadowed in the following passages of ASIC’s outline:

“[1](c)(i) the zealousness [sic] of the [appellant’s] response to the [first respondents’] application appears to have distracted it from... its proper focus namely, the interests of the unitholders of the [Fund]... ” and “(iii) the person(s) responsible for the winding up should be appropriately independent...”.

“[14] ASIC is concerned that the zealousness [sic] of the [appellant’s] response to the [first respondents’] application has distracted it from its proper focus, namely the interests of the unitholders...”;

“[15](a)...the administrator’s [sic] purported use of the procedures in Part 2G.4 of the Act to fend off the Trilogy challenge was inappropriate” and “(b)... the administrator’s [sic] level of engagement in the adversarial process of this proceeding is surprising in the circumstances...”.

“[19]...on 23 April 2013 [at the meeting between representatives of ASIC and of the administrators] the solicitor for the [appellant]

⁴⁴ AB 1904.

⁴⁵ Affidavit of Ms Muller, at [79], AB 1077.

⁴⁶ Submissions on behalf of ASIC, at [52], AB 2536.

⁴⁷ [2013] QSC 192 at [60].

⁴⁸ [2013] QSC 192 at [56].

⁴⁹ [2013] QSC 192 at [86].

⁵⁰ [2013] QSC 192 at [86].

expressed confidence that if a meeting were called in which unitholders of the [Fund] were given a choice between the [appellant] and Trilogy, the [appellant] would win...”

“[27]...these circumstances lead to the inference that the administrators of the [appellant] sought to utilise the procedure in Part 2G.4, Division 1 to orchestrate a meeting in respect of which they expected the [appellant] to prevail, not for the purpose of acting upon a genuine request for a meeting by underlying investors in the [Fund], but for the purpose of staving off Trilogy’s challenge to its position as responsible entity.”

“[40] The [appellant] did not bring the nature and extent of its interest in the resolutions to the attention of the unitholders with full disclosure ...”. (That paragraph went on to draw an analogy with a director’s fiduciary obligation to a company to disclose any benefits which the director might derive from the passing of any resolution at the company’s general meeting.)

- (c) The findings that misleading statements were made in the notice of meeting and other documents⁵¹ were foreshadowed in a section in ASIC’s outline headed “Content of the notice of meeting”, including:

“[28] ASIC has expressed concern to the administrators...that a number of statements made in the notice [of meeting] had the potential to confuse or mislead investors...”

“[32] That statement [in the notice of meeting] was misleading”...[in respects including that it wrongly implied that ASIC had endorsed the calling of the meeting].

“[34] That statement [that the appellant was “strongly of the view that it is in the best interests of Members that they have the opportunity to determine whether or not they wish to remove LM and appoint Trilogy”]...was likely to mislead unitholders” and a subsequent statement “was itself cast in terms calculated more to proselytise than inform...”

“[42] The notice was neither balanced nor neutral...”

“[37] The notice suggested (at 5) that the calling of the meeting was “likely to save significant legal costs for the Fund”. That was never likely to be the result of the meeting, and in the event has proven to be inaccurate.”

“[39]...that statement [in the notice of meeting] implied that the potential of a liquidator of the [appellant] to utilise Part 5.7B of the Act, is a genuine point of differentiation between the [appellant] and Trilogy... [but] there was no reasonable basis for drawing that implication”.

- (d) The primary judge’s rejection of Ms Muller’s justification for the meeting that she thought at all times up until the vote closed that there was “an appreciable chance” that Trilogy would be elected as responsible entity by the meeting and consequential finding that this demonstrated that the interests of the members of the scheme were not at the forefront of the administrators’ thinking⁵² was to some extent foreshadowed in the paragraphs of ASIC’s outline identified in

⁵¹ [2013] QSC 192 at [65], [66], [72], [73], [74], [75], [76] and [77] and the reference to “misleading statements” in [86].

⁵² [2013] QSC 192 at [88].

subparagraph (b) (including the submission in [27] that “the administrators of the [the appellant] sought to utilise the procedure in Part 2G.4, Division 1 to orchestrate a meeting in respect of which they expected [the appellant] to prevail, not for the purpose of acting upon a genuine request for a meeting by underlying investors in the [Fund], but for the purpose of staving off Trilogy’s challenge to its position as responsible entity.”)

- (e) The finding that Ms Muller’s affidavit evidence that she wished to ensure that the appellant’s conduct “was, to the extent possible, satisfactory to ASIC” was not “consistent with the reality of the [appellant’s] interactions with ASIC” was not clearly sought in ASIC’s outline, but it reflected the inconsistency between her affidavit evidence and the findings which were sought in ASIC’s outline (for example, in paragraph [20]) that the administrators did not in fact co-operate in those respects with ASIC.

- (f) The finding that the appellant’s conduct in the litigation was combative and partisan was foreshadowed in ASIC’s outline:

“[15](b)...the administrator’s [sic] level of engagement in the adversarial process of this proceeding is surprising...”

“[47] The [appellant] has...resisted [the first respondents’ application]...in a partisan manner”.

“[48] ASIC is concerned that the zealotry [sic] of the [appellant’s] conduct of this proceeding, exemplified by the volume of material filed on behalf of the [appellant] and the scope of the issues sought to be agitated, is disproportionate to the extent to which the interests of unitholders of the scheme are likely to be advanced.”

“[50] ... It is surprising therefore that the administrators have been so strenuous with the [appellant’s] defence to Trilogy’s challenge to its position as responsible entity.

[51] An example of that strenuousness can be found in the commission and preparation, on behalf of the administrators by their solicitors, of the affidavit of Bradley Vincent Hellen... That affidavit, and the report exhibited to it was, in the circumstances in which it was prepared, never likely to provide much assistance to the Court given:

- a. the limited information upon which the opinions expressed in the report were based; and
- b. the limited relevance of the assumption upon which those opinions were predicated, namely the “maturity” of a contingent liability that was the subject of proceedings in this Court in respect of which judgment had at that time been reserved by Applegarth J. ...”

[45] The following discussion relates to the appellant’s challenges to the findings in (a) – (e). The appellant’s challenges to the finding in (f) and other findings about the administrators’ conduct in the litigation are discussed under headings referring to the relevant grounds of appeal.

[46] There was considerable emphasis in the appellant’s argument upon the contention that ASIC’s outline did not give the administrators clear and express notice of an imputation that the administrators preferred their interests to the interests of scheme members in the way found by the primary judge. The primary judge’s conclusion to that effect is the only finding which is not clearly expressed in ASIC’s outline.

However, that imputation was implicit in the outline, particularly in the contentions that the appellant was distracted from its proper focus upon the interests of the unit holders, it orchestrated a meeting for the purpose of staving off Trilogy's challenge to its position as responsible entity, and it failed to disclose its interest in the resolutions to the scheme members. Also taking into account the context described in [43] of these reasons, it is difficult to accept that the administrators did not understand well before the hearing that ASIC and the first respondents would seek a finding that the administrators preferred their interests to the interests of members. That this is so is confirmed by subsequent events at the hearing.

- [47] In opening the first respondents' case, senior counsel described the administrators' conduct in calling the meeting as wasting the unit holders' time and money and as a good example of "the administrators using the shareholders' time and money to pursue their own personal interests, namely, to preserve their ability to get fees as administrators from administering this company and fund ...".⁵³ In response, the appellant's senior counsel did not object that this was not in issue. Rather, he acknowledged that the first respondents wished to raise an issue "which goes to the motivations of my clients in calling a meeting ...".⁵⁴ He also observed that the first respondents and ASIC were critical of the administrators in relation to the meeting, and he advanced arguments upon the merits of the serious imputations advanced for ASIC and the first respondents, justifying the administrators conduct as "good corporate governance ... notwithstanding all the criticisms that have been raised."⁵⁵ He argued that the appellant's conduct in calling the meeting was "perfectly proper".⁵⁶ ASIC's counsel opened next. He referred to the dealings between the administrators and ASIC and submitted that the steps taken by the administrators were taken "to protect their position and to ensure that they remain in the fund and that they're not acting in the interests of the members of the fund, and that's why ... an independent party should be appointed to wind up the fund."⁵⁷ The following opening on behalf of Mr Shotton endorsed ASIC's counsel's further submission that the administrators were "more focused on ... maintaining control of the winding up of that fund."

- [48] The appellant argued that the cross-examination of Ms Muller by the first respondents' senior counsel did not challenge the statement in her affidavit that fees formed no part of her or Mr Park's reasons for convening the meeting. It was submitted that the cross-examination essentially concerned only two matters: first, that the real reason for calling the meeting was to create evidence that would assist the appellant's response to the first respondents' application for the appointment of Trilogy and, secondly, that Ms Muller was not sincere in her evidence that she believed that there was an appreciable chance that a result of the meeting was that Trilogy would replace the appellant as the responsible entity. Both propositions were certainly put to Ms Muller, but the cross-examiner also put to Ms Muller the matters upon which ASIC relied for the inference that the administrators preferred their interests to the unit holders' interests. In particular, the cross-examiner put to Ms Muller that calling the meeting was "a ploy" because she thought that she would control the numbers and "get rid of Trilogy",⁵⁸ she thought that Trilogy would be defeated and that would "induce Trilogy to depart",⁵⁹ the statement in the appellant's

⁵³ Transcript, 15 July 2013, at 1-17.

⁵⁴ Transcript, 15 July 2013, at 1-21.

⁵⁵ Transcript, 15 July 2013, at 1-24.

⁵⁶ Transcript, 15 July 2013, at 1-27.

⁵⁷ Transcript, 15 July 2013, at 1-31.

⁵⁸ Transcript, 15 July 2013, at 1-41.

⁵⁹ Transcript, 15 July 2013, at 1-42.

solicitor's letter to ASIC on 27 May 2012 that the appellant's objective in calling the meeting was to allow investors to democratically determine who they wished to manage their fund was not true,⁶⁰ and the meeting was pursued "to shore up your own position" and "to fend off Trilogy".⁶¹

- [49] Furthermore, contrary to the appellant's argument, senior counsel for the first respondents did cross-examine Ms Muller upon her statement that fees formed no part of her or Mr Park's reasons for convening the meeting. Most of the cross-examination was directed to the various aspects of the administrators' conduct upon which ASIC relied for the inference that the administrators had preferred their own interests to the interests of the scheme members. That amounted to an indirect challenge to the statement. Furthermore, Ms Muller's attention was specifically directed to the relevant paragraph of her affidavit, together with preceding paragraphs in which Ms Muller swore that she believed that there was an appreciable chance that Trilogy "would carry the day",⁶² and senior counsel suggested to her that "you are not really being sincere in those paragraphs...because your solicitor had announced at the meeting with ASIC on 23 April the confidence that the resolutions would be defeated and you told ASIC in May that it [sic] the overwhelming majority of the proxies were against the resolutions...". That suggestion inappropriately combined two questions, but no objection was taken. (Ms Muller disagreed with the suggestion.)
- [50] The imputations of misconduct were clearly put in the final submissions for ASIC. In particular, counsel for ASIC submitted that the Court should not permit the administrators to conduct the winding up because "there is sufficient for your Honour to be concerned but [sic] that they may not act always in the interests of the unit holders and not in their own interests."⁶³ Similarly, senior counsel for the first respondents submitted that this was a very clear case of administrators "pursuing their own commercial interest at the expense of members."⁶⁴ Senior counsel for the appellant did not object that the primary judge should not consider those and related submissions of misconduct by the administrators. Rather, he acknowledged in terms that ASIC's case included an allegation that the administrators had exercised their powers as fiduciaries to call a meeting for an improper purpose and he met ASIC's case on its merits. Thus, for example, he argued that there was no evidence to support ASIC's complaint that there had been a distraction from the proper focus of the administration of the Fund,⁶⁵ that the serious allegations made by ASIC were wrong, that the administrators acted on legal advice, and that the administrators' conduct in arranging the meeting did not amount to evidence of bad faith.⁶⁶ That the appellant always appreciated that ASIC and the first respondents sought a finding that the administrators had preferred their own interests to the interests of members is also suggested by the appellant's senior counsel's criticism of the submission in paragraph 40 of ASIC's outline (see [44](b) of these reasons) that it reflected an excessive desire to find fault because the interests of the administrators in the appellant remaining the responsible entity were "blindingly obvious".⁶⁷
- [51] The appellant contended that ASIC should have given earlier notice of the imputations it made against the administrators. On 7 May 2013 Peter Lyons J directed

⁶⁰ Transcript, 15 July 2013, at 1-48.

⁶¹ Transcript, 15 July 2013, at 1-51.

⁶² Affidavit of Ms Muller, at [69] and [75], AB 1074, 1075.

⁶³ Transcript, 16 July 2013, at 2-57.

⁶⁴ Transcript, 17 July 2013, at 3-21.

⁶⁵ Transcript, 17 July 2013, at 3-44 to 3-45.

⁶⁶ Transcript, 17 July 2013, at 3-55 to 3-58.

⁶⁷ Transcript, 17 July 2013, at 3-57.

ASIC to file and serve on all parties by 10 June 2013 a statement identifying the grounds on which ASIC relied for the relief sought in paragraphs 3, 5 and 7 of its interlocutory application, including any contraventions alleged under s 1101B(1) of the *Corporations Act* 2001.⁶⁸ Those paragraphs sought orders for and relating to the appointment of receivers “[p]ursuant to section 1101B(1) of the Act”.⁶⁹ The application under s 601NF(1) was made instead in paragraph 2 of the interlocutory application. ASIC proceeded on the basis that the required statement was confined to the grounds said to justify orders specifically for and relating to the appointment of receivers and it was not required to identify the grounds upon which the other orders were sought. Its statement referred only to a failure by the appellant to lodge a required financial report with ASIC.⁷⁰ In other respects, ASIC proceeded on the basis that the relevant grounds were to be identified in the outline of submissions which the same order of Peter Lyons J directed it to file, and which it did file, on Friday 12 July 2013. ASIC’s construction of the directions was not unreasonable. In any event it must have been immediately apparent that ASIC’s statement in relation to paragraphs 3, 5 and 7 of its application did not set out the grounds upon which ASIC relied for an order under s 601NF(1).

- [52] The appellant pointed out that it was senior counsel for the first respondents rather than counsel for ASIC who conducted the relevant cross-examination of Ms Muller. Those parties sought different orders and advanced separate cases, but it must have been apparent that the first respondents’ and ASIC’s cases coincided in the respects put by the first respondents’ senior counsel in cross-examination. Repetition of that cross-examination by ASIC’s counsel would have been a pointless and wasteful exercise. In this case at least, the identity of the party whose barrister conducted the cross-examination does not bear upon the question whether the purposes underlying the rule in *Browne v Dunn* were satisfied.
- [53] Contrary to another submission made for the appellant, in the unusual circumstances of this matter the fact that Mr Park was not cross-examined about the imputations of misconduct is not a ground for setting aside the primary judge’s findings. The appellant originally did not file an affidavit by Mr Park even though ASIC and the first respondent had given notice in correspondence and in ASIC’s outline of serious criticisms of the conduct of the administrators. Ms Muller’s oral evidence was completed on the first day of the hearing. Mr Park swore his affidavit on the same day. The appellant’s senior counsel made it clear that Mr Park’s evidence concerned only different issues recently raised in new submissions for Mr Shotton. Mr Park’s affidavit included statements to the effect that Ms Muller had the primary carriage of the administration and that his affidavit responded only to the new issues raised by Mr Shotton. As Mr Shotton argued, the inference is that the appellant was content to meet the imputations of misconduct by relying only upon the evidence of Ms Muller. That explains why the appellant’s senior counsel did not at the hearing object that the primary judge should not make any findings adverse to Mr Park. As ASIC argued, if (which was not contended) the administrators’ reliance only upon the affidavit of Ms Muller and her answers in cross-examination did not take the best advantage of the opportunities which the rule in *Browne v Dunn* is designed to secure, that does not establish that there was any breach of the rule.⁷¹

⁶⁸ AB 2585.

⁶⁹ AB 2399.

⁷⁰ AB 2403.

⁷¹ *Re Association of Architects of Australia; ex parte Municipal Officers Association of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J, referring to Deane J’s observations in *Sullivan v Department of Transport* (1978) 1 ALD 383 at 403.

- [54] In the result (again putting aside the imputations about the administrators' conduct in the litigation dealt with elsewhere in these reasons), with one arguable exception the primary judge's findings adverse to the administrators were made only after the administrators had been given such clearly expressed notice of the imputations as allowed them the opportunity of responding to them by their own evidence (as Ms Muller did) and any other evidence they might obtain. The arguable exception concerns the primary judge's conclusion that the administrators preferred their own interests to the interests of scheme members. An imputation to that effect was clearly made in ASIC's and Trilogy's solicitors' correspondence before the hearing and it was implicit in ASIC's outline, but notice of it was given to Ms Muller in cross-examination only indirectly, by questioning upon other imputations from which this conclusion was sought to be inferred, and obliquely, by a double-barrelled suggestion in cross-examination about the sincerity of Ms Muller's denial that the administrators were motivated by fees.
- [55] If the appellant's conduct of its case were not taken into account, the proper conclusions might be that the rule in *Browne v Dunn* was contravened and that the finding should be set aside because an imputation of this seriousness should have been put in cross-examination in direct and unambiguous terms to each of Ms Muller and to Mr Park. If the administrators had occupied the role of independent witnesses, the manner in which the appellant conducted its case might not have been relevant in deciding whether the rule was contravened, or in deciding whether a contravention required the finding to be set aside,⁷² but the administrators were not independent witnesses. Because they controlled the appellant, the appellant's conduct of the litigation should be taken into account.
- [56] If the rule in *Browne v Dunn* is breached, the party affected by the breach ordinarily should take that point at the hearing.⁷³ The administrators could have caused the appellant to seek a remedy at the hearing for the points which the appellant now takes for the first time on appeal. As Gummow, Kirby and Callinan JJ said in *MWJ v The Queen*, reliance on *Browne v Dunn* can be "misplaced and overstated"; their Honours gave the example of a case in which, where the evidence has not been completed, "a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put."⁷⁴ Instead of taking that course, the appellant relied upon Ms Muller's evidence to oppose the findings it now challenges.
- [57] The appellant's conduct of the litigation confirms that the administrators did have sufficient notice to meet ASIC's and the first respondents' cases that the administrators preferred their own interests to the interests of scheme members. That should be inferred from an accumulation of circumstances: the clear notice of that imputation in ASIC's and the first respondents' solicitors' correspondence to the appellant's solicitor well before the hearing, the fact that Ms Muller addressed that imputation in her affidavit, the indirect notice of that imputation given in ASIC's outline delivered before the hearing, the clear notice of it given in the

⁷² See *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 and *Bale v Mills* (2011) 81 NSWLR 498 at 515 [66].

⁷³ See, for example, *Gordon Martin Pty Ltd v State Rail Authority of New South Wales & Anor* [2009] NSWCA 287 at [69].

⁷⁴ (2005) 80 ALJR 329 at 339 [40].

openings for ASIC and the first respondents, the oblique notice of it given in the cross-examination of Ms Muller, the unmistakable notice of it given in ASIC's and the first respondents' final submissions, and the appellant's omission to object to the primary judge considering this aspect of ASIC's and the first respondents' cases or to require the administrators to be recalled for the imputation to be put to Mr Park and to be put more clearly and directly to Ms Muller. In those circumstances the essential purposes of the rule in *Browne v Dunn* were fulfilled.

- [58] Before leaving this topic I should add that, contrary to what may have been implicit in aspects of the argument for the administrators, the primary judge did not hold that the administrators had breached their duties as officers of the appellant as responsible entity under s 601FD(1)(c) of the *Corporations Act* 2001 to give priority to the members' interests in a conflict between those interests and the interests of the responsible entity (the primary judge did not refer to that provision or express any conclusion in relation to it), or that they had in fact breached an applicable statutory duty, or that they had intentionally preferred their own interests to the interests of the members in a situation in which the administrators were conscious that there was a conflict between those different interests.

- [59] I refer now to the grounds of appeal.

Ground 1

- [60] Ground 1 in the notice of appeal challenges the primary judge's conclusions that the administrators had demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act* 2001, they had preferred their own commercial interests to the interests of the Fund, the Court could not be assured that they would act properly in the interests of the members of the Fund in identifying conflicts during the course of the winding up or in dealing with those conflicts, and the conduct of the administrators made it necessary that the Court appoint someone independent to have charge of the winding up of the Fund pursuant to s 601NF(1) of the *Corporations Act* 2001.

Ground 1(e)

- [61] The first basis of that challenge is expressed in ground 1(e). It is that the first two of those findings were not put to either of the administrators in cross-examination. The first finding is a reformulation of the second finding. This ground of appeal fails for the reasons given in relation to *Browne v Dunn*.

Ground 1(f)

- [62] Ground 1(f) contends that none of the findings took into account unchallenged evidence of the administrators that they believed that it was in the best interests of the members of the Fund that the appellant remain the responsible entity and that the appointment of Trilogy as responsible entity of the Fund was not in the best interests of members (as the primary judge found), and the existence of a reasonable basis for both beliefs in the findings and the evidence. The appellant submitted that the reasonableness of the administrators' belief was demonstrated by evidence that staff of Administration (which was related to the appellant) and the administrators' firm had done a great deal of complex work in familiarising themselves with the Fund assets and in developing strategies to dispose of those assets in a way which achieved the greatest return for members over the shortest period of time, that the administrators had developed a sound working relationship with the secured creditor Deutsche Bank AG, that they had sought to ensure that the bank did not take action prejudicial to the interests of members, and that there was a risk that the

proceedings might prompt the bank to appoint receivers (a risk which eventuated shortly before the trial).

- [63] The inferences drawn by the primary judge were not inconsistent with the administrators having believed on reasonable grounds that it was in the members' interests that the appellant should not be replaced by Trilogy as responsible entity of the Fund. Rather, those inferences were drawn from the cumulative effect of findings about the particular ways in which the administrators went about responding to Trilogy's challenge.

Ground 1(g)

- [64] The remaining paragraph of ground 1, ground 1(g), contends that the findings were not the proper inferences to be drawn from the evidence. That should not be accepted. Those findings were justified by the cumulative effect of the following interrelated circumstances:
- (a) The administrators organised the meeting in the circuitous and technical way described by the primary judge.
 - (b) They did so upon their own initiative, without any request for a meeting by any underlying investor.
 - (c) They did so in the midst of discussions with ASIC about calling a meeting to consider its initial draft resolutions, where the administrators' conduct had conveyed an intention to cooperate with ASIC in the drafting of those resolutions, and upon giving only perfunctory notice of the proposed meeting to ASIC.
 - (d) They did so without disclosing the technique they had used in organising the meeting until ASIC later elicited that information from them.
 - (e) The resolutions in the notice of meeting which the administrators caused to be issued differed significantly from those in ASIC's initial draft. Instead of open-ended questions which allowed the members to decide whether the appellant should remain as responsible entity and whether the Fund should be wound up, the proposed resolutions were framed in a way which ensured that the appellant's appointment as responsible entity would be endorsed if the appointment of Trilogy was rejected.
 - (f) The administrators then appreciated that it was unlikely that Trilogy would be appointed. (On 23 April 2013 the administrators' solicitor stated to a representative of ASIC that the appellant would prevail in a contest with Trilogy⁷⁵ and, in an affidavit sworn on 2 May 2013 in support of an application for an adjournment of the hearing of the first respondents' application, Ms Muller referred to the meeting convened for 30 May 2013 and deposed that the "matters of fact that will need to be resolved in the present proceeding include... (e) That a substantial body of members is in favour of the [appellant] remaining as Responsible Entity... (f) That a substantial body of members is opposed to Trilogy becoming a temporary or permanent Responsible Entity...").
 - (g) The administrators strenuously opposed the resolution for the appointment of Trilogy which they had themselves proposed in the notice of the meeting.

⁷⁵ Affidavit of Ms Hayden, at [14], AB 2290.

- (h) The notice of meeting and other documents included misleading statements, all of which advocated the rejection of Trilogy as responsible entity in favour of the appellant.
- (i) The administrators did not adequately modify those misleading statements when they were drawn to their attention.
- (j) The administrators persisted with the meeting even when it must have seemed to them to be inevitable that Trilogy would not be appointed because, in addition to the administrators advocating against its appointment, Trilogy itself advocated against it by refusing to accept any appointment purportedly made at the meeting on the grounds that the appointment would be invalid, that Trilogy did not have the necessary licence, and that it did not consent to an appointment made at the meeting.
- (k) The grounds for Trilogy's contention that any appointment of it at the meeting would be invalid were explained in clear and cogent terms to the administrators, but the administrators rebutted that contention without advancing any substantial argument to the contrary.
- (l) The meeting lacked utility as a poll for use in evidence in Trilogy's proceedings in light of Trilogy's opposition to the resolutions and the misleading statements advocating rejection of the appointment of Trilogy.
- (m) Ms Muller repeatedly denied that the primary purpose of the meeting was for use as evidence in the proceedings by the first respondents for the appointment of Trilogy.⁷⁶
- (n) Convening and persisting with the meeting involved expenditure, but (subject to (o)) the meeting could save the members the costs of resisting Trilogy's application only if Trilogy were appointed at the meeting, which could not realistically be expected.
- (o) The only other way in which costs might be saved by convening and persisting with the meeting was if (as ASIC submitted in its outline delivered before the hearing was the administrators' purpose in pursuing the meeting), the rejection of the resolutions at the meeting deterred Trilogy from pursuing appointment as responsible entity.

[65] The appellant argued that it was entitled to call a meeting of members without first obtaining ASIC's approval. That is so. The appellant as responsible entity of the Fund was empowered by s 252A of the *Corporations Act* 2001 to call a meeting of members, but (as I understood the appellant to accept in argument) the members' power to remove the appellant as responsible entity and appoint a replacement responsible entity by resolution was confined to s 601FL and s 601FM. There was in this case no suggestion that there was any other source of power.⁷⁷ Accordingly, any vote by the members upon the resolutions proposed in the appellant's notice of meeting could have effect, if at all, only as a poll which the appellant might seek to put in evidence in Trilogy's application – but Ms Muller denied that this was the administrators' motivation in convening the meeting and the administrators maintained throughout the correspondence that the relevant source of power lay in s 601FL or s 601FM.

[66] The appellant also argued that the meeting was not called without prior notice to ASIC. It is correct, as the appellant submitted, that Ms Muller and Mr Russell gave unchallenged evidence that the appellant consulted ASIC before calling the meeting

⁷⁶ Transcript, 15 July 2013, at 1-44, 1-48, 1-52.

⁷⁷ Cf *MTM Funds Management Ltd v Cavalane Holdings Pty Ltd* (2000) 158 FLR 121 at 128 – 132.

and that ASIC did not object to the appellant calling the meeting, but the evidence nonetheless supports the primary judge's descriptions of the appellant's conduct. The consultation at the meeting of 23 April was accurately described by the primary judge: see [15] of these reasons. It did not concern possible resolutions in the form subsequently published by the administrators. That meeting was followed by ASIC forwarding a draft enforceable undertaking for discussion purposes on 24 April 2013. It contemplated resolutions about the appointment of a responsible entity over the Fund and about whether the Fund should be wound up and, if so, by whom. On 25 April 2013 there were communications between ASIC and the administrators' solicitor, Mr Russell, in which Mr Russell was invited to forward any changes to the initial draft undertaking. Ms Gubbins deposed to a telephone conversation with Mr Russell on the morning of 26 April in which Mr Russell responded to Ms Gubbins' request to forward a proposed amended draft undertaking for ASIC's review by indicating that he should have something for ASIC by lunch time; Mr Russell did not mention that the administrators intended to issue a notice of meeting without further discussion about the draft undertaking.⁷⁸ (This was not in issue: senior counsel for the appellant put to Ms Gubbins and she agreed, that Mr Russell ended up by saying that he would send her a fresh draft.⁷⁹) Mr Russell's affidavit evidence did not contradict Ms Gubbins' evidence on that topic. In another affidavit Mr Russell referred to a conversation in the afternoon of 26 April in which he told Ms Gubbins that he had done some work on the draft enforceable undertaking and he had some concerns about it; Ms Gubbins said that the enforceable undertaking was no longer urgent (Trilogy's application had been adjourned from 29 April to 2 May), and that "we could take more time to talk about the terms of the undertaking".⁸⁰ In cross-examination by the appellant's senior counsel, Ms Gubbins agreed that her understanding was that the enforceable undertaking was still under consideration on the administrators' side.⁸¹

- [67] As the primary judge accepted, the evidence revealed that the appellant briefly informed ASIC of the notice of meeting, but the appellant did not give ASIC the material sent to members.⁸² The consultations could not possibly be regarded as an endorsement by ASIC of the appellant's conduct in issuing the notice of meeting, of doing so in the terms in which that notice was issued, or of interrupting the previous cooperative approach in those respects. The evidence to which the appellant referred justified the primary judge's finding that the appellant contradicted ASIC's expectation that the administrators would work with ASIC about what would be put at the meeting.⁸³ As the appellant submitted, there was no legal impediment to the appellant acting in that way. But in the context of other conduct it suggested that "the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions".⁸⁴

- [68] It is not helpful to consider the brief submissions made about the power of ASIC to seek an enforceable undertaking and the efficacy of the resolutions as they appeared in ASIC's draft. ASIC put its draft forward only for the purposes of discussion and the discussion was not concluded before it was interrupted by the administrators'

⁷⁸ Affidavit of Ms Gubbins, at [6] – [8], AB 2248.

⁷⁹ Transcript, 15 July 2013, at 1-63, AB 176.

⁸⁰ Affidavit of Mr Russell, 15 July 2013, at [7] – [12], AB 1507 – 1508.

⁸¹ Transcript, 15 July 2013, at 1-63, AB 176.

⁸² [2013] QSC 192 at [60].

⁸³ [2013] QSC 192 at [60].

⁸⁴ [2013] QSC 192 at [88].

unilateral decision to convene a meeting for the members to consider the resolutions framed by the administrators.

- [69] In relation to [64](e), ASIC argued that the effect of the resolutions in the appellant's notice of meeting was to "put Trilogy on the spot because the removal of LM depends upon the members being satisfied that Trilogy should be appointed in its stead"; this should be contrasted with the "open question" drafted by ASIC which inquired whether the members wanted the appellant to be removed, for reasons of conflict, for example, and replaced by somebody else.⁸⁵ The appellant argued that ASIC's argument was new and in any event could not succeed because the expressed interlinking of the resolutions merely gave express notice to the scheme members of what was in any event required by the *Corporations Act* 2001. The appellant referred to the provision in s 601NE(1)(d) that the responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution if the members remove the responsible entity by resolution but do not at the same meeting pass a resolution choosing a new responsible entity which consents to becoming the scheme's responsible entity.
- [70] The point about the interlinking of the resolutions was not new. The first respondents' senior counsel put to Ms Muller that the two resolutions, which Ms Muller believed were not in the interests of unit holders, were to be put at the meeting, each resolution was dependent upon the other, calling the meeting was a ploy because Ms Muller thought that she would control the numbers and get rid of Trilogy, she thought that Trilogy would be defeated at the meeting and that would induce Trilogy to depart, she would not have put the resolutions to the meeting if there was a risk of them succeeding, nothing put forward at the meeting was considered by her to be in the members' interests, it was not true that the administrators' objective in calling the meeting was to allow investors to democratically determine who they wished to manage their Fund, that could not be true because Trilogy had made it plain that it would not consent to be appointed by the meeting, and the meeting was being pursued to shore up the appellant's position as responsible entity and to fend off Trilogy. The primary judge referred to the interlinking of the resolutions in finding that the appellant unilaterally departed from its foreshadowed co-operation with ASIC by convening a meeting which proposed "much more specific" resolutions than those which ASIC had proposed.⁸⁶ The inference that this meeting was a tactic to defeat a rival for control of the Fund was not negated by the fact that a similarly framed resolution would be required in a different case.
- [71] In relation to [64](l) and (m), the appellant argued that even if the resolutions were not authorised by s 601FL or s 601FM, the appellant validly called the meeting and the votes cast at the meeting could be used in evidence in Trilogy's application. The appellant emphasised the primary judge's acceptance that the scheme for deciding who was an "associate" within the meaning of s 253E was complex, so that the administrators could not be criticised, and were not criticised by the primary judge, for making an error about that. The appellant also argued that the only possible reason for the administrators' attempt to engage s 601FL or s 601FM was to make effective any resolution passed by the members to remove the responsible entity and appoint Trilogy in its stead. These arguments do not suggest any flaw in the primary judge's conclusion that the meeting was a tactic to defeat a rival for control of the Fund. The weight of the argument about ss 601FL and 601FM was distinctly

⁸⁵ Transcript, 18 November 2013, at 1-38.

⁸⁶ [2013] QSC 192 at [60].

reduced by the circumstances that the artifice used by the administrators to organise the proposed meeting came to light only as a result of the active pursuit of the relevant documents by ASIC and that the appellant continued to rely upon ss 601FL and 601FM to justify the meeting without making any serious attempt to rebut Trilogy's arguments against the applicability of those provisions.

- [72] ASIC argued that the representations made by the administrators lacked candour and were inaccurate "in ways that it is difficult to ascribe to oversight or mistake."⁸⁷ The appellant responded that the evidence did not support a conclusion that the administrators deliberately made the misleading representations. The primary judge did not find that the administrators deliberately mislead the members. Nevertheless, the failure of the administrators to appreciate that their advocacy against Trilogy's appointment was misleading in the rather obvious respects found by the primary judge supports the conclusions that "...the interests of the members of the scheme were not at the forefront of the thinking of those making the decisions".⁸⁸
- [73] The appellant also argued that the primary judge's findings were inconsistent with and did not take into account the evidence given by Ms Muller in paragraph 79 of her affidavit that "...the matter of professional fees formed no part of [Mr Park's] or my reasons in convening the meeting of members".⁸⁹ The appellant referred to *Pollard v RRR Corporation Pty Ltd*⁹⁰ and argued that the primary judge impermissibly rejected Ms Muller's evidence without grappling with it in the reasons. In the cited paragraph McColl JA said that "[w]here it is apparent from a judgment that no analysis was made of evidence competing with evidence apparently accepted and no explanation is given in the judgment for rejecting it, it is apparent that the process of fact finding miscarried". Ms Muller's evidence on this point was not susceptible of analysis of the kind contemplated by McColl JA. It was in the form of a conclusion which was either correct or incorrect. The detailed evidence about the administrators' conduct in relation to the meeting and their dealings with ASIC did require analysis. That was reflected in the focus upon that body of evidence in the final submissions at the hearing. Ms Muller was cross-examined at length about the administrators' conduct and dealings and her state of mind and the primary judge carefully analysed the evidence and explained in detail why ASIC's and the first respondents' cases should be accepted and the appellant's case rejected. The primary judge's reasons and conclusion sufficiently explained why the primary judge did not accept Ms Muller's statement. (I note also that no ground of appeal challenged the judgment on the ground that the primary judge's reasons were inadequate).

- [74] Ground 1(g) is not made out.

Ground 2

- [75] Ground 2 contends for error in the primary judge's ultimate conclusions on the basis of challenges to some of the findings which informed those conclusions.

Ground 2(a)

- [76] Ground 2(a) challenges the primary judge's finding that the administrators' purpose was "to use the meeting as a strategy to defeat or damage Trilogy's prospects on its

⁸⁷ Transcript, 28 November 2013, at 1-44.

⁸⁸ [2013] QSC 192 at [88].

⁸⁹ Affidavit of Ms Muller, at [79], AB 1077.

⁹⁰ [2009] NSWCA 110 at [66], a passage quoted with approval in *Coote v Kelly* [2013] NSWCA 357 at [39].

originating application”⁹¹ or as “a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund]”⁹² on the ground that those findings were not the proper inferences to be drawn from all of the evidence. This ground fails for the reasons given in relation to ground 1(g).

Ground 2(b)

- [77] Ground 2(b) contends that the finding that the appellant pursued continuing control of the Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witnesses in cross-examination and that it was not the proper inference to be drawn from all of the evidence. The first contention fails for the reasons given in relation to *Browne v Dunn*. The second contention fails for the reasons given in relation to ground 1(g).

Ground 2(c)

- [78] Ground 2(c) contends that the finding that the appellant’s choice not to work with ASIC and not to hold a meeting at a time which allowed resolutions as to winding up at the same time as resolutions as to the responsible entity meant that the appellant was pursuing its continuing control of the Fund in a manner which was at odds with the interests of members was not put to either of the administrators or any other witness in cross-examination and was not the proper inference to be drawn from all of the evidence.
- [79] The first contention invoked non-compliance with the rule in *Browne v Dunn*. That contention fails for the reasons given under that heading. In relation to the second contention, the appellant’s dealings with ASIC formed only one of the many circumstances from which the primary judge inferred that the appellant pursued its continuing control of the Fund in a manner which was at odds with the interests of the members. The first contention fails for the reasons given in relation to ground 1(g).

Ground 2(d)

- [80] Ground 2(d) challenges the primary judge’s rejection of Ms Muller’s evidence that there was “an appreciable chance” that Trilogy might be elected at the 13 June 2013 meeting. Ground 2(d)(i) contends that Ms Muller was not cross-examined on the facts about which she gave evidence as the basis for her belief and ground 2(d)(ii) contends that there was no evidence which controverted those facts.
- [81] As ASIC argued, both contentions are based upon the false premise that Ms Muller’s evidence concerned her state of mind when the administrators caused the meeting to be convened. The primary judge’s finding was expressly related to the later time when members had been informed that Trilogy did not have a licence to operate as responsible entity and did not consent to do so. The relevant part of Ms Muller’s affidavit appeared under a heading “The Meeting of Members held on 30 May 2013”. The appellant’s submissions identified the relevant facts as those set out in paras 69, 76 and 77 of her affidavit. Those alleged facts were that, as a member of the fund, Trilogy was entitled to attend a meeting of members and advocate and vote for its own appointment; it had become the responsible entity of a related fund earlier upon a vote of the members of that fund; it was interested in becoming the responsible entity of the Fund; a mortgagee of one of the member’s units in the Fund might have exercised its security rights to vote in favour of Trilogy; and

⁹¹ [2013] QSC 192 at [51].

⁹² [2013] QSC 192 at [86].

Trilogy might have made various legal arguments about its and others' entitlements to vote. Ms Muller summarised her resulting belief as being that:

"...before convening the meeting, I believed that there was an appreciable chance that Trilogy may have responded to the Notice of Meeting (including by litigation either before or after the meeting) to secure voting rights in respect of approximately 45% of the required vote and, in that event, it may easily secure the requisite 50% majority."⁹³

- [82] The first respondents' senior counsel asked Ms Muller when she held her belief in that respect. She responded that she held the belief "right up until the time that the votes closed".⁹⁴ Ms Muller was then cross-examined about her state of mind at the time specified in the primary judge's finding. Senior counsel for the first respondent cross-examined Ms Muller in detail upon the appellant's solicitor's letter of 27 May 2013. Ms Muller disagreed that the purpose in calling the meeting was to get evidence for the court. It was put to her that **by this time** she already knew that Trilogy was not going to participate in a meeting. Her response was that they might have changed their mind, but she could not identify any facts which might support that view. When it was put to Ms Muller that it could not be true that the appellant's objective in calling the meeting was to allow investors to democratically determine who they wished to manage their fund because Trilogy had made it plain they would not consent to be appointed at the meeting, she responded that Trilogy could have consented after the results of the vote, but she acknowledged that there had not been any facts to suggest that Trilogy had changed its view.⁹⁵ The primary judge was entitled to treat those answers as unconvincing. In cross-examination on subsequent correspondence, it was put to Ms Muller that the proxies received before the meeting were overwhelmingly against the resolutions. Her response was that she did not know whether Trilogy might place a number of proxies at the last minute. That too seems unconvincing.
- [83] It was put to Ms Muller in terms that "the meeting was being pursued to shore up your own position...to help... to fend off Trilogy". Ms Muller denied that. It was put to her that the administrators' true motive was "to achieve a forensic advantage in these proceedings". After further detailed cross-examination upon the correspondence it was put to Ms Muller that she was not being sincere. Ms Muller agreed that she did not tell the members of the Fund that the administrators had organised the Trustee to requisition the meeting or that ASIC's view was that the meeting was void, had been called for an ulterior purpose, and should be cancelled. She agreed that this could have affected the members' voting. Her explanation was that "...in my view, my solicitors were still working with [ASIC] right up until the day of the meeting in relation to disagreeing with their position...".⁹⁶ That the administrators' solicitor expressed disagreement with the statements made by ASIC is not a persuasive explanation for the administrators' failure to correct the misleading impression conveyed to the members that ASIC was not opposed to the meeting.
- [84] Ms Muller denied the suggestion that she was not sincere in her statement that, up to the time when the voting closed, "I believed that there was an appreciable chance that Trilogy would carry the day".⁹⁷ When it was put to her that she was not being sincere because she knew that the overwhelming majority of proxies were against

⁹³ Affidavit of Ms Muller, at [78], AB 1076 (emphasis added).

⁹⁴ Transcript, 15 July 2013, at 1-54.

⁹⁵ Transcript, 15 July 2013, at 1-48, 1-49.

⁹⁶ Transcript, 15 July 2013, at 1-53, line 20.

⁹⁷ Affidavit of Ms Muller, at [15], AB 1075; Transcript, 15 July 2013, at 1-54, lines 20 – 41.

Trilogy and she knew what her solicitor had stated to ASIC on 23 May (that the overwhelming majority of the proxies were against the resolutions), Ms Muller responded that those were just the proxies which had been received and “a substantial amount of proxies could be received which would exceed the number that had been received...”.⁹⁸ The appellant relied upon this answer and upon what was submitted to be the absence of evidence contradicting Ms Muller’s statements forming the factual foundation for her opinion. The primary judge was entitled to consider that the mere assertion of a possibility that the trend of proxies might be reversed was unpersuasive.

- [85] The statements of Ms Muller identified in the appellant’s argument concerned Ms Muller’s state of mind at the earlier time when the meeting was called. Thus, for example, Ms Muller’s statement that, for various reasons, she believed that Trilogy “was well able to promote its case for election to members”⁹⁹ had been superseded by Trilogy’s subsequent conduct in advocating against its own election and stating that it did not consent to appointment, it did not hold a requisite licence, and it considered that the meeting was invalid. The same was true of the other paragraphs in Ms Muller’s affidavit upon which the appellant relied. They depended upon a view that Trilogy might take steps designed to procure its appointment at the meeting,¹⁰⁰ a view which was well and truly falsified by Trilogy’s subsequent conduct.
- [86] The evidence to which the primary judge referred justified the primary judge in rejecting Ms Muller’s evidence that there was an appreciable chance that Trilogy would be elected at the 13 June 2013 meeting. Nor was there any contravention of the rule in *Browne v Dunn* in that respect.

Ground 2(e)

- [87] Ground 2(e) contends that the finding that the interests of the members were not at the forefront of the thinking of the administrators was not put to the administrators in cross-examination and was not the proper inference to be drawn from all of the evidence. The first contention fails for the reasons given in relation to *Browne v Dunn*. The second contention fails for the reasons given in relation to ground 1(g).

Ground 2(f)

- [88] Ground 2(f) contends that the findings in relation to the meeting failed to have sufficient regard to the desirability of ascertaining the views of the members as to which entity they wished to act as responsible entity of the Fund. The primary judge did have regard to that matter, ultimately finding that “any objective observer must have doubted the meeting’s use even as a poll”.¹⁰¹ That finding was correct for the reasons given by the primary judge. In any case, Ms Muller repeatedly denied that the administrators were motivated to convene the meeting for the purpose of ascertaining the members’ views for use as evidence in the court proceedings.

Ground 2(g)

- [89] Ground 2(g) contends that the primary judge erred in failing to have regard to the consideration that once a meeting was called the responsible entity had no power to cancel the meeting. The appellant referred to the provision in s 252A of the *Corporations Act* 2001 that a responsible entity of a registered scheme may call a meeting of the scheme’s members and argued that, the meeting having been relevantly called, the appellant had no power to cancel it.

⁹⁸ Transcript, 15 July 2013, at 1-54.

⁹⁹ Affidavit of Ms Muller, at [69], AB 1074.

¹⁰⁰ Affidavit of Ms Muller, at [76] and [77], AB 1076.

¹⁰¹ [2013] QSC 192 at [87].

- [90] The administrators had confirmed in their solicitors' correspondence of 27 May 2013 that they relied upon ss 601FL and 601FM as the legal basis for the meeting. They did not invoke s 252A or any legal impediment to cancelling the meeting. Rather they insisted upon the meeting proceeding in the face of cogent arguments, with which the administrators did not engage in a meaningful way, which suggested that the meeting was pointless and a waste of the members' time and money.

Ground 2(h)

- [91] Under ground 2(h) the appellant contended that the primary judge failed to have regard to the activities of two firms of solicitors in relation to issues concerning the 13 June meeting. The appellant argued¹⁰² that the reasons and ASIC's submissions on appeal did not explain a series of events established by the evidence:

- “(a) the retainer of solicitors by the administrators to assist them to draw and settle the meeting materials and in their dealings with ASIC;
- (b) numerous statements by the solicitors in the correspondence that they wished to cooperate with ASIC;
- (c) Norton Rose's request to meet with ASIC to restore good relations;
- (d) Mr Russell's and Ms Muller's evidence that he was not instructed to refuse any undertaking;
- (e) Mr Russell's evidence that he would have advised against such a course;
- (f) Mr Russell's contemporaneous reports to the administrators and counsel after his last conversation with Ms Gubbins before the hearing on 2 May, 2013;
- (g) Mr Russell continuing to work on the terms of the draft EU after that conversation;
- (h) the immediate attempt to settle the terms of the draft EU with ASIC, once Mr Russell learned that ASIC did want the undertakings;
- (i) why evidence of Ms Muller was rejected;
- (j) why evidence of Mr Russell was rejected.”

- [92] Subparagraphs (d) – (h) relate to ground 3(a) and are considered under that heading. Subparagraph (i) relates to ground 1(g) and is considered under that heading. As ASIC argued, the appellant did not contend that the solicitors acted otherwise than on the administrators' instructions. The appellant's approach at the hearing was instead to argue that the administrators' conduct, including that engaged in by the solicitors on behalf of the administrators, was appropriate. In those circumstances, the evidence about the appellant's solicitors' conduct upon which the appellant relied does not suggest any error in the primary judge's findings.

Ground 3(a)

- [93] Ground 3(a) challenges the primary judge's finding that on 29 April 2013 the appellant informed ASIC that the appellant was not willing to enter into an enforceable undertaking. For that finding the primary judge referred to an affidavit by Ms Hayden. Ms Hayden was special counsel in the chief legal office of ASIC. The paragraph of her affidavit to which the primary judge referred contained a statement that her ASIC colleague, Ms Gubbins, informed her that the administrators' solicitor

¹⁰² Appellant's outline of argument in reply to that of ASIC, at [20].

Mr Russell had just telephoned Ms Gubbins and advised that the administrators were no longer willing to enter into an enforceable undertaking. There was no objection to the admission in evidence of this hearsay statement, but the appellant argued that it had no weight. The appellant also argued that the primary judge failed to have regard to Mr Russell's and Ms Muller's evidence that he was not instructed to refuse any undertaking, and other aspects of Mr Russell's evidence (including that he would have advised against such a course).

[94] The effect of Ms Hayden's hearsay statement was that it was the administrators rather than the appellant who were unwilling to give an enforceable undertaking. Mr Russell gave evidence that he told Ms Gubbins that he did not think that the administrators could sign the enforceable undertaking but the appellant could do so. He did not tell Ms Gubbins that the administrators were not willing to enter into an enforceable undertaking. Ms Gubbins said that the appellant and ASIC could, in view of an adjournment of the Trilogy application, take more time to talk about the terms of the enforceable undertaking. He continued to work on those terms following his discussion with Ms Gubbins on 26 April 2013. After a directions hearing on 2 May 2013 there was a discussion between Ms Muller, Ms Gubbins and himself in which a question was asked about whether, as a result of the trial taking place before the meeting, the enforceable undertaking had fallen by the wayside. Ms Gubbins agreed with that assessment. It was not until 20 May that he learned indirectly that Ms Hayden still wanted the enforceable undertakings.

[95] In Ms Gubbins' affidavit in reply, she did not refer to Mr Russell's evidence and on this topic she said only that Mr Russell told her on 26 April 2013 that the administrators had some concerns about signing an enforceable undertaking but were happy to sign some other form of public undertaking. (That is similar to evidence which Ms Hayden gave in her affidavit that on 29 April 2013 Ms Gubbins informed her that Ms Gubbins had spoken to either Ms Muller or one of Ms Muller's lawyers who had told Ms Gubbins that "she and/or [the appellant]...does not want to sign an EU due to the negative connotations, but is willing to sign a public undertaking in some other form..."¹⁰³). Ms Muller gave evidence to similar effect; she did not ever give instructions that the administrators were unwilling to sign an enforceable undertaking, as a result of the conversation on 2 May 2013 she understood that ASIC no longer required an enforceable undertaking; and she did not become aware until 20 May 2013 that ASIC still sought an enforceable undertaking from the appellant. In cross-examination, Ms Gubbins accepted Mr Russell's and Ms Muller's versions of the conversation which occurred after the directions hearing on 2 May 2013.

[96] This evidence is inconsistent with the primary judge's finding that on 29 April 2013 the appellant informed ASIC that the appellant was not willing to enter into an enforceable undertaking.

Grounds 3(b) and (c)

[97] Ground 3(b) contends that the error identified in ground 3(a) vitiated the primary judge's conclusion that Ms Muller's statement in an affidavit of the administrators' desire to "ensure that our conduct of [the appellant] was, to the extent possible, satisfactory to ASIC..." and that "...Mr Park and I have been discussing with ASIC a proposal for undertakings to meet any concerns of ASIC and any (bona fide) concerns of members in relation to the conduct of this Fund" were not "consistent with the reality of the [appellant's] interactions with ASIC".¹⁰⁴ That should not be

¹⁰³ Affidavit of Ms Hayden, at [31](b)(i), AB 2293.

¹⁰⁴ [2013] QSC 192 at [62].

accepted. The primary judge's conclusion was amply supported by the findings that although ASIC had sought the administrators' comments and amendments to the draft enforceable undertaking forwarded by ASIC on 24 April 2013, instead of the appellant responding to ASIC as it had foreshadowed, on 26 April 2013 the appellant adopted a circuitous and technical approach to convene the meeting without reference to any underlying investor for the purpose of putting resolutions which differed from those discussed with ASIC and it did not give to ASIC the material sent to members.

- [98] Ground 3(c) contends that errors identified in "paragraph 1 above" affected the primary judge's findings in relation to the 13 June 2013 meeting upon which the primary judge's conclusion depended. This contention fails for the reasons given in relation to grounds 1 and 3(b).

Ground 4

- [99] Ground 4 contends that, for the reasons set out in grounds 4(a) – (f) the primary judge's conclusion that the administrators had preferred their own commercial interests to the interests of the Fund was in error because it was based upon errors in findings adverse to the appellant about its conduct in the litigation.

- [100] I note that the respondents did not address arguments against most of these contentions.

Ground 4(a): introduction

- [101] Ground 4 (a) contends that the conclusion that the appellant conducted the litigation in a combative and partisan way reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members was not put to either of the administrators or any other witness, it did not have regard to the matters in ground 2(h),¹⁰⁵ and was not the proper inference to be drawn from the evidence.

- [102] I will return to ground 4(a) after discussing the findings challenged in grounds 4(b) – (f).

Ground 4(b)

- [103] Ground 4(b) contends that the primary judge erred in finding that it was not argued that Trilogy had published false or misleading statements because (4(b)(i)) the appellant adduced evidence of such statements and (4(b)(ii)) the appellant made submissions at the trial.

- [104] The relevant finding was that Ms Muller's statement in one of her affidavits that Trilogy made false or misleading statements was a serious allegation made against professional people which was not supported in argument at the hearing.¹⁰⁶ Ms Muller's statement was that "numerous statements" in material circulated by Trilogy and its solicitor "are either false or misleading".¹⁰⁷ The appellant argued that it did advance argument in support of this evidence in paragraphs 134 and 135 of its written outline at the trial.¹⁰⁸ ASIC pointed out, however, that those paragraphs referred to only one allegedly misleading statement made on 17 May 2013,¹⁰⁹ which was after the date (2 May 2013)¹¹⁰ when Ms Muller swore her affidavit. There was no error in the finding challenged in grounds 4(b)(i) and (ii).

¹⁰⁵ The ground refers to "1(h)". There is no ground 1(h).

¹⁰⁶ [2013] QSC 192 at [93].

¹⁰⁷ Affidavit of Ms Muller, at [68], AB 720.

¹⁰⁸ AB 2477 – 2478.

¹⁰⁹ AB 1093.

¹¹⁰ Affidavit of Ms Muller, AB 723.

- [105] However, Ground 4(a) raises an issue about the use of that finding in relation to the primary judge's conclusion that the appellant conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members. It was not put to Ms Muller (or any other witness) that the error in the statement in Ms Muller's affidavit was indicative of the administrators preferring their own interests to the members' interests. That was far from being an obvious conclusion.
- [106] In [44](f) of these reasons I noted that the finding that the appellant's conduct in the litigation was combative and partisan was foreshadowed in the following paragraphs of ASIC's outline delivered before the hearing:
- “[15](b)...the administrator's [sic] level of engagement in the adversarial process of this proceeding is surprising...”.
- “[47] The [appellant] has...resisted [the first respondents' application]...in a partisan manner”.
- “[48] ASIC is concerned that the zealotry [sic] of the [appellant's] conduct of this proceeding, exemplified by the volume of material filed on behalf of the [appellant] and the scope of the issues sought to be agitated, is disproportionate to the extent to which the interests of unitholders of the scheme are likely to be advanced.”
- “[50] ... It is surprising therefore that the administrators have been so strenuous with the First Respondent's defence to Trilogy's challenge to its position as responsible entity.
- [51] An example of that strenuousness can be found in the commission and preparation, on behalf of the administrators by their solicitors, of the affidavit of Bradley Vincent Hellen... That affidavit, and the report exhibited to it was, in the circumstances in which it was prepared, never likely to provide much assistance to the Court given:
- a. the limited information upon which the opinions expressed in the report were based; and
- b. the limited relevance of the assumption upon which those opinions were predicated, namely the “maturity” of a contingent liability that was the subject of proceedings in this Court in respect of which judgment had at that time been reserved by Applegarth J. ...”
- [107] Some of those paragraphs were expressed too generally to amount to the notice required by the rule in *Browne v Dunn* about serious allegations in the circumstances of this case. No paragraph in ASIC's outline advocated the particular finding challenged in ground 4(b). So far as I can tell, the appellant also had no notice before the judgment was delivered that the primary judge might rely upon such a finding for a conclusion that the administrators were acting in their own interests rather than in the members' interests.
- [108] It follows that the rule in *Browne v Dunn* was contravened in that respect: see [39] – [40] of these reasons. The imputation that the error in the allegation in Ms Muller's affidavit suggested the administrators were acting in their own interests rather than in the members' interests was serious. Had it been put to Ms Muller, she might have been able to explain why it should not be accepted. Mr Park and the administrators' solicitor might also have been able to give evidence opposed to the primary judge's conclusion. In these circumstances, the appropriate remedy is to treat the finding challenged in ground 4(b) as supplying no support for the primary judge's conclusion.

Ground 4(c)

- [109] Ground 4(c) challenges a finding in paragraph 93 of the primary judge's reasons that Ms Muller's affidavit evidence that Trilogy would not be able to pay a debt of \$81 million if litigation about the claimed debt went against Trilogy was "unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions". The grounds of the challenge are that this was not put to Ms Muller and it was not the proper characterisation of her evidence.
- [110] Mr Hellen concluded that if Trilogy lost the litigation it would be driven to rely either upon insurance or to seek indemnity from a managed fund of which it was responsible entity. Mr Hellen could not assist upon the question whether those sources would allow Trilogy to pay a judgment of \$81 million. Ms Muller deposed that she had reviewed the documents provided to Mr Hellen and his report and that she believed that if judgment went against Trilogy in that litigation "it will be unable to pay that debt...".¹¹¹ Ms Muller did not explain in any more detail the basis for that unqualified opinion. She was not asked to do so in oral evidence.
- [111] It may be that Ms Muller was not challenged about this evidence because the issue became moot when judgment was given in Trilogy's favour in the relevant litigation. In any event the contention in ground 4(c) that there was no such challenge is correct. Furthermore, although ASIC's outline contended that the appellant had conducted the proceeding in a strenuous, partisan and zealous manner, it did not impute to Ms Muller conduct of that kind in relation to this particular statement in her affidavit. So far as I have been able to discover, no party contended for such a conclusion at the hearing before the primary judge. For reasons similar to those given in relation to ground 4(b), the finding that Ms Muller's affidavit evidence was "unprofessionally robust and partisan when it is compared to Mr Hellen's conclusions" should be set aside.

Ground 4(d)

- [112] Ground 4(d) contends that the primary judge's finding in paragraph 94 of the reasons that an affidavit sworn by the appellant's solicitor "was little more than combative and querulous commentary on the litigation" was not put to the solicitor in cross-examination and was not the proper characterisation of the affidavit evidence in light of the application in support of which it was sworn.
- [113] ASIC's outline did not make this imputation against the solicitor, it was not put to him in cross-examination and, so far as I have been able to discover, it was not contended for by any party in at the hearing. This finding should be set aside.
- [114] In any case, such a finding could not be relied upon to support the primary judge's conclusion challenged in ground 4(a). The appellant filed affidavits in response to the contentions in ASIC's outline about the administrators' conduct in the litigation. Ms Muller was not cross-examined upon the statements in her affidavit sworn on 16 July 2013 that she had "relied entirely on our solicitors for the proper conduct of these proceedings" and she had not instructed them "to increase costs, complicate the proceedings, delay the proceedings, or to conduct the proceedings other than perfectly properly." It was not suggested to her or Mr Park that they endorsed or even knew of the contents of their solicitor's affidavit. Nor was their solicitor, Mr Russell, cross-examined. In his affidavit of 15 July 2013 he denied in detail the

¹¹¹ Affidavit of Ms Muller, at [74], AB 721.

contentions in ASIC's outline that the conduct of the proceedings was improper (including in relation to Mr Hellen's report). In the absence of any challenge to that body of evidence, the inference drawn by the primary judge (that the content of the solicitor's affidavit indicated that the administrators conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members) was not open, even if the finding about the character of that affidavit could be sustained.

Ground 4(e)

- [115] Ground 4(e) contends that a finding that an affidavit sworn by Ms Muller was characterised by "sniping and argumentative passages" was not the proper characterisation of the affidavit evidence and was in any event irrelevant. The imputation challenged in this ground was not made in ASIC's outline of submissions or in any other submissions at the hearing and it was not put to Ms Muller in cross-examination. She presumably relied upon her solicitor to exclude any irrelevant material from the draft affidavit she executed, and it was necessary for ASIC to grapple with Mr Russell's evidence if it wished to seek this finding. It must be set aside.

Ground 4(f)

- [116] Ground 4(f) challenges the primary judge's finding that the appellant did not give any prior notice of a proposal made at the conclusion of the hearing that the ASIC and Shotton application should be dismissed on the administrators' undertaking to do all things necessary to secure independent liquidators to the appellant and to Administration. In support of this ground, the appellant referred to a paragraph in an affidavit of Ms Muller in which she deposed that if a conflict arose between the appellant and the Fund, the administrators would seek the appointment of special purpose liquidators to the assets of the appellant held in its own right and the appointment of other practitioners as administrators or liquidators of Administration.¹¹² ASIC did not respond to this argument. It seems that the primary judge overlooked this evidence. This finding must also be set aside.

Ground 4(a): discussion

- [117] It follows that none of the findings challenged in grounds 4(b) – 4(f) are available as support for the primary judge's conclusion that the appellant conducted the litigation in a combative and partisan way reflective of the administrators acting in their own interests to keep control of the winding up rather than acting in the interests of members.
- [118] It is then necessary to refer to other findings made by the primary judge as support for that conclusion.
- [119] The primary judge made a finding (which related to the finding challenged in ground 4(f)) that it appeared that no consideration had been given to the separate interests of the appellant or Administration or the effect of the order proposed in the appellant's alternative submission upon those companies in terms of wasted costs, for example. The primary judge inferred from that finding that "the administrators were acting without regard to the interests of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their

¹¹² Affidavit of Ms Muller, at [36], AB 1065.

continuing control of [the Fund].”¹¹³ That inference was not put to the administrators or otherwise foreshadowed at the hearing, so far as I have been able to discover. For the reasons given in preceding paragraphs this finding is not available as support for the primary judge’s conclusion challenged in ground 4(a).

- [120] The primary judge also made the finding contended for in paragraph [51] of ASIC’s outline (see [106] of these reasons) and relied upon that finding as support for the conclusion challenged in ground 4(a). This finding cannot stand against the body of unchallenged evidence summarised in [114] of these reasons. The same applies in relation to the finding that the appellant had filed an affidavit of over 800 pages “which was of such marginal relevance that it was not referred to in either written or oral submissions by any party.”¹¹⁴ This is an example of ASIC’s argument in its outline of submissions delivered before the hearing that the volume of material filed on behalf of the appellant exemplified the zeal of the appellant’s conduct of the proceeding,¹¹⁵ but that argument was implicitly abandoned when ASIC decided not to cross-examine any of Ms Muller, Mr Park and Mr Russell upon their evidence to the contrary.

- [121] It follows that ground 4 succeeds in relation to all of the findings concerning the administrators’ conduct in the litigation.¹¹⁶ Those findings are not available as support for the primary judge’s ultimate conclusions.

Ground 5

- [122] After concluding that the administrators’ conduct in the litigation was one of the matters which demonstrated that the administrators had preferred their own commercial interests to the interests of the Fund, the primary judge observed that this extended to the administrators swearing to matters which they either conceded were wrong in cross-examination or which were not consonant with reality.¹¹⁷ Ground 5 challenges the conclusion on the basis that it was drawn from incorrect findings that the administrators had sworn to matters which they conceded in cross-examination were wrong.
- [123] The findings were not incorrect for any reason given in ground 5. My reasons for that conclusion are given in the discussion relating to the notice of contention at paragraphs [148] to [156].

Ground 6

- [124] Ground 6 challenges the primary judge’s conclusion that the administrators had preferred their own commercial interests to the interests of the Fund. The ground of this challenge is that the primary judge erred in finding that the administrators had sworn to matters which they conceded were not consonant with reality. That finding is said to be vitiated by errors identified in grounds 6(a) – (f).

Grounds 6(a) and (b)

- [125] Ground 6(a) and (b) fail because they rely upon challenges made in grounds 2(c), 2(d)(ii), and 3(a) which fail for the reasons given in relation to those grounds.

¹¹³ [2013] QSC 192 at [114].

¹¹⁴ [2013] QSC 192 at [94].

¹¹⁵ Submissions on behalf of ASIC, at [48], AB 2536.

¹¹⁶ [2013] QSC 192 at [89] – [96].

¹¹⁷ [2013] QSC 192 at [117].

Ground 6(c)

- [126] Ground 6(c) relies upon the challenge in grounds 4(a) and 4(b)(ii). The challenge in ground 4(b)(ii) fails for the reasons given in relation to that ground. Ground 4(a) succeeds, but for reasons given in relation to grounds 6(e) and (f) that does not justify setting aside the conclusion that the administrators had preferred their own commercial interests to the interests of the Fund.

Ground 6(d)

- [127] Ground 6(d) contends that a finding that a statement in Ms Muller's affidavit (that her and Mr Park's current understanding was that there were no conflicts which existed or were likely to arise) could not objectively be held was not put to Ms Muller in cross-examination and overlooked the balance of her evidence about how the administrators intended to monitor the acknowledged potential for conflict and deal with conflicts.
- [128] Under this ground of appeal the appellant argued that, in referring to Ms Muller's statement that there were no conflicts existing or likely to arise, the primary judge referred only to part of Ms Muller's evidence; reference should also have been made to other statements in which Ms Muller recognised that the current state of affairs might change and that there was potential for conflict to arise. The appellant referred to paragraphs of Ms Muller's affidavit to that effect. Ms Muller implicitly acknowledged in cross-examination,¹¹⁸ as she had in her affidavit, that conflicts might arise. As was submitted for ASIC, however, the primary judge's challenged finding concerned only Ms Muller's unqualified statement that there were no conflicts which existed or which were likely to arise.
- [129] The appellant did not argue that there was a contravention of the rule in *Browne v Dunn* in this respect. The finding that Ms Muller's statement that no conflict existed or was likely to arise was wrong and not consonant with reality should not be set aside.

Grounds 6(e) and (f)

- [130] Grounds 6 (e) and (f) challenge the primary judge's conclusions that the conduct of the 13 June 2013 meeting, the appellant's interactions with ASIC, and the appellant's conduct in the litigation supported the conclusions that the appellant's administrators would pursue their duties otherwise than independently, professionally and with due care, and might not adequately identify and deal fairly with conflicts if they were to arise. The first basis of each challenge is that the adverse imputations about the administrators' conduct were not put to either of them in cross-examination. The other bases for each challenge are that the conclusion was not the proper inference to be drawn from the evidence and the conclusion did not follow from the premise.
- [131] Apart from the primary judge's conclusion about the appellant's conduct in the litigation, the first basis of challenge fails for the reasons given in relation to *Browne v Dunn* and the other bases of challenge fail for the reasons given in relation to other grounds of appeal, particularly ground 1(g).
- [132] For the reasons given in relation to ground 4, the primary judge's findings about the appellant's conduct in the litigation are not available as support for her Honour's ultimate conclusions. That does not justify setting aside those ultimate conclusions or the orders challenged in this appeal. The primary judge derived the findings set

¹¹⁸ Transcript, 15 July 2013, at 1-55.

out in [36] of these reasons from matters which were unrelated to the administrators' conduct in the litigation. The appellant has not established any error in those findings. In the context of the primary judge's conclusions about the potential conflicts which the appellant would face in winding up the Fund, those findings themselves justified the primary judge's ultimate conclusions and the challenged orders.

Ground 7

- [133] Ground 7 contends that the primary judge erred in appointing Mr Whyte to take control of the winding up because evidence that he was the liquidator of a company which was a debtor of the Fund established that his appointment placed him in a position of conflict. By the time the appeal was heard Mr Whyte had embarked upon the winding up of the Fund. In an affidavit filed by leave granted at the hearing of the appeal without opposition, Mr Whyte stated that on 20 September 2013 the Court made an order upon his application that he and his partner be removed as liquidators of the relevant companies. The appellant did not argue that Mr Whyte thereafter remained affected by the suggested conflict or any conflict, or that he should be replaced by a different appointee if the appellant failed on its other grounds of appeal. The appellant argued instead that no appointment should have been made under s 601NF(1) for reasons which are articulated in the remaining grounds of appeal. The appellant's arguments upon ground 7 do not justify the Court setting aside the primary judge's orders.

Conclusion

- [134] For those reasons the appeal should be dismissed.
- [135] Although that conclusion renders it strictly unnecessary to consider the notice of contention, I will explain my conclusions upon that topic.

Notice of contention: conflicts or potential conflicts of interest

- [136] Mr Shotton contended that the judgment should be upheld on the ground, which the primary judge had rejected, that conflicts of interest which the appellant would face in winding up the Fund made it necessary to make the order under s 601NF(1) of the *Corporations Act* 2001 appointing an independent person to take responsibility for ensuring that the Fund was wound up in accordance with its constitution. Mr Shotton argued that the primary judge erred in characterising the relevant matters as potential rather than actual conflicts of interest,¹¹⁹ in holding that "necessary" in the expression "if the Court thinks it necessary to do so" in s 601NF(1) of the *Corporations Act* means "essential",¹²⁰ and in failing to find that the matters found by the primary judge empowered the Court to make, and made it appropriate to make, the order.¹²¹ The appellant argued that the primary judge correctly construed s 601NF, that the distinction between actual conflicts and potential conflicts did not correspond with what was and what was not "necessary" for the purposes of s 601NF(1), and that the primary judge's conclusion appropriately gave effect to the relevant factors.
- [137] It is useful first to deal with Mr Shotton's arguments about the meaning of the word "necessary" in s 601NF(1). Mr Shotton argued that the primary judge treated *Re Orchard Aginvest Ltd*¹²² as authority for the proposition that a real potential for conflicts is not sufficient under s 601NF(1) and as requiring instead that an order is shown to be "essential" for the purpose of the winding up. I accept the appellant's argument that

¹¹⁹ Notice of contention, at [3].

¹²⁰ Notice of contention, at [4](1)–(c).

¹²¹ Notice of contention, at [4](d) and [4](e).

¹²² [2008] QSC 2.

this is not a correct description of the primary judge's reasoning. In *Re Orchard Aginvest Ltd*, Fryberg J accepted that because the particular conflict in issue in that case was "only potential, it may be that the winding-up can be carried out without any conflict actually arising, and therefore the statutory test of necessity can not be satisfied" and that "in all probability" an order under s 601NF(1) could be made only if the order was necessary in the sense of being essential to enable the winding up to occur.¹²³ The primary judge did not adopt that approach. The primary judge held that the power conferred upon the Court to appoint a person other than the responsible entity to take responsibility for the winding up of a scheme "if the Court thinks it necessary to do so" was "more limited than if the section had provided for an appointment where the Court thought it was convenient or desirable to do so."¹²⁴ The primary judge observed that the same view was taken in *Re Orchard Aginvest Ltd*,¹²⁵ *Re Stacks Managed Investments Ltd*,¹²⁶ *Re Equititrust Ltd*,¹²⁷ and *Re Environinvest Ltd*.¹²⁸

[138] It is not necessary to discuss all of the provisions in the *Corporations Act* which use the words "necessary" and "desirable" as alternatives, which were cited for the appellant: ss 961N(1)(b), 983D(1)(a), 1022C(1)(b) and 1323(1). Numerous statutory provisions confer upon courts discretionary power to make an order where that is "convenient" or "desirable". Another common formulation is used in s 601ND(1)(a), which confers a power to make orders where the Court considers it "just and equitable". The word "necessary" imposes a more stringent test than those other expressions. The appellant submitted that "necessary" bears the ordinary meaning of "that [which] cannot be dispensed with" (as given in the *Macquarie Dictionary*). It may not be very helpful to substitute other words for the words actually used in the provision, but that definition does seem to convey the sense of "necessary" in this provision. That comprehends the situation described in parentheses in the provision where the responsible entity is "not properly discharging its obligations in relation to the winding up". Because a Court acting under s 601NF(1) is more directly concerned, not so much with what has happened in a winding up, but what will happen in a winding up, an order may be made where the Court is satisfied that there is an unacceptable risk that the responsible entity will not properly discharge its obligations in conducting the winding up.

[139] The primary judge referred to three matters as amounting to potential conflicts. Mr Shotton described the first of those matters as requiring the appellant to investigate distributions it made as responsible entity of the Fund to itself as responsible entity of other funds. The appellant was the responsible entity for two of the three feeder funds which were Class B unit holders in the Fund; individual unitholders were in a different class. The matter arose out of disproportionate distributions of Fund money as between Class B unit holders and others. The constitution of the Fund permitted the appellant as responsible entity to "distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the [responsible entity] treats the different Classes fairly."¹²⁹ Mr Shotton's argument raised the question whether the different classes of unit holders were treated fairly for the purposes of the constitutional provision.

¹²³ [2008] QSC 2 at 8 – 9.

¹²⁴ *RE Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192 at [47].

¹²⁵ [2008] QSC 2 at 8 – 9.

¹²⁶ (2005) 219 ALR 532 at [50].

¹²⁷ (2011) 288 ALR 800 at [51].

¹²⁸ (2009) 69 ACSR 530 at [132] – [133].

¹²⁹ Constitution of the Fund, cl 3.2, AB 1572.

- [140] In the annual report for the Fund for the year ended 30 June 2012, the “statement of comprehensive income” for year ended 30 June 2012 referred to “distributions paid/payable to unitholders” as \$17,024,389, with the reference to Note 3(a). The “statement of changes in net assets attributable to unitholders” for the same year attributed \$15,959,774 to “units issued on reinvestment of distributions”. Note 3(a) referred to a total of “distributions to unitholders” of \$17,024,389, made up of \$12,318,354 “Distributions paid/reinvested” and \$4,806,035 “Distributions payable”. Note 3(b) referred to nil distributions “paid and payable” to Class A unit holders and an insignificant amount to Class C unit holders. It referred to \$16,904,211 “Distributions paid and payable” to Class B unit holders. The text of the note referred to \$5,572,054 distributions payable being related to distributions requested to be paid before 30 June 2012 and that distributions had been suspended from 1 January 2011. The note recorded that the distributions of \$16,904,211 were declared to Class B unit holders “to enable the feeder funds to recognise distribution income to match expenses incurred. All feeder funds have reinvested back into the Scheme during the period. Compliance with the Trust Deed and Corporations Act in relation to these distributions is a matter of legal interpretation and the Responsible Entity believes it has an arguable position to support the declaration of these distributions as being fair and reasonable to all classes of unitholders”.
- [141] Note 10 referred to “related parties”. It recorded details of the holdings in the relevant scheme by the appellant and its affiliates. Those holdings had increased from 44.09 per cent of the total interest in the scheme at 30 June 2011 to 47.07 per cent at 30 June 2012. Thus it appeared that the feeder funds’ reinvestments in the scheme of the distributions made to them as Class B unit holders resulted in an aggregate increase of about three percentage points of the total interest in the relevant scheme over the 12 month period. The auditors’ report referred to the distributions of \$16,904,211 to Class B unit holders described in Note 3, substantially repeated the text I have quoted, and recorded that this was “an area of significant judgment and accordingly, we bring it to your attention.”
- [142] As Mr Shotton submitted, the accounts suggest that at a time when distributions were generally suspended the appellant in effect distributed substantial amounts of money to itself and did not distribute money to the individual investors, and that the distributions were effected in a way which increased the proportion of the interest in the Fund of the appellant as responsible entity of two feeder funds and correspondingly decreased the proportion of others’ interests in the Fund. Mr Shotton contended that the constitutional provision did not authorise that conduct, or at least that the appellant was obliged to investigate that issue, and that gave rise to an actual conflict of interest.
- [143] The primary judge concluded that before the administrators were appointed the appellant had faced a conflict between its duties as responsible entity of the Fund and as responsible entity for the feeder funds, the administrators had conceded that the distributions might need to be investigated and might give rise to a claim on behalf of some unit holders of the Fund, and, although Mr Park swore to the contrary in his affidavit, he conceded in cross-examination that undoing the transaction would be difficult because of the reinvestment into the Fund on behalf of the Class B unit holders of almost \$16,000,000 of the distribution.¹³⁰ The primary judge held that this issue illustrated the potential for conflict between the interests of the feeder funds and the interests of the Fund if one responsible entity had charge of them all

¹³⁰

[2013] QSC 192 at [103] – [104].

and that there was a potential for the same type of conflict to arise again, including in any attempt to undo the 2012 transaction.¹³¹

- [144] Mr Park described the transaction as involving an actual net cost to the Fund of a maximum of about \$900,000 (the difference between the dividend declared of \$16,900,000 and the units credited on reinvestment of \$15,900,000 referred to in Notes 3 and 6). The appellant argued that where the accounts disclosed that the distribution was made because the feeder funds were in need of distributions to match expenses, Mr Park's unchallenged evidence was that the distributions were used by the feeder funds to pay for audit fees, hedging losses and the like, independent accounting and legal advice was taken, the distributions occurred when the Fund was illiquid, and the funded expenses had to be paid, Mr Shotton had not fulfilled his onus of proof of identifying circumstances which suggested that the distributions were unfair. In addition, the appellant argued that it was significant that the transaction had been the subject of independent accounting and legal advice, that the resultant increase in the proportion of units in the Fund held by Class B members was not unfair to other unit holders because the different classes of units did not carry equal rights, that the imbalance could be rectified by similarly disproportionate distributions in favour of the holders of ordinary units, and that the "actual disproportion" involved only a net payment of about \$900,000, which was very small in comparison to the net assets of the Fund at that time of about \$289,000,000.
- [145] However Mr Park conceded that the transaction was "controversial" and did call for an investigation. He agreed in cross-examination that the transaction was "another example of a transaction that, I agree, should be investigated now that it has been (very belatedly) drawn to our attention" and that "[a]s with all other controversial transactions, should a conflict emerge, then we will take appropriate action – independent legal advice and, if the conflict is sufficiently acute, we will approach the Court."¹³² That evidence was consistent with the highly qualified terms in which the transaction was described in the notes to the accounts and in the auditor's report. The proposition that the various matters to which the appellant referred in argument established that there was no arguable conflict is not readily reconcilable with the combined effect of the qualifications by the appellant and its auditors in its accounts and Mr Park's concessions in evidence as to the necessity for an investigation of this "controversial" transaction. Nor does the fact, if it be a fact, that the effect of the transactions might be readily capable of remedy if they are found to be inappropriate deny the existence of a conflict in the appellant in one capacity investigating transactions which benefited the appellant in different capacities. The conceded necessity of the appellant as responsible entity of the Fund investigating its own conduct in making payments to the appellant as responsible entity of two feeder funds involved an actual conflict of interest.
- [146] The issue is not without significance. After Mr Park referred to the net cost to the Fund as being a maximum of about \$900,000 he deposed that, since the Fund had a capital of several hundred million dollars, "these book entries will be relatively easy to reverse, should an investigation show that they were improper; and an overpayment of \$900,000.00 to the three Feeder Funds will easily be able to be offset, as the assets are converted to cash and appropriate distributions made."¹³³ A very different picture emerged in cross-examination. Mr Park then accepted that it was

¹³¹ [2013] QSC 192 at [105].

¹³² Affidavit of Mr Park, at [13], AB 1516.

¹³³ Affidavit of Mr Park, at [12], AB 1516.

necessary to distribute income in accordance with the unit holdings. He would need to obtain advice about what could be done to take the units back from the funds to whom the units had been issued. He had not formed a view about whether this was merely a book entry. He did not know and he would have to seek advice about the options in relation to unilaterally taking units from others, such as Trilogy. After making those concessions, Mr Park agreed that it was “not relatively easy” to reverse and that this might involve the various funds in litigation with each other.¹³⁴ There was no re-examination on that point.

[147] It was that evidence to which the primary judge referred in finding that Mr Park conceded in cross-examination the difficulty of undoing the transactions although he had sworn to the contrary in his affidavit.¹³⁵ Ground 5(a) in the notice of appeal contended that the finding was incorrect because the matter upon which Mr Park was cross-examined did not properly reflect the content of his affidavit and it was not put to Mr Park that he had contradicted his affidavit evidence. As to the first contention, the appellant argued that whilst Mr Park’s affidavit evidence concerned reversing the net effect of the disproportionate distribution by making offsetting future distributions, the answer in cross-examination concerned the difficulty of reversing the issue of the units, which was the means by which the distribution had been effected. That should not be accepted. The relevant paragraph of the affidavit appeared under a heading “alleged feeder fund conflict”. It was Mr Park’s response¹³⁶ to written submissions by Mr Shotton under a similar heading. Mr Shotton’s submissions concluded that if the appellant were left to wind up the Fund and to act as responsible entity for each of the other feeder funds, it “will have the same possible feeder fund conflicts that Trilogy may have, described above at paragraphs 30, 31 and 32... as each feeder fund participated in the disproportionate distribution of \$16.9 million as at 30 June 2012”.¹³⁷ The cited paragraphs referred to both the approximately \$900,000 of distributed funds which were not reinvested and the dilution of the interests of Class A and C unit holders and the corresponding increase in the interests of the Class B unit holders.¹³⁸ Mr Park’s affidavit thus conveyed that the transaction about which Mr Shotton complained – which included the allotment of the units – could be reversed relatively easily. That proposition was unequivocally contradicted by Mr Park in cross-examination.

[148] The second proposition in ground 5(a) is also wrong. Mr Park’s affidavit comprised only 22 substantive paragraphs and it was sworn on the day preceding the cross-examination. The cross-examiner directed Mr Park’s attention to the paragraph in which Mr Park had asserted that the book entries would be relatively easy to reverse. That Mr Park understood he was being challenged about the accuracy of that assertion is evident from his own answer to a different question about the same paragraph, in which Mr Park referred to what was “outlined in” that paragraph.¹³⁹ The immediately following question elicited the answer about the possible reversal of the relevant transaction that it was “not relatively easy”.

[149] This matter involved the appellant in a position of actual conflict by reason of its accepted obligation to investigate transactions between itself in one capacity and itself in different capacities, but it is not possible to decide upon the limited material

¹³⁴ Transcript, 16 July 2013, at 2-19, AB 205.

¹³⁵ [2013] QSC 192 at [104].

¹³⁶ See Affidavit of Mr Park, at [4], AB 1514.

¹³⁷ Mr Shotton’s outline of submissions, 14 July 2013, at [47], AB 2520.

¹³⁸ Mr Shotton’s outline of submissions, 14 July 2013, at [31] – [33], AB 2514 – 2515.

¹³⁹ Transcript, 16 July 2013, at 2-19, AB 205.

before the Court whether or not the investigation would reveal grounds for taking action or whether it ultimately would prove relatively easy to reverse the effect of the transactions if that were required. (The appellant posited that the transactions could be reversed by making further disproportionate issues of units to reverse the effect of the impugned issues of units.) As to the significance of the issue, the amounts involved are significant but they are not large in the context of this very substantial administration.

- [150] As to the second matter found to amount to a potential conflict, the primary judge made the following succinct findings:

“...In both 2011 and 2012 the fund paid around \$5 million to the first respondent as “loan management fees”. There may be a question as to the legitimacy of these payments under the constitution of [the Fund], as they seem to be in addition to management fees, and on their face do not seem to have been expenses. Once again the administrators have not yet formed a concluded position as to this, but acknowledge the potential for an overpayment, and acknowledge that the process of reversing the entries may prove to be complex, though again Mr Park originally swore to the contrary.”¹⁴⁰

- [151] Under 5(b) in the notice of appeal the appellant contended that the finding in the last sentence was not the proper inference to be drawn from the evidence and that the primary judge did not take into account Mr Park’s evidence in re-examination and documents to which he referred in re-examination.

- [152] Mr Park’s affidavit made it plain that he had not been able to gain a proper understanding of these transactions and did not defend or impugn them, but he believed that, like the distributions of income that were declared, management fees amounting to \$9,100,000 were declared but not paid. Mr Park deposed that if the fees were not properly charged, “it will be a relatively simple matter of righting the situation.” After the cross-examiner referred Mr Park to the relevant paragraph of his affidavit, and asked some questions about that, the following exchange occurred:

“Well, you said it’s a relatively simple matter of righting the situation.

Tell me the relatively simple matter? --- Obtaining legal advice.

Well, judging by the...? --- It’s a play on words, yes.”¹⁴¹

- [153] Although the cross-examination had focussed upon the “loan management fees” of about \$5,000,000 paid to the appellant to which the primary judge’s finding referred, rather than upon the additional “management fees” of about \$9,100,000, the terms of Mr Park’s answer plainly justified the primary judge in taking this evidence into account adversely to the appellant.

- [154] The accounts recorded that the “[m]anagement fees” were “paid or payable” to Administration and that the “[l]oan management fees” were “paid” to the appellant “for loan management and receivership services provided by the Responsible Entity on behalf of the Scheme in replacement of appointing external receivers. Those fees are charged directly to the borrower to facilitate future possible recovery.”¹⁴² The appellant argued that it emerged in re-examination that the account which had been shown to Mr Park were prepared on an accruals rather than a cash basis and that the evidence of the cash accounts revealed that the relevant amounts had not been paid. The directly relevant question in re-examination was whether a page of the accounts

¹⁴⁰ [2013] QSC 192 at [106].

¹⁴¹ Transcript, 16 July 2013, at 2-21, AB 207

¹⁴² LM First Mortgage Income Fund Annual Report for the year ended 30 June 2012, at 5, AB 1679.

headed “Statement of Cash Flows” showed that a sum of \$9,100,000 had been paid by way of management fees to anyone; Mr Park answered that it did not.¹⁴³

- [155] As is apparent from the terms of the primary judge’s finding, the issue upon which Mr Park was cross-examined instead concerned the total amount of about \$5,000,000 (recorded in the accounts as about \$4,800,000) for “loan management fees” that were “paid” by borrowers to the appellant in addition to the “management fees” of about \$9,100,000 that was “paid or payable” to Administration. It was in relation to the approximately \$4,800,000 “loan management fees” that Mr Park acknowledged that “they’re in addition to the management fee, which gives us cause for concern”. Mr Park’s evidence in re-examination that the accounts did not show the \$9,100,000 as having been paid did not detract from his evidence in cross-examination that he was not throwing doubt on whether the amounts about which he was cross-examined had been paid.¹⁴⁴ The re-examination did not deal with those amounts. In the result, the arguments under appeal ground 5(b) disclosed no error in the primary judge’s reasons.
- [156] The evidence before the primary judge suggested at least a potential conflict between the appellant’s interest in retaining the loan management fees of about \$4,800,000 paid to itself – a company in administration and apparently destined for liquidation – and its duty to investigate those payments. The appellant argued that there was no conflict for four reasons: s 601FC(1)(c) and s 601FC(3) provided that the interests of the members took priority over the interests of the responsible entity; payment of all fees (including the management fees and loan management fees) were outside the related party provisions of Chapter 2E as modified by Part 5C.7 (particularly s 601LC(3) and s 601LD); the total of the impugned fees (\$13.9 million) did not exceed the amount of 5.5 per cent of the Net Fund Value of \$288,980,628 (\$15,893,934) authorised by the constitution; and because the fees were authorised by the constitution, their payment or non-payment could not create a conflict. The first two propositions, that by statute the interests of members take priority over the interests of the appellant and that the fees are outside the related party provisions, do not deny the possibility of a conflict in relation to the fees. The third and fourth propositions do suggest that there was no conflict such as might justify relieving the administrators of responsibility for the winding up. Any conflict involved in a responsible entity charging fees authorised by the constitution is inherent in the scheme of the Act. However, it would be necessary in that respect to consider the reduction of the fee mentioned in the constitution from 5 per cent to 1.5 per cent, the absence of up to date valuations with reference to which the fee could be charged, and the effect of the decision or agreement by the administrators that they would charge their usually hourly rates rather than management fees.¹⁴⁵
- [157] It is not necessary to reach any final conclusion about this topic. The primary judge did not express any firm conclusion about it, but referred to the administrators’ acknowledgement of a potential for overpayment and observed only that there “may be a question” about the legitimacy of the payments.¹⁴⁶ On the limited state of the

¹⁴³ Transcript, 16 July 2013, at 2-26.

¹⁴⁴ Transcript at 2.21.

¹⁴⁵ In the final submissions for the appellant, senior counsel observed that the management fee of 5.5 per cent was unexceptionable in legal terms because it was in the constitution, but the fee was practically excessive, as was demonstrated by the fact that the appellant had voluntarily reduced the fee to 1.5 per cent before the administrators were appointed – but even that amount could not be justified on a commercial basis because there were not up to date valuations for all the properties, so something else had to be done instead of charging a percentage of value.

¹⁴⁶ [2013] QSC 192 at [106].

evidence that was the correct conclusion. Mr Shotton's contention that this matter should be characterised as an actual conflict of interest rather than a potential conflict of interest should not be accepted.

- [158] The primary judge dealt with the third matter concerning conflicts in the following passage:

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

The evidence as to what the administrators will do as to this fee is rather vague and not adequately documented. While the administrators say they have "agreed" not to charge a management fee, I do not know who that agreement was with. I am not convinced that any arrangement they have made in relation to management fees would be sustainable if there were real pressure exerted by creditors of the [appellant]."¹⁴⁷

- [159] This topic was not discussed in the oral submissions for Mr Shotton. His written outline substantially repeated the primary judge's reasons and asserted that there was a conflict between the administrators' decision that they would not pay a management fee to the appellant and the interests of the appellant's creditors. That suggests that the administrators may have preferred the unit holders' interests over the interests of the appellant's creditors in the appellant being paid fees to which it was entitled. It is difficult to see how Mr Shotton could legitimately complain about that in circumstances in which, as was pointed out for the appellant, it was Mr Shotton's own solicitor who suggested to Ms Muller, who agreed, that the appellant should not charge the management fees but should charge only at an hourly rate.¹⁴⁸ There was no error in the primary judge's comment that this arrangement was vague and not adequately documented – Mr Park agreed that there was no resolution or minute to that effect and it arose only out of discussions¹⁴⁹ – but Mr Shotton's contention in this appeal that the transaction itself, or the possibility that it might be challenged by the appellant's creditors (or shareholders), involves the administrators being in a position of actual conflict is unsustainable.

- [160] Accordingly, the only transaction which might properly be described as involving the appellant in a position of actual conflict is the first matter, and then only to the extent that the appellant acknowledged its obligation to investigate transactions involving distributions of some \$17 million, part of which was distributed to the appellant in different capacities, and apparently involving a maximum net cost to the Fund of about \$900,000. The primary judge did not describe the necessity to investigate the transactions as involving an actual conflict, but did refer to the possible need for

¹⁴⁷ [2013] QSC 192 at [101], [102].

¹⁴⁸ Affidavit of Ms Muller, at [46], [49], AB 1067, 1068.

¹⁴⁹ Transcript, 16 July 2013, at 2-14, AB 200.

investigation and the possibility that it might give rise to a claim on behalf of some unitholders of the Fund.¹⁵⁰ My limited acceptance of the contentions made for Mr Shotton does not justify the conclusion that the primary judge was in error in finding that the real potential for conflicts of interest to rise in the future did not of itself make it “necessary” to appoint a person other than the responsible entity under s 601NF(1). Any liquidator’s task is likely to involve dealing with conflicts of interest which might arise from time to time, including in the adjudication of claims, and it might be possible to manage potential conflicts through undertakings and directions should those conflicts arise.¹⁵¹

[161] Mr Shotton’s arguments under the notice of contention should not be accepted.

Proposed orders

[162] The appeal should be dismissed. The appellant should be ordered to pay the respondents’ costs of the appeal.

[163] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[164] **DAUBNEY J:** I respectfully agree with Fraser JA.

¹⁵⁰ [2013] QSC 192 at [104].

¹⁵¹ See [2013] QSC 192 at [115].

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From: Stephen Russell [<mailto:srussell@russellslaw.com.au>]

Sent: 26/11/2014 9:40 AM

To: Scott Couper

Cc: Alexander Zivkovic; Tim Russell

Subject: LM Investment Management Ltd v Bruce CA 8895 of 2013 ~20131268~

Dear Scott

As you know, we act for LM Investment Management Ltd (in liquidation) ("LMIM") in relation to its appeal mentioned above.

We have been advised by Tucker & Cowen that you are now engaged to advise Mr Whyte in relation to the claim by LMIM for indemnity from the assets of the LM First Mortgage Income Fund in respect of costs payable to another client of Tucker & Cowen, a Mr Shotton.

We attach our letter to those solicitors dated 19 September 2014. (Please note that in referring to Tucker & Cowen's client in the letter, we referred to the Applicant, Mr Bruce. That should have been a reference to Mr Shotton.)

You may also be aware that Mr Whyte has on foot an application for approval of a claim for remuneration in relation to his work, scheduled for hearing this Thursday 28 November 2014. Given the long delay in Mr

Whyte (or, possibly, Tucker & Cowen) dealing with this matter, and also certain of the contents of his claim for remuneration, may I have an answer our letter of 19 September 2014 by the close of business on 27 November?

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

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Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

RUSSELLS

19 September, 2014

Our Ref: Mr Russell
Your Ref: Mr Tucker

EMAIL TRANSMISSION

Tucker & Cowen Solicitors
GPO Box 345
BRISBANE QLD 4001

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") v Bruce & Ors - CA 8895 of 2013

We refer to your letter dated 17 June, 2014 and to your recent demands for payment of the sum of \$87,841.20, being your client's assessed costs of LMIM's appeal.

We note that you have made reference to the Order of Dalton J on 20 December, 2013.

Her Honour delivered her Reasons for Judgment in the proceedings on 8 August, 2013. The order was made on 26 August, 2013. A Notice of Appeal was filed on 23 September, 2013. The appeal was heard on 28 November, 2013.

Accordingly, it was impossible for LMIM to appeal against the Reasons for Judgment delivered on 20 December, 2013.

The liquidators of LMIM decided, in the interests of economy and efficiency, to await delivery of the Reasons for Judgment of the Court of Appeal. Obviously, those reasons were delivered long after the time for appeal against the judgment delivered on 20 December, 2013 expired – in fact, not until 6 June, 2014.

No party applied for any special order as to costs, whether under UCPR 700 or otherwise.

The appeal was, in the result, unsuccessful. However, the Court of Appeal set aside many of the findings of Dalton J upon which her Honour relied in her judgment of 20 December, 2013. LMIM succeeded completely in relation to what one of the two most important factors that underpinned her Honour's reasoning for the orders made on 26 August; that is, literally all of her Honour's criticisms of the conduct of the litigation by LMIM and its administrators and liquidators were set aside.

As for the other basis for her Honour's orders in relation to costs - findings in relation to the convening of the meeting of members - Fraser, JA, on behalf of the Court made the following critically significant finding:-

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000

Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

RussellsLaw.com.au

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[58]... the primary judge did not hold that the administrators had breached their duties as officers of the appellant as responsible entity under s 601FD(1)(c) of the Corporations Act 2001 to give priority to the members' interests in a conflict between those interests and the interests of the responsible entity (the primary judge did not refer to that provision or express any conclusion in relation to it), or that they had in fact breached an applicable statutory duty, or that they had intentionally preferred their own interests to the interests of the members in a situation in which the administrators were conscious that there was a conflict between those different interests.

The balance of his Honour's judgment was, of course, consistent with that finding.

Accordingly, the judgment of the Court of Appeal constitutes a judicial finding binding on your client, that:-

1. no conduct of the administrators and liquidators amounted to a breach of their duties as officers;
2. their conduct did not amount to a breach of any applicable statutory duty; and
3. nor have they intentionally preferred their own interests to the interests of the members.

His Honour also noted that the administrators were conscious of the conflicts between those different interests.

Accordingly, having given careful consideration to the matter, and particularly in the absence of any application by any party in the course of the appeal, and the absence of any application for special leave to appeal from the costs order that has been made, LMIM's liquidators regard the judgment of the Court of Appeal as substantially, if not completely, destroying the basis for the orders made by Dalton J on 20 December, 2013.

Naturally, LMIM's liquidators have an open mind in relation to any arguments that your client, Mr Bruce, or your client, Mr Whyte, may wish to put, although we think that the reasons of the Court of Appeal admit of no other interpretation.

For these reasons, absent any persuasive argument to the contrary, LMIM's liquidators take the view, contrary to your suggestion, that LMIM is entitled to an indemnity from the LM First Mortgage Income Fund in respect of the order for costs made in favour of your client, Mr Bruce.

We reject your contention that the appeal was principally directed towards our "client's personal position" if, by that expression, you intended to refer to the liquidators. That, with respect, exhibits a misunderstanding of the continuing role of LMIM in the winding-up of the Fund.

In our view, the time for making an application of the kind referred to in the last paragraph of your letter under reply was during the appeal. No such application was made. No appeal or application for special leave to appeal from the order for costs was made.

In the regrettable event that either of your clients, Mr Bruce or Mr Whyte, wish now to urge that on the Court of Appeal, then we expect to receive instructions

similarly to appeal against the order of Dalton J, made on 20 December, 2013 (it having been impossible to include that appeal in the appeal that was heard).

We await your reply.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Stephen Russell', enclosed within a large, loopy oval shape.

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Liam Roberts

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: 26/11/2014 4:54 PM
To: srussell@russellslaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [WOV-BD.FID1006751]
Attachments: Letter to Russells (26.11.14).PDF

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

Law Firm of the Year - 2014 Australian Banking and Finance Awards

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5650

26 November 2014

Russells
Level 21, 300 Queen Street
BRISBANE QLD 4000

Attention: Stephen Russell

gadens.com

By email: srussell@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed)
("LMIM") as responsible entity of the LM First Mortgage Income Fund ("Fund") -v- Bruce & Ors
Court of Appeal no. 8895 of 2013
Supreme Court of Queensland proceeding no. 3383 of 2013

We refer to your earlier email of 26 November 2014 and to your letter of 19 September 2014 addressed to Tucker & Cowen Solicitors.

We note that we have only recently received instructions from David Whyte, the court appointed receiver of the property of the Fund, to respond to your correspondence in so far as it relates to your clients' claim for an indemnity out of the Fund in respect of the amount of \$87,841.20, being Mr Shotton's assessed costs of the appeal.

In your correspondence you contend that (for the reasons set out therein) LMIM is entitled to an indemnity from the Fund in respect of the order for costs made in favour of Mr Shotton (the **Shotton Costs Order**).

As you are aware, the right of LMIM to be indemnified out of the Fund arises, principally, from the terms of the Constitution of the Fund.

So that we may properly advise our client and so that our client may consider further the matters raised in your correspondence, and, your clients' request for an indemnity out of the Fund, would you please clarify the basis upon which your clients seek an indemnity. In particular, would you please set out the reasons why the indemnity should be granted under the terms of the Constitution in respect of the Shotton Costs Order, including, the basis upon which your clients contend that those costs were reasonably incurred by LMIM on behalf of the Fund.

As you are aware, our client's application for approval of his remuneration is to be heard tomorrow, 27 November 2014 (referred to as 28 November 2014 in your email). For this reason you have sought our response by close of business on 27 November 2014 (which we take to mean by close of business today). As noted above, in order to properly advise our client we consider it necessary for your clients to properly articulate why your clients should be indemnified. We will endeavour to respond to your clients request as soon as we have the clarification sought. In any event, your clients' claim for an indemnity out of the Fund does not, in our view, have any bearing on our client's application for approval of his remuneration to be heard tomorrow.

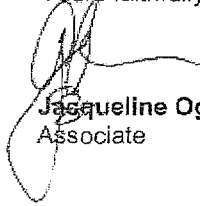
If your clients have a different view, please advise us immediately in order so that we may seek our client's further instructions.

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We otherwise look forward to receiving the clarification sought above as soon as possible.

Yours faithfully

A handwritten signature in black ink, appearing to be 'J. Ogden', written over the printed name.

Jacqueline Ogden
Associate

From: O'Kearney, Glenn [mailto:Glenn.OKearney@fticonsulting.com]
Sent: 22 January 2015 11:02 AM
To: Joanne Garcia nee Kedney
Subject: RE: Management accounts for the half year ending 31 December 2014

Dear Joanne

Amounts are excluding GST unless marked.

LM Investment remuneration and outlays:

Category 1: \$1,742,674

Category 2: \$1,174,678

Category 3: \$62,505

Operational costs: \$62,162.85 (including GST)

Legal Advisors: \$123,354

Loan recovery costs (LM Administration Pty Ltd): \$229,373. Per email to David Whyte 1 October 2010 – copy attached.

Regards

Glenn O'Kearney
Senior Director | Corporate Finance/Restructuring

F T I Consulting
+61 7 5630 5205 direct | +61 7 5630 5299 fax
glenn.okearney@fticonsulting.com

RUSSELLS

31 January, 2015

Our Ref: Mr Russell
Your Ref: Mr Couper / Ms Ogden

EMAIL TRANSMISSION

Gadens Lawyers
BRISBANE QLD 4000

email: Jacqueline.Ogden@gadens.com

Dear Colleagues

**LM Investment Management Limited (In Liquidation) (Receivers and
Managers Appointed) ("LMIM") -v- Shotton & Ors
LM First Mortgage Income Fund ("FMIF")
CA 8895 of 2013**

We refer to your letter dated 26 November, 2014 regarding the right of LMIM to indemnity from the Scheme Property for the liability to costs under the order of the Court of Appeal in this matter.

In answer to your enquiry, the principal bases for this right of indemnity are, in summary, as follows.

1. LMIM was and is the responsible entity of the FMIF.
2. It is entitled to be indemnified for "liabilities and expenses incurred in relation to the performance of its duties" (Constitution of the FMIF, clause 18.5).
3. The order for costs was incurred in the appeal.
4. The appeal was instituted to set aside the order of Dalton J made on 26 August, 2013.

No party contended that the appeal was irregular or improper in any way, or sought any particular order for costs to interfere with LMIM's entitlement to indemnity.

That of itself is sufficient. Your client has in his hands funds to answer the order for costs in favour of Mr Shotton.

But, in addition, more can be said. In particular, had the appeal succeeded:-

- (a) The winding-up of the FMIF would have been rendered much simpler and more cost-effective;

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Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000

Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

RussellsLaw.com.au

TPR_20131268_099.docx

-
- (b) The winding-up of LMIM would also have been rendered much simpler and more cost-effective;
- (c) Hence, the interests of members and creditors would both have been served.

Dalton J herself referred to the practical difficulties that would be experienced by reason of her order, because of the provisions of the *Corporations Act 2001*. We referred to these dicta in our letter to Tucker & Cowen dated 19 September, 2014.

Her Honour ordered our client LMIM to wind-up the FMIF. The liquidators of course must wind up LMIM.

Some of the liabilities of LMIM are the subject of a right of indemnity against the FMIF; some are the subject of a right of indemnity against other funds; some have no such right of indemnity.

Other claims from litigants and potential litigants are still emerging.

She then appointed Mr Whyte to do the work described in her order, and described the "receivership [as] a clumsy way" to ensure the winding-up of the FMIF was conducted in accordance with its Constitution.

By way of example of the practical difficulties to which her Honour referred:-

1. Schedule 1 to this letter lists functions, duties and responsibilities of the liquidators of LMIM in the winding up of LMIM and the FMIF; and
2. Schedule 2 to this letter lists functions, duties and responsibilities of LMIM in the winding up of the FMIF.

None of those functions, duties or responsibilities have been, or can be, transferred to Mr Whyte. Obviously, it was desirable to avoid these difficulties, which was the point of the appeal.

Please send us Mr Whyte's cheque in the sum of \$87,841.20 to Tucker & Cowen Trust Account.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

SCHEDULE 1 – LIQUIDATORS’ FUNCTIONS DUTIES AND RESPONSIBILITIES

The following functions and duties set out in the following provisions of the Act:-

1. subject to the provisions of section 556 of the Act, to pay any class of creditors in full (including creditors for whose debts LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to paragraph 477(1)(b) of the Act;
2. to call for and adjudicate on proofs of debt and claims against LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to Division 6 of Part 5.6 of the Act and to compromise such debts or claims under paragraphs 477(1)(c) and (d) of the Act;
3. to pay to third parties, in respect of whose claim monies are received under a contract of insurance, the sum necessary to discharge the liability to the third party, after deducting any expenses, pursuant to section 562 of the Act;
4. to recover property of the FMIF pursuant to the provisions of Part 5.7B Division 2 of the Act; and
5. to pay the debts of LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to section 506(3) of the Act.

SCHEDULE 2 – LMIM’S FUNCTIONS DUTIES AND RESPONSIBILITIES

The following functions and duties set out in the following clauses of the Constitution of the FMIF:-

1. Clause 2.1 – to act as trustee of the FMIF
2. Clause 3.2 – to manage the classes of units
3. Clause 3.6 – to consolidate or divide the capital of the FMIF
4. Part 5 –to issue units
5. Part 9 – to deal with the registration of any transfers
6. Part 10 – to maintain and effect transmissions of units where members die or become bankrupt
7. Part 11 – to determine the Income of the FMIF for each Financial Year
8. Part 12 – to calculate and distribute Distributable Income, and to distribute capital of the FMIF to the Members
9. Part 14 – to deal with complaints of Members
10. Clause 16.6 – to manage the FMIF until such time as all winding up procedures have been completed (subject to the functions expressly assigned to Mr Whyte in the order of Dalton J.
11. Subclause 16.7(b) – To pay the liabilities of LMIM (in its capacity as trustee of the FMIF), including liabilities owed to any Member who is a creditor of the FMIF except where such liability is a “Unit Holder Liability”.
12. Subclause 16.7(c) – to distribute the net proceeds of realisation among members in the proportions specified in clause 12.4.
13. Subclause 16.7(f) – to retain for as long as it thinks fit any part of the Scheme Property which, in its opinion may be required to meet any actual or contingent liability of the FMIF, subject to Mr Whyte’s obligation to take possession of, and to sell, all of the Scheme Property.
14. Subclause 16.7(g) - to distribute among the members in accordance with clause 16.7 and anything retained under Subclause 16.7(f) which is subsequently not required for the winding up of the FMIF
15. Clause 16.10 - to arrange for an auditor to audit the final accounts of the FMIF after the FMIF is wound up
16. Part 17 – to obtain valuations of the Scheme Property as may be required
17. Clause 18.1 – to pay taxes (and to lodge income tax returns and Business Activity Statements of the FMIF)
18. Clause 18.2 – to set aside money from Scheme Property which, in the opinion of the First Applicants, is sufficient to meet any present or

-
- future obligation of the FMIF, subject to Mr Whyte's obligation to take possession of, and to sell, all of the Scheme Property
19. Clause 21.1 - to deal with the Custodian, as agent for LMIM, on the terms and conditions set out in the Custody Agreement, subject to Mr Whyte's obligation to take possession of, and to sell, all of the Scheme Property
 20. Part 22 – to maintain the Register of Members and any other registers required by the law
 21. Clause 26.1 – to amend the constitution if the First Applicants reasonably consider the change will not adversely affect members' rights, provided that no such amendment would purport to alter the operation of the Order
 22. Clause 27.1 – to appoint auditors to audit the accounts
 23. Clause 27.4 – to keep and prepare the accounts of the FMIF in accordance with applicable Accounting Standards and the Act, and to report to members concerning the affairs of the FMIF and their holdings as required by the Act
 24. Part 28 – to call and convene meetings of Members

The following functions and duties set out in the following provisions of the Act:-

25. to prepare, for each financial year, a financial report for the FMIF, pursuant to Division 1 of Part 2M.3 of the Act
26. to have each such financial report audited in accordance with Division 3 of Part 2M.3 of the Act and to obtain an auditor's report pursuant to section 301 of the Act
27. to report to members of the FMIF for each financial year in accordance with Division 4 of Part 2M.3 of the Act
28. to lodge with ASIC the reports for each financial year, pursuant to Division 5 of Part 2M.3 of the Act
29. to prepare, for each half-year, a financial report for the FMIF, pursuant to Division 2 of Part 2M.3 of the Act
30. to have each such half-yearly financial report for the FMIF audited or reviewed in accordance with Division 3 of Part 2M.3 of the Act
31. to lodge with ASIC such half-yearly financial reports and auditors' report, pursuant to Division 3 of Part 2M.3 of the Act
32. to engage a registered company auditor, an audit firm or an authorised audit company to audit compliance with the FMIF's Compliance Plan in accordance with section 601HG of the Act.

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

gadens.com

10 February 2015

Russells
Level 21, 300 Queen Street
BRISBANE QLD 4000

Attention: Stephen Russell

By email: srussell@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") as responsible entity of the LM First Mortgage Income Fund ("Fund") -v- Bruce & Ors Supreme Court of Queensland proceeding no. 3383 of 2013 ("Supreme Court Proceeding") Court of Appeal proceeding no. 8895 of 2013 ("Appeal Proceeding")

We refer to your letter of 31 January 2015.

In order to take our client's further instructions we seek clarification of the matters noted below.

We note that our correspondence to date has been in relation to your clients' claim for an indemnity out of the Fund in respect of the amount of \$87,841.20, being Mr Shotton's assessed costs of the Appeal Proceeding.


Would you please clarify whether your liquidator clients intend to seek an indemnity from the Fund in respect of their legal costs which were incurred in relation to the Appeal Proceeding?

Further, as you are aware, Her Honour Justice Dalton ordered on 20 December 2013 that LMIM is indemnified from the Fund only to the extent of 20 per cent of its costs of and incidental to this Supreme Court Proceeding, excluding any reserved costs. In your correspondence of 19 September 2014 you state that *"the LMIM's liquidators regard the judgment of the Court of Appeal as substantially, if not completely, destroying the basis for the orders made by Dalton J on 20 December, 2013"*. For that reason, your clients contend that LMIM is entitled to an indemnity from the Fund in respect of the order for costs made in favour of Mr Shotton in the Appeal Proceeding. The indemnity sought is for 100 per cent of the costs.

If your clients intend to seek an indemnity from the Fund for their legal costs incurred in relation to the Appeal Proceeding, would you please clarify whether they intend to seek 100 per cent of those costs or the some lesser percentage?

We look forward to receiving the clarification sought above as soon as possible in order so that our client may consider further the matters raised in your correspondence.

Yours faithfully


Jacqueline Ogden
Associate

Liam Roberts

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: 16/04/2015 8:56 AM
To: srussell@russellslaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [GQ-BD.FID1006751]
Attachments: Letter to Russells dated 10.02.15.pdf

Dear Colleagues,

We refer to our correspondence of 10 February 2015, 19 February 2015 and 12 March 2015 **below** and note we have not yet received your response.

Would you please advise when we can expect to receive the clarification sought in our correspondence of 10 February 2015 (a copy of which is **attached** for your ease of reference)?

We look forward to receiving your response as soon as possible in order so that our client may consider further the matters raised in your correspondence.

Yours faithfully,

Jacqueline Ogden | Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: 12/03/2015 8:18 AM
To: srussell@russellslaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [IWOV-BD.FID1006751]

Dear Colleagues,

We refer to our correspondence of 10 February 2015 and 19 February 2015 **below** and note we have not yet received your response.

Would you please advise when we can expect to receive the clarification sought in our correspondence of 10 February 2015?

We look forward to receiving your response as soon as possible in order so that our client may consider further the matters raised in your correspondence.

Yours faithfully,

Jacqueline Ogden | Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: 19/02/2015 1:53 PM
To: srussell@russellslaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [IWOV-BD.FID1006751]

Dear Colleagues,

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Yours faithfully,

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jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

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From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: 10/02/2015 4:33 PM
To: srussell@russellslaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [IWOV-BD.FID1006751]

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

gadens.com

10 February 2015

Russells
Level 21, 300 Queen Street
BRISBANE QLD 4000

Attention: Stephen Russell

By email: srussell@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") as responsible entity of the LM First Mortgage Income Fund ("Fund") -v- Bruce & Ors Supreme Court of Queensland proceeding no. 3383 of 2013 ("Supreme Court Proceeding") Court of Appeal proceeding no. 8895 of 2013 ("Appeal Proceeding")

We refer to your letter of 31 January 2015.

In order to take our client's further instructions we seek clarification of the matters noted below.

We note that our correspondence to date has been in relation to your clients' claim for an indemnity out of the Fund in respect of the amount of \$87,841.20, being Mr Shotton's assessed costs of the Appeal Proceeding.

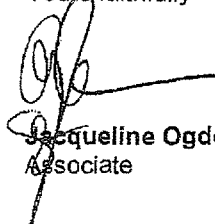
Would you please clarify whether your liquidator clients intend to seek an indemnity from the Fund in respect of their legal costs which were incurred in relation to the Appeal Proceeding?

Further, as you are aware, Her Honour Justice Dalton ordered on 20 December 2013 that LMIM is indemnified from the Fund only to the extent of 20 per cent of its costs of and incidental to this Supreme Court Proceeding, excluding any reserved costs. In your correspondence of 19 September 2014 you state that *"the LMIM's liquidators regard the judgment of the Court of Appeal as substantially, if not completely, destroying the basis for the orders made by Dalton J on 20 December, 2013"*. For that reason, your clients contend that LMIM is entitled to an indemnity from the Fund in respect of the order for costs made in favour of Mr Shotton in the Appeal Proceeding. The indemnity sought is for 100 per cent of the costs.

If your clients intend to seek an indemnity from the Fund for their legal costs incurred in relation to the Appeal Proceeding, would you please clarify whether they intend to seek 100 per cent of those costs or the some lesser percentage?

We look forward to receiving the clarification sought above as soon as possible in order so that our client may consider further the matters raised in your correspondence.

Yours faithfully



Jacqueline Ogden
Associate

Liam Roberts

From: Stephen Russell <srussell@russellslaw.com.au>
Sent: 20/05/2015 11:50 AM
To: Jacqueline Ogden
Cc: Scott Couper; Ashley Tiplady; Tim Russell
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [GQ-BD.FID1006751] ~20131268~
Attachments: SCR_20131268_102.pdf; Letter Tucker & Cowen to Russells 01.05.2015 (TCS00971817) (2).pdf

Dear Ms Ogden

Please see our letter attached, with the enclosure referred to, namely a letter from Tucker & Cowen dated 1 May 2015. Please note we have requested a reply by next Monday 25 May 2015.

RUSSELLS

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
srussell@russellslaw.com.au

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Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: Thursday, 16 April 2015 8:56 AM
To: Stephen Russell
Cc: Scott Couper
Subject: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [GQ-BD.FID1006751]

Dear Colleagues,

We refer to our correspondence of 10 February 2015, 19 February 2015 and 12 March 2015 **below** and note we have not yet received your response.

Would you please advise when we can expect to receive the clarification sought in our correspondence of 10 February 2015 (a copy of which is **attached** for your ease of reference)?

We look forward to receiving your response as soon as possible in order so that our client may consider further the matters raised in your correspondence.

Yours faithfully,

Jacqueline Ogden | Associate | [gadens](http://gadens.com)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

RUSSELLS

20 May, 2015

Our Ref: Mr Russell
Your Ref: Mr Couper/Ms Ogden

EMAIL TRANSMISSION

Gadens Lawyers
BRISBANE QLD 4000

email: Jacqueline.Ogden@gadens.com

Dear Colleagues

**LM Investment Management Limited (in liquidation) (Receivers and
Managers Appointed) ("LMIM") -v- Shotton & Ors
LM First Mortgage Income Fund ("FMIF")
CA 8895 of 2013**

We refer to your email dated 16 April 2015.

There has been a change in circumstances since we first made our demand for reimbursement of the costs due to Mr Shotton under the order of the Court of Appeal.

First, Mr Whyte's other solicitors have written to us on Mr Shotton's behalf, contending, quite correctly, that LMIM is entitled to indemnity for the appeal costs. We attach their letter dated 1 May, 2015.

We refer to what Tucker & Cowen have had to say about LMIM's right to indemnity. We respectfully agree with them.

We respectfully commend Mr Whyte's attention to those matters.

Secondly, those solicitors had earlier purported to commence enforcement proceedings against LMIM to recover the award of costs in Mr Shotton's favour. Although that was, because LMIM is being wound up, incompetent, it does illustrate the fact that Mr Whyte's sitting on the fence is starting to cause more than trouble and inconvenience – it is causing financial embarrassment, and costs, quite unnecessarily.

We therefore repeat LMIM's demand for a cheque drawn on the FMIF, or whatever account Mr Whyte is keeping for FMIF, in the sum of \$87,841.20 to Tucker & Cowen Trust Account for Mr Shotton's assessed costs of the appeal.

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Brisbane / Sydney
Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899
RussellsLaw.com.au
SCR_20131268_102.docm

As to your email under reply, we repeat that, aside from what we have said in our letter dated 31 January, 2015, and what Tucker & Cowen have said in their letter dated 1 May, 2015, we have nothing to add in support of the right of LMIM to indemnity in support of Mr Shotton's costs of the appeal.

In the circumstances, we think the matter is beyond any sensible argument. Hence, if it becomes necessary to sue to recover these monies, we propose to seek an order personally against Mr Whyte, on the indemnity basis (including for the interest that is mounting up in favour of Mr Shotton).

Please let us have Mr Whyte's cheque by 25 May, 2015 or, failing that, his reasons for not paying the liability.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

gadens.com

22 May 2015

Russells Law
Level 18, 300 Queen Street
Brisbane QLD 4000

Attention: Stephen Russell

By email: srussell@russellsllaw.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") as responsible entity of the LM First Mortgage Income Fund ("Fund") -v- Bruce & Ors Supreme Court of Queensland proceeding no. 3383 of 2013 ("Supreme Court Proceeding") Court of Appeal proceeding no. 8895 of 2013 ("Appeal Proceeding")

We refer to your letter of 19 September 2014, our letter of 26 November 2014, your response of 31 January 2015 as well as our letter of 10 February 2015 and our subsequent emails of 19 February 2015, 12 March 2015 and 16 April 2015.

We further refer to your recent letter of 20 May 2015.

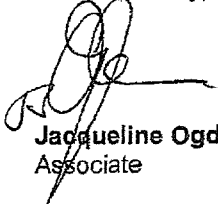
At the outset, it is not accurate to say that our client has been "sitting on the fence" in respect of this matter. That statement is not supported by the history of correspondence in this matter (referred to above). We have been awaiting your response to our letter of 10 February 2015. On that basis, our client cannot be said to be the cause of any "financial embarrassment" (as you put it).

Our client has now had an opportunity to properly consider your client's position and the position of Mr Shotton (as set out in a letter of 1 May 2015 from the solicitors for Mr Shotton to our client). We are instructed that our client will arrange for the amount to be drawn from the Fund in payment of the costs awarded to Mr Shotton pursuant to the order for costs made in the Appeal Proceeding and as assessed pursuant to the order of the Registrar dated 29 September 2014. We will write to Tucker & Cowen separately to arrange for payment.

For the avoidance of doubt, we note that the fact Mr Shotton's costs are being paid from the Fund should not be taken as an indication or agreement that any other costs incurred in respect of the Appeal Proceeding will be paid from the Fund.

We reserve our client's rights in this regard.

Yours faithfully,



Jacqueline Ogden
Associate

Jamie O'Regan

From: O'Kearney, Glenn <Glenn.OKearney@fticonsulting.com>
Sent: 22/07/2015 2:55 PM
To: Murray Daniel
Cc: Robson, Benjamin; John Somerville; David Whyte; Trenfield, Kelly
Subject: RE: Management Accounts for year ending 30 June 2015

Dear Murray

Amounts are excluding GST.

- LM Investment remuneration and outlays:
 - Category 1: \$1,764,634
 - Category 2: \$1,248,759
- Legal Advisors: \$375,249. Note that this includes fees and disbursements for the Appeal to the Court of Appeal from the judgement of Dalton J where we have received advice that these fees are properly payable from the funds of the LM FMIF.
- Loan recovery costs (LM Administration Pty Ltd): \$229,373.

Please advise if you require any further information at this time.

Regards

Glenn O'Kearney

Senior Director | Corporate Finance/Restructuring

FTI Consulting

+61 7 5630 5205 direct | +61 7 5630 5299 fax

glenn.okearney@fticonsulting.com

Level 9, Corporate Centre One | 2 Corporate Court | Bundall QLD 4217 | Australia

www.fticonsulting.com

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From: Murray Daniel [mailto:Murray.Daniel@bdo.com.au]
Sent: Monday, 20 July 2015 2:53 PM
To: O'Kearney, Glenn
Cc: Robson, Benjamin; John Somerville; David Whyte
Subject: Management Accounts for year ending 30 June 2015

Glenn,

I received an email from Ben Robson last week advising that you should be able to provide the information below over the next week. Please provide this information asap to assist with the preparation of the management accounts.

Thank you for your assistance.

Any questions let me know.

Regards,

Scott Couper

From: Stephen Russell <srussell@russellslaw.com.au>
Sent: 10/02/2016 7:29 PM
To: Scott Couper
Cc: Jacqueline Ogden; Ashley Tiplady; Sean Russell
Subject: LM Investment Management Limited (receivers and managers appointed) (in liquidation) v Bruce and others CA 8895 of 2013 ~201301268~
Attachments: SCR_20131268_109(1).pdf; Sealed Order of Justice Jackson dated 17 December 2015.pdf; Certificate of Taxation 1.2.2016.pdf; Fee ledger appeal 20131268.PDF; Final Bill 20131268.pdf

Dear colleagues

Please find attached:-

- Our letter to you dated today;
- Order of Jackson J made on 17 December 2015;
- Certificate of assessment of the costs incurred by LMIM in this appeal;
- Fee Ledger;
- Invoice B21820 dated 29 May, 2015.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
srussell@russellslaw.com.au

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

RUSSELLS

10 February, 2016

Our Ref: Mr Russell
Your Ref: Mr Couper / Ms Ogden

Gadens
Lawyers
BRISBANE

email: Scott.Couper@gadens.com

Dear Colleagues

LM Investment Management Limited (receivers and managers appointed) (in liquidation) ("LMIM") as responsible entity of the LM First Mortgage Investment Fund ("FMIF") -v- Bruce and Others – CA 8895 of 2013

We refer to previous correspondence. We are writing to you by way of formal notice to Mr Whyte. If you do not accept this letter on that basis, please advise by return. In that regard, we would otherwise write to Tucker & Cowen, but in light of previous correspondence, we understand that you are Mr Whyte's solicitors in respect of this appeal and the costs thereof.

We attach for your information a copy of the Order of Jackson J made on 17 December, 2015, in respect of the expenses recoverable by LMIM from the FMIF.

We also attach a Certificate of Costs Assessment dated 1 February 2016, whereby the costs assessor appointed by the Supreme Court of Queensland has assessed LMIM's solicitors and own client costs of the Appeal as follows:-

Professional fees	164,273.66
Disbursements	77,179.88
Total	\$241,453.54

Pursuant to the Order of Jackson J made on 17 December, 2015, we advise:-

1. The liquidators have identified the costs and disbursements assessed in the total sum of \$241,453.54 as an expense and liability incurred by them and LMIM, in connection with LMIM acting as responsible entity of the FMIF;
2. This sum is payable from the property of the FMIF;

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-
3. The liquidators hereby give notice to Mr Whyte of this claim under paragraph 6 of the order.

We also attach:

- (a) Fee Ledger;
- (b) Invoice B21820 dated 29 May, 2015.

These comprise a complete accounting of all attendances in respect of the costs assessed following the order of the court. In any event, these costs have been independently assessed and the Certificate takes effect as a judgment.

You will note that the fees for counsel were paid from trust.

In the circumstances, LMIM seeks payment of the sum of \$241,453.54 from the Scheme Property of the FMIF. We record that Mr Whyte decided in May, 2015 that the costs of this appeal are properly payable from the Scheme Property of the FMIF and applied Scheme Property for that purpose.

In the circumstances, we are instructed to ask for a cheque made payable to our trust account in the sum of \$241,453.54 by return.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3508 of 2015

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

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

AND

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

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

ORDER

Before: Jackson J

Date: 17 December 2015

Initiating document: Originating Application filed 8 April 2015; Amended
Originating Application filed 20 July, 2015; Further
Amended Originating Application filed 16 December,
2015

THE ORDER OF THE COURT IS THAT:-

1. In respect of the 60 members of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") to whom reference is made in paragraph 26 of the Affidavit of Murray Daniel sworn on 17 July 2015 and filed on 20 July 2015, the notice sent to those members in the manner described in paragraphs 27 to 30 of the Affidavit of Mr Daniel is taken to be sufficient notice for the purposes of Order 4(ii) of the Order of this Court made on 7 May 2015.

2. Subject to the matters expressly set out in this Order, nothing in this Order derogates from the powers and rights conferred upon David Whyte ("Mr Whyte") by Order of this Court dated 21 August 2013 in proceeding BS3383 of 2013 (the "existing Order") as the person appointed:
 - (a) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment"); and
 - (b) as the receiver of the property of the FMIF.
3. Pursuant to section 601NE(2) of the *Corporations Act 2001* ("the Act") Mr Whyte is empowered to determine, in accordance with paragraphs 4 to 10 herein, whether, and if so to what extent, the Second Applicant ("LMIM") is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against, LMIM in acting as Responsible Entity of the FMIF.
4. The First Applicants ("the Liquidators") are directed to:-
 - (a) ascertain the debts payable by, and the claims against, LMIM in accordance with the Act;
 - (b) adjudicate upon those debts and claims in accordance with the provisions of the Act;
 - (c) identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, debt payable by or claim against LMIM which is admitted by the Liquidators in the winding up of LMIM (each such claim for indemnity referred to below as a "Creditor Indemnity Claim");
 - (d) identify whether LMIM has (at the date of this Order and from time to time) a claim for indemnity from the property of the FMIF in respect of any, or any part of any, expense or liability incurred by John Richard Park and Ginette Dawn Muller in acting as administrators or liquidators of LMIM (whether incurred in their own name or in the name of LMIM) insofar as the expense or liability was or is incurred in connection with LMIM acting as Responsible Entity for the FMIF (each such claim for indemnity referred to below as an "Administration Indemnity Claim"); and
 - (e) identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, other expense or liability incurred and paid by LMIM in its capacity as Responsible Entity for the FMIF or by John Richard Park and Ginette Dawn Muller in acting as administrators or liquidators of LMIM (whether incurred in their own name or in the name of LMIM) insofar as the expense or liability was or is incurred in connection with LMIM acting as Responsible Entity for the FMIF (being an expense or liability to which paragraphs 4(c) and 4(d) above do not apply) (each such claim for indemnity referred to below as a "Recoupment Indemnity Claim").

5. Within sixty days of the date of this Order the Liquidators must notify Mr Whyte in writing of any Administration Indemnity Claim and any Recoupment Indemnity Claim identified by the Liquidators as at the date of this Order.
6. Within 14 days after:-
 - (a) any debt or claim is admitted by the Liquidators in the winding up of LMIM and, in respect of such debt or claim, a Creditor Indemnity Claim is identified by the Liquidators;
 - (b) any Administration Indemnity Claim (being one to which paragraph 5 of this Order does not apply) is identified by the Liquidators; or
 - (c) any Recoupment Indemnity Claim (being one to which paragraph 5 of this Order does not apply) is identified by the Liquidators,the Liquidators must notify Mr Whyte in writing of such claim.
7. When notifying Mr Whyte of a claim in accordance with paragraphs 5 or 6 of this Order (each such claim for indemnity referred to below as an “**Eligible Claim**”), the Liquidators must:-
 - (a) Provide Mr Whyte with:-
 - (i) (if the Eligible Claim is a Creditor Indemnity Claim) a copy of the relevant proof of debt and supporting documentation relating to the Eligible Claim; and
 - (ii) Such other information the Liquidators consider relevant to LMIM’s claim for indemnity from the property of the FMIF;
 - (b) Within 14 days of receipt of a request from Mr Whyte pursuant to paragraph 8(a) below for further information in respect of an Eligible Claim, provide such reasonably requested further information to Mr Whyte.
8. Mr Whyte is directed to:-
 - (a) Within 14 days of receipt of an Eligible Claim, request any further material or information he reasonably considers necessary to assess the Eligible Claim;
 - (b) Within 30 days of receipt of an Eligible Claim or of the information requested in accordance with paragraph 8(a) above (whichever is the later):-
 - (i) accept the Eligible Claim as one for which LMIM has a right to be indemnified from the property of the FMIF; or
 - (ii) reject the Eligible Claim; or
 - (iii) accept part of it and reject part of it;

and give to the Liquidators written notice of his determination; and

- (c) If Mr Whyte rejects an Eligible Claim, whether in whole or in part, provide the Liquidators with written reasons for his decision when, or within 7 days after, giving notice of his determination.
9. Within 28 days of receiving notification from Mr Whyte of the reasons for rejecting, in whole or in part, any Eligible Claim ("Rejected Claim"), the Liquidators:-
- (a) may make an application to this Honourable Court for directions as to whether or not the Eligible Claim is or is not one for which LMIM has a right of indemnity out of the scheme property of the FMIF; or
 - (b) must notify the relevant creditor for any Rejected Claim of:-
 - (i) Mr Whyte's decision;
 - (ii) any reasons provided by Mr Whyte for that decision;
 - (iii) any material provided pursuant to paragraphs 6, 7 or 8 hereof; and
 - (iv) whether they intend to make an application for directions in respect of the Rejected Claim pursuant to paragraph 9(a) hereof.
10. Mr Whyte has liberty to apply to the Court for direction in respect of any question arising in connection with his consideration or payment of an Eligible Claim.
11. Pursuant to section 601NF(2) of the Act, the parties are directed that for so long as the Appointment and the appointment of Mr Whyte as receiver of the property of the FMIF continue, LMIM shall not be responsible for, and is not required to discharge, the functions, duties and responsibilities set out in clauses 16.7(c), 16.7(f), 16.7(g) and 18.2 of the constitution of the FMIF.
12. Pursuant to section 601NF(2) of the Act, Mr Whyte is directed not to make any distribution to the members of the FMIF, without the authority of a further Order of the Court.
13. Pursuant to section 601NF(2) of the Act:-
- (a) the Liquidators are directed not to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the constitution of the FMIF;
 - (b) LMIM is relieved of the obligations imposed by clauses 9, 10 and 22 of the constitution of the FMIF; and
 - (c) Mr Whyte is authorised and empowered to exercise the powers of, and is responsible for the functions of, the Responsible Entity as set out in Clauses 9, 10 and 22 of the constitution of the FMIF

14. Pursuant to section 601NF(2) of the Act:
 - (a) Mr Whyte is directed to apply to ASIC to obtain relief from the financial reporting and audit obligations imposed by Part 2M.3 of the Act and section 601HG of the Act; and
 - (b) in the event that the parties are unable to obtain relief from those financial reporting and audit obligations, then Mr Whyte is directed to provide to LMIM all reasonably requested information as is necessary to enable LMIM to comply with the financial reporting obligations imposed on LMIM as responsible entity of the FMIF under Part 2M.3 of the Act and the constitution of the FMIF.
15. Pursuant to section 1322(4)(c) of the Act, Mr Park and Ms Muller are relieved in whole from any civil liability in respect of a contravention or failure to discharge LMIM's financial reporting obligations under Part 2M.3 of the Act for the period from 19 March 2013 to 31 December 2015.
16. Nothing in this Order prejudices the rights of:
 - (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or
 - (b) The receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.
17. The Liquidators are directed to notify any claim for the reasonable costs and expenses of LMIM of carrying out the work it is required to do by and under this order as an Administration Indemnity Claim under paragraph 4 and may make such a claim from time to time.
18. The Liquidators are entitled to claim reasonable remuneration in respect of the time spent by them and employees of FTI Consulting who perform work in carrying out the work they are required to do by and under this order in connection with the FMIF at rates and in the sums from time to time approved by the Court and to be indemnified out of the assets of the FMIF in respect of such remuneration.
19. Service of the Further Amended Originating Application dated 16 December, 2015 ("**the Further Application**") under s.96 of the Trusts Act be effected on the members of the LM Cash Performance Fund ARSN 087 304 032, the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868, the LM Australian Income Fund ARSN 133 497 917 and the LM Australian Structured Products Fund ARSN 149 875 669 ("**Other Funds**") and on the members of the FMIF as follows:-
 - (a) by the First Applicants uploading to the website www.lminvestmentadministration.com copies of this application, the statement of facts to be filed, the Notice to Members in the form of Schedule 7 to the Further Application ("**the Notice**"), any order made as to service and the substantive affidavits (including all the exhibits) that the First Applicants intend to rely upon in support of the Further Application;

- (b) by the Respondent sending by email to those members of the FMIF for whom an email address is recorded, the Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely on the website www.lminvestmentadministration.com;
 - (c) by the First Applicants sending by email to those members of the Other Funds for whom an email address is recorded, the Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely on the website www.lminvestmentadministration.com;
 - (d) where the First Applicants receive a response to an email that indicates the email was not received, or if the First Applicants do not hold an email address for any member, and the First Applicants have a postal address for those members, the First Applicants are to post the Notice to the postal address of those members; and
 - (e) where the Respondent receives a response to an email that indicates the email was not received, or if the Respondent does not hold an email address for any member, and the Respondent has a postal address for those members, the Respondent is to post the Notice to the postal address of those members.
20. That service of the Further Amended Originating Application under s.511 of the Act be effected on the creditors of the Second Applicant as follows:-
- (a) by the First Applicants uploading to the website www.lminvestmentadministration.com copies of this application, the statement of facts to be filed, the Notice to Creditors in the form of Schedule 8 to the Further Application ("the Creditors' Notice"), any order made as to service and the substantive affidavits (including all the exhibits) that the First Applicants intend to rely upon in support of the Further Application;
 - (b) by sending by email to those creditors of the Second Applicant, for whom an email address is recorded, the Creditors' Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely in support of the Further Application on the website www.lminvestmentadministration.com; and
 - (c) where the First Applicants receive a response to an email that indicates the email was not received, or if the First Applicants do not hold an email address for any creditor, and the First Applicants have a postal address for those creditors, the First Applicants are to post the Creditors' Notice to the postal address of those creditors.
21. That service of the Further Application in accordance with any orders made be deemed to be effective on each of the members of the FMIF and Other Funds and the creditors of the Second Applicant.
22. That, where the First Applicants propose to rely on further material in support of the Further Application, they may serve that material by uploading the material to the website and sending notice by email or, where the First Applicants do not hold a

valid email address, by post to those members or creditors, with such notice to direct the members or creditors to the further material which has been uploaded at the website www.lminvestmentadministration.com.

23. That the First Applicants and Respondent not be required to take further steps to serve the members of the FMIF, the Other Funds or creditors of the Second Applicant whose email addresses return permanent undeliverable receipts and for whom the First Applicants or the Respondent (as the case requires) do not have a postal address.
24. That the Respondent be at liberty to upload any material served by the Applicants on the website lmfmif.com.
25. Directions for the hearing of the relief sought by the Further Application as follows:-
 - (a) by no later than 27 January, 2016, the Applicants are to file any affidavit material in support of the Further Application;
 - (b) by no later than 27 January, 2016, the Applicants are to serve, pursuant to Part 4 of Chapter 4 of the Uniform Civil Procedure Rules 1999 (Qld), this Further Amended Originating Application and any supporting affidavit material on which the Applicants intend to rely, on the Respondent;
 - (c) by no later than 4 February, 2016, any party other than the Respondent who wishes to appear at the hearing of the Further Application shall file and serve, at the Applicants' address for service, a Notice of Appearance in Form 4;
 - (d) by no later than 18 February, 2016, the Respondent is to file and serve any affidavit upon which he intends to rely at the hearing of the Further Application;
 - (e) by no later than 18 February, 2016, any party other than the Respondent who has filed a Notice of Appearance in accordance with sub-paragraph (c) herein is to file any affidavit upon which it intends to rely at the hearing of the Further Application.
26. The parties' costs of and incidental to this application, including the costs reserved by Orders of this Court on 7 May 2015, be paid out of the assets of the FMIF on the indemnity basis.
27. Any person affected by these Orders has liberty to apply.
28. The Further Amended Originating Application filed 15 December, 2015 is otherwise adjourned to 10am on 22 February, 2016.

Signed:

Deputy Registrar

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 7211 of 2015

Plaintiff: **RUSSELLS (A FIRM)**

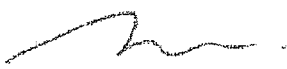
AND

Defendant: **JOHN RICHARD PARK AND GINETTE DAWN MULLER IN
THEIR CAPACITY AS LIQUIDATORS OF LM INVESTMENT
MANAGEMENT LTD (IN LIQUIDATION) (RECEIVERS
APPOINTED) ACN 077 208 461**

COSTS ASSESSOR'S CERTIFICATE

I, Stephen Kenneth Hartwell, of Level 27, 32 Turbot Street, Brisbane Qld 4000, certify that:

1. I am an approved costs assessor appointed under the Uniform Civil Procedure Rules 1999.
2. I was appointed to assess the costs in this matter pursuant to the Order of the Registrar made 29 July 2015.
3. I have assessed the legal costs payable by the Defendant to the Plaintiff in relation to file 20131268 the amount of \$241,453.54 (two hundred and forty-one thousand four hundred and fifty-three dollars and fifty-four cents) comprising:
 - a. Professional Fees \$164,273.66
 - b. Disbursements \$77,179.88
4. My fees of \$9,068.68 are payable by the Defendant and have been included as a disbursement.
5. The party entitled to be paid the costs of the assessment is the Plaintiff. Those costs are assessed at \$60.12 and have been included as a disbursement.

Signed: 

Dated: 21/1/16

COSTS ASSESSOR'S CERTIFICATE
Filed on Behalf of the Costs Assessor
Form 62 Rule 737

Hartwell Lawyers
Level 27, 32 Turbot Street
Brisbane Qld 4000
Ph: (07) 3181 4387
Fax: (07) 3181 4388

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
20/09/2013 14	Meeting out of Office - Mr Park, Ms Muller and Mr Bender, with Ms Copley to discuss prospects of success, and advisability of, appeal	SCR SCR	B21820 29/05/2015	60.00	12.00	0.00	700.00	70.00	770.00	770.00
20/09/2013 23	Reviewing or amending Draft grounds of Notice of Appeal, as prepared by Mr Cooper	SCR SCR	B21820 29/05/2015	40.00	8.00	0.00	466.67	46.67	513.34	1,283.34
21/09/2013 20	Preparing a document - Notice of Appeal	SCR SCR	B21820 29/05/2015	40.00	8.00	0.00	466.67	46.67	513.34	1,796.68
23/09/2013 23	Reviewing or amending Notice of Appeal	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	1,925.02
23/09/2013 12	Telephone call to Mr Bender	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	2,117.52
23/09/2013 11	Telephone call from Mr Park, Ms Muller and Mr Bender	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	2,310.02
23/09/2013 90	Email to Mr Sheahan QC and Mr Cooper - instructions to appeal confirmed	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	2,374.18
23/09/2013 23	Reviewing or amending Mr Sheahan's revised draft grounds for appeal	SCR SCR	B21820 29/05/2015	95.00	19.00	0.00	1,108.33	110.83	1,219.16	3,593.34
23/09/2013 12	Telephone call to Mr Sheahan QC regarding his email, parties to appeal, grounds of appeal and arrangements for settling revised grounds of appeal	SCR SCR	B21820 29/05/2015	20.00	4.00	0.00	233.33	23.33	256.66	3,850.00
23/09/2013 28	Miscellaneous - Various attendances on counsel and clients; final settling of Notice of Appeal	SCR SCR	B21820 29/05/2015	55.00	11.00	0.00	641.67	64.17	705.84	4,555.84
23/09/2013 13	Meeting in Office - discussing with Mr Derek Finch arrangements to file Notice of Appeal; telephone conversation with Mr Stephen Russell regarding Notice of Appeal; emailing Court of Appeal Registry regarding arrangements for filing Notice of Appeal; reading revised grounds of appeal from Counsel; telephone conversation with Mr S	IMC SCR	B21820 29/05/2015	85.00	17.00	0.00	701.25	70.12	771.37	5,327.21

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
	Cooper; emailing Counsel and Mr Stephen Russell regarding revised draft Notice of Appeal									
23/09/2013 28	Miscellaneous - receiving and considering revised Notice of Appeal settled by Sheahan QC; signing Notice of Appeal for filing	IMC SCR	B21820 29/05/2015	15.00	3.00	0.00	123.75	12.38	136.13	5,463.34
23/09/2013 13	Meeting in Office - with Ms Ilenna Copley re filing of Notice of Appeal	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	5,522.93
23/09/2013 11	Telephone call from Mr Stephen Russell re filing	DMF SCR	B21820 29/05/2015	5.00	1.00	0.00	27.08	2.71	29.79	5,552.72
23/09/2013 28	Miscellaneous - arranging filing fees	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	5,612.31
23/09/2013 28	Miscellaneous - attending to filing of Notice of Appeal at Supreme Court Registry	DMF SCR	B21820 29/05/2015	75.00	15.00	0.00	406.25	40.62	446.87	6,059.18
23/09/2013 28	Miscellaneous - attending to copying of filed notice	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	6,118.77
23/09/2013 09	Preparing email to Mr Stephen Russell re copy of filed notice	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	6,178.36
24/09/2013 22	Preparing/dictating memo - to Ms Copley with draft application for expedition, and matters for evidence to support expedition application	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	6,306.70
24/09/2013 10	Reading email received from Mr Park	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	6,370.86
24/09/2013 23	Reviewing or amending Draft media responses	SCR SCR	B21820 29/05/2015	45.00	9.00	0.00	525.00	52.50	577.50	6,948.36
24/09/2013 28	Miscellaneous - serving Notice of Appeal on ASIC, Piper Alderman and Tucker & Cowen	REF SCR	B21820 29/05/2015	60.00	12.00	0.00	220.00	22.00	242.00	7,190.36
24/09/2013 28	Miscellaneous - attendance at Tucker & Cowen to Serve Notice of Appeal	REF SCR	B21820 29/05/2015	25.00	5.00	0.00	91.67	9.17	100.84	7,291.20

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
24/09/2013 23	Reviewing or amending settling letter to Mr Meakin re: bill	IMC SCR	B21820 29/05/2015	10.00	2.00	0.00	82.50	8.25	90.75	7,381.95
24/09/2013 12	Telephone call to receiving instructions from Mr Stephen Russell regarding expedition of appeal telephone conversation of Mr P Irvine; Court of Appeal Registrar; dictating and drafting affidavit of Ginette Muller and John Park in support of application on expedited appeal; further telephone conversations with Registrar Irvine; emailing mobile of appeal to parties; dictating letter to service; arranging physical service; emailing counsel regarding appeal date; emailing client regarding appeal date	IMC SCR	B21820 29/05/2015	280.00	56.00	0.00	2,310.00	231.00	2,541.00	9,922.95
26/09/2013 15	Reading letter received from Registrar Court of Appeal	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	9,987.11
26/09/2013 28	Miscellaneous - Reviewing email from Clayton Utz re costs	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	10,051.27
26/09/2013 21	Preparing/dictating letter - Registrar Court of Appeal, seeking expedition	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	10,436.27
26/09/2013 09	Preparing email to Mr Park and others re Whyte's statement no interim dividends	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	10,500.43
26/09/2013 10	Reading email received from Mr Bender - no such statement to him	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	10,564.59
26/09/2013 11	Telephone call from Mr Park - no such statement to his knowledge	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	10,628.75
26/09/2013 10	Reading email received from Ms Trenfield re Mr Whyte's intention not to make distributions	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	10,692.91
26/09/2013 23	Reviewing or amending Letter to Registrar Court of	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	11,077.91

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
	Appeal									
26/09/2013 11	Telephone call from Mr Greg Litster re Notice of Appeal, him agreeing to support application for expedition, him seeking agreement to the appellant seeking no order as to costs against his clients, who propose to enter a submitting appearance only; me agreeing	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	11,270.41
26/09/2013 21	Preparing/dictating letter - for FTI to send without prejudice to Mr Shotton, offering to settle the appeal	SCR SCR	B21820 29/05/2015	75.00	15.00	0.00	875.00	87.50	962.50	12,232.91
26/09/2013 15	Reading letter received from Registrar Court of Appeal re timetable	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	12,297.07
26/09/2013 21	Preparing/dictating letter - Mr Sheahan QC and Mr Cooper re timetable	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	12,361.23
26/09/2013 19	Perusing a document - letter to Court of Appeal registrar regarding hearing	IMC SCR	B21820 29/05/2015	10.00	2.00	0.00	82.50	8.25	90.75	12,451.98
27/09/2013 11	Telephone call from Mr Bender and Mr Park (several) discussing the (possibly) imminent refinance by BOQ, and advising and taking instructions to send a letter to Tucker regarding the terms of any refinance	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	12,836.98
27/09/2013 21	Preparing/dictating letter - Mr Whyte re terms of any refinancing	SCR SCR	B21820 29/05/2015	20.00	4.00	0.00	233.33	23.33	256.66	13,093.64
27/09/2013 11	Telephone call from Mr Bender re appeal also to replace Whyte as a fallback	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	13,221.98
27/09/2013 23	Reviewing or amending draft letter to Mr Whyte	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	13,414.48
27/09/2013 10	Reading email received from Mr Copley of ASIC re	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	13,478.64

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale	Cost	WIP				
	appeal allegedly out of time									
27/09/2013 09	Preparing email to Mr Copley - appeal not out of time; including research	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	13,671.14
27/09/2013 23	Reviewing or amending letter to Mr Whyte re refinance	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	13,799.48
27/09/2013 10	Reading email received from Mr Whyte - informing us that he has resigned as liquidator of Redland Bay	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	13,991.98
27/09/2013 09	Preparing email to Mr Whyte, pressing for confirmation re-finance	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	14,056.14
27/09/2013 09	Preparing email to Clients, re correspondence with Mr Whyte	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	14,120.30
27/09/2013 10	Reading email received from Mr Litster to Mr Copley re ASIC's recalcitrance	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	14,184.46
27/09/2013 09	Preparing email to Respondents' solicitors, re expedition of appeal	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	14,312.80
27/09/2013 09	Preparing email to Clients and counsel re status of expedition	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	14,376.96
27/09/2013 09	Preparing email to opposing solicitors re expedition	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	14,505.30
27/09/2013 10	Reading email received from Mr Schmidt, with case reference re appellate courts and findings of fact below	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	14,569.46
27/09/2013 17	Researching Law - Jew v Holloway & Anor [2013] VSCA 260 (20 September 2013)	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	14,954.46

Matter 20131268 Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
27/09/2013 19	Perusing a document - receiving and considering email from Hugh Copley; considering operation of VCPR Rule 748; receiving and considering email from Mr Stephen Russell; drafting index to appeal record book	IMC SCR	B21820 29/05/2015	170.00	34.00	0.00	1,402.50	140.25	1,542.75	16,497.21
27/09/2013 19	Perusing a document - draft letter of offer from FTI to Mr Shotton	SCR SCR	B21820 29/05/2015	130.00	26.00	0.00	1,516.67	151.67	1,668.34	18,165.55
28/09/2013 09	Preparing email to Sean Cooper re Jew v Holliday	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	18,229.71
28/09/2013 10	Reading email received from Mr Litster to Mr Copley	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	18,293.87
28/09/2013 27	Searching a Public Office - ASIC Historical Company Extract and Whyte resignation and final accounts for re Redland Bay	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	18,358.03
30/09/2013 20	Preparing a document - drafting affidavit section of index to appeal record book; drafting index; arranging copies of affidavit for appeal book; arranging copies of tother documents in appeal book; emailing parties regarding material read to be included in index to appeal book; receiving email from Mr Stephen Russell regarding index; receiving index from Mr G Lister; discussing with Mr Stephen Russell; searches to be undertaken regarding Redland and David Whyte	IMC SCR	B21820 29/05/2015	300.00	60.00	0.00	2,475.00	247.50	2,722.50	21,080.53
30/09/2013 09	Preparing email to Mr Hugh Copley re expedition	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	21,144.69
30/09/2013 10	Reading email received from Mr Tucker - he is acting in the appeal	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	21,208.85
30/09/2013 09	Preparing email to Mr Tucker re expedition	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	21,273.01
30/09/2013 09	Preparing email to clients re status of other lawyers' instructions on expedition	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	21,337.17

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Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
30/09/2013	Telephone call to Ms Banton re appeal	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	21,401.33
12		SCR	29/05/2015							
30/09/2013	Preparing email to Ms Banton re appeal	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	21,465.49
09		SCR	29/05/2015							
30/09/2013	Reading email received from Mr Copley of ASIC	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	21,529.65
10		SCR	29/05/2015							
30/09/2013	Telephone call to Registrar of Court of Appeal	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	21,593.81
12		SCR	29/05/2015							
30/09/2013	Preparing email to other solicitors cc Registrar	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	21,657.97
09		SCR	29/05/2015							
30/09/2013	Preparing email to clients, updating them re expedition	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	21,722.13
09		SCR	29/05/2015							
30/09/2013	Miscellaneous - attendances with Ms Copley to settle Index to Appeal Books	SCR	B21820	10.00	2.00	0.00	116.67	11.67	128.34	21,850.47
28		SCR	29/05/2015							
1/10/2013	Other - perusing correspondence from and drawing correspondence to Tucker Cowen, ASIC and the Registrar of the Court of Appeal regarding expedition	SCR	B21820	60.00	12.00	0.00	0.00	0.00	0.00	21,850.47
90		SCR	29/05/2015							
1/10/2013	Telephone call to Mr Sean Cooper discussing court to be undertaken with Natasha, emailing Mr Sean Cooper regarding status of expediting appeal; telephone conversation with Gabriel Ash regarding list of material; perusing letter to registration	IMC	B21820	50.00	10.00	0.00	412.50	41.25	453.75	22,304.22
12		SCR	29/05/2015							
2/10/2013	Preparing email to Mr Whyte re terms of refinancing	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	22,368.38
09		SCR	29/05/2015							
3/10/2013	Reading letter received from Tucker Cowen re terms of refinancing	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	22,432.54
15		SCR	29/05/2015							
3/10/2013	Preparing email to Tucker Cowen acknowledging receipt and also letter to clients informing them of arrangements	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	22,496.70
09		SCR	29/05/2015							

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
3/10/2013 10	Reading email received from ASIC and other parties; arranging searches regarding Redlands companies and David Whyte	IMC SCR	B21820 29/05/2015	30.00	6.00	0.00	247.50	24.75	272.25	22,768.95
4/10/2013 19	Perusing a document - receiving and considering affidavits and other court documents regarding replacement of Mr David Whyte as liquidator of Redland companies	IMC SCR	B21820 29/05/2015	15.00	3.00	0.00	123.75	12.38	136.13	22,905.08
8/10/2013 19	Perusing a document - bundle of documents re the Redland Bay matters	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	23,097.58
8/10/2013 10	Reading email received from Registrar Court of Appeal	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	23,161.74
8/10/2013 15	Reading letter received from Registrar Court of Appeal	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	23,225.90
8/10/2013 90	Email with counsel regarding timing of revised timetable	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	23,354.24
8/10/2013 20	Preparing a document - initial draft outline of submissions	SCR SCR	B21820 29/05/2015	195.00	39.00	0.00	2,275.00	227.50	2,502.50	25,856.74
8/10/2013 20	Preparing a document - drafting index to appeal book regarding material of Bruce and Nunn; receiving email from Mr D Tucker regarding index; telephone conversation with S Cooper regarding brief	IMC SCR	B21820 29/05/2015	240.00	48.00	0.00	1,980.00	198.00	2,178.00	28,034.74
9/10/2013 20	Preparing a document - detailed memo to counsel regarding time for appeal, Osachy, and associated authorities, with suggested strategy for dealing with any application to strike out the appeal as being out of time	SCR SCR	B21820 29/05/2015	60.00	12.00	0.00	700.00	70.00	770.00	28,804.74
9/10/2013 20	Preparing a document - preparing brief to Mr S	IMC SCR	B21820 29/05/2015	100.00	20.00	0.00	825.00	82.50	907.50	29,712.24

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
	Cooper; emailing Mr S Cooper regarding brief; drafting index to appeal book									
10/10/2013 22	Preparing/dictating memo - to Derek Finch for research on the status of ASIC in corporations litigation, for submissions	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	29,776.40
10/10/2013 10	Reading email received from Mr Stephen Russell re: Research task on the status of ASIC's views and interpretations of the Corporations Act	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	29,835.99
10/10/2013 17	Researching Law - cases on status of ASIC as "model litigant" and implications of special duty of fairness	DMF SCR	B21820 29/05/2015	165.00	33.00	0.00	893.75	89.38	983.13	30,819.12
10/10/2013 15	Reading letter received from D.Whyte to ASIC re: financial reports and auditing requirements	DMF SCR	B21820 29/05/2015	15.00	3.00	0.00	81.25	8.12	89.37	30,908.49
10/10/2013 19	Perusing a document - correspondence with D.Whyte and clients and ASIC re: financial reports and audit	DMF SCR	B21820 29/05/2015	15.00	3.00	0.00	81.25	8.12	89.37	30,997.86
10/10/2013 20	Preparing a document - memo to Mr Stephen Russell re: research on status of ASIC and special duty of fairness	DMF SCR	B21820 29/05/2015	50.00	10.00	0.00	270.83	27.08	297.91	31,295.77
10/10/2013 17	Researching Law - case of Environinvest Ltd v Misko re: auditing requirements	DMF SCR	B21820 29/05/2015	75.00	15.00	0.00	406.25	40.62	446.87	31,742.64
10/10/2013 09	Preparing email to Mr Stephen Russell re: Environinvest case and distinguishing case from FMIF and LM	DMF SCR	B21820 29/05/2015	60.00	12.00	0.00	325.00	32.50	357.50	32,100.14
10/10/2013 17	Researching Law - ASIC exemption orders and class orders re: financial reporting requirements and auditing requirements	DMF SCR	B21820 29/05/2015	40.00	8.00	0.00	216.67	21.67	238.34	32,338.48

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Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
10/10/2013 20	Preparing a document - reading emails and correspondence regarding requirements to prepare audited account; drafting index to appeal book; emailing draft index to Mr Stephen Russell for consideration; dictating and settling letter to Mr S Cooper enclosing exhibits	IMC SCR	B21820 29/05/2015	160.00	32.00	0.00	1,320.00	132.00	1,452.00	33,790.48
11/10/2013 23	Reviewing or amending draft outline of argument on appeal	SCR SCR	B21820 29/05/2015	55.00	11.00	0.00	641.67	64.17	705.84	34,496.32
11/10/2013 17	Researching Law - class orders and exemptions re: financial reporting and auditing requirements	DMF SCR	B21820 29/05/2015	50.00	10.00	0.00	270.83	27.08	297.91	34,794.23
11/10/2013 20	Preparing a document - email to Mr Stephen Russell re: powers of ASIC to exempt schemes from reporting requirements	DMF SCR	B21820 29/05/2015	60.00	12.00	0.00	325.00	32.50	357.50	35,151.73
11/10/2013 10	Reading email received from Mr Stephen Russell re: class orders, regulatory guides and further research	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	35,211.32
11/10/2013 17	Researching Law - class order 03/392 and regulatory guide 174	DMF SCR	B21820 29/05/2015	30.00	6.00	0.00	162.50	16.25	178.75	35,390.07
11/10/2013 17	Researching Law - re: ASIC exemptions under section 111AT of the Corporation Act	DMF SCR	B21820 29/05/2015	50.00	10.00	0.00	270.83	27.08	297.91	35,687.98
11/10/2013 09	Preparing email to Mr Stephen Russell re: ASIC's power to exempt schemes from compliance with Part 2M.3 of the Corporations Act	DMF SCR	B21820 29/05/2015	40.00	8.00	0.00	216.67	21.67	238.34	35,926.32
11/10/2013 10	Reading email received from receiving email from Mr Stephen Russell regarding notice of appeal for website; emailing ASIC regarding notice of appeal on website; emailing Mr Stephen Russell regarding correspondence to ASIC	IMC SCR	B21820 29/05/2015	10.00	2.00	0.00	82.50	8.25	90.75	36,017.07

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
12/10/2013 23	Reviewing or amending outline of argument for appeal	SCR SCR	B21820 29/05/2015	240.00	48.00	0.00	2,800.00	280.00	3,080.00	39,097.07
14/10/2013 23	Reviewing or amending outline of argument for appeal, with memoranda to counsel by email, for final settling	SCR SCR	B21820 29/05/2015	150.00	30.00	0.00	1,750.00	175.00	1,925.00	41,022.07
14/10/2013 23	Reviewing or amending outline of argument for appeal, as re-settled by Mr Sheahan QC, including detailed final proof read, inserting missing references to the evidence, and settling List of Authorities, and sending same by email to Court of Appeal and opposing solicitors	SCR SCR	B21820 29/05/2015	120.00	24.00	0.00	1,400.00	140.00	1,540.00	42,562.07
14/10/2013 20	Preparing a document - reviewing and drafting outline of submissions; considering amended version of submissions prepared by Mr J Sheahan QC; discussing and settling submission with Mr Stephen Russell discussing index to appeal book with Mr Stephen Russell	IMC SCR	B21820 29/05/2015	295.00	59.00	0.00	2,433.75	243.38	2,677.13	45,239.20
15/10/2013 10	Reading email received from Registrar Court of Appeal	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	45,303.36
15/10/2013 09	Preparing email to Registrar Court of Appeal	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	45,367.52
15/10/2013 28	Miscellaneous - preparing of authorities for filing, emailing parties on the list of authorities, drafting and settling letter of service to ASIC; telephone conversation with Haidee, Sheahan QC chambers settling draft index to appeal book	IMC SCR	B21820 29/05/2015	140.00	28.00	0.00	1,155.00	115.50	1,270.50	46,638.02
16/10/2013 09	Preparing email to Mr Sean Cooper regarding draft index to appeal book; further telephone conversation with Mr Sean Cooper	IMC SCR	B21820 29/05/2015	20.00	4.00	0.00	165.00	16.50	181.50	46,819.52
21/10/2013 28	Miscellaneous - reviewing Mr Cooper's recommendations regarding the appeal book and	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	46,947.86

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
	index									
21/10/2013 20	Preparing a document - considering draft index to appeal book revised by Mr S Cooper suggesting removal of certain affidavits; emailing Mr Stephen Russell regarding counsel draft	IMC SCR	B21820 29/05/2015	40.00	8.00	0.00	330.00	33.00	363.00	47,310.86
22/10/2013 28	Miscellaneous - receiving email for Mr Stephen Russell; settling draft index to appeal book; draft index to parties for consideration; receiving email for David Tucker and replying	IMC SCR	B21820 29/05/2015	40.00	8.00	0.00	330.00	33.00	363.00	47,673.86
25/10/2013 28	Miscellaneous - review correspondence with Tucker regarding transcript, hearing on 7 May, and draft order sought on that date by LMIM	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	47,802.20
25/10/2013 20	Preparing a document - preparing appeal book; emailing Mr D Tucker regarding request for transcript; settling documents by extracts for appeal book	IMC SCR	B21820 29/05/2015	230.00	46.00	0.00	1,897.50	189.75	2,087.25	49,889.45
28/10/2013 19	Perusing a document - reviewing submission in preparation for receiving other parties submissions; receiving correspondence from the Court of Appeal registry regarding extension of time	IMC SCR	B21820 29/05/2015	35.00	7.00	0.00	288.75	28.88	317.63	50,207.08
29/10/2013 17	Researching Law - memo from Mr McQuade regarding Coote v Kelly, reading case; preparing memo to senior and junior counsel	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	50,592.08
29/10/2013 19	Perusing a document - reading ASIC submissions and dictating comments	IMC SCR	B21820 29/05/2015	130.00	26.00	0.00	1,072.50	107.25	1,179.75	51,771.83
30/10/2013 19	Perusing a document - circular regarding Whyte conduct	IMC SCR	B21820 29/05/2015	10.00	2.00	0.00	82.50	8.25	90.75	51,862.58

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
30/10/2013 20	Preparing a document - dictating comments regarding ASIC submissions; drafting memorandum regarding comments	IMC SCR	B21820 29/05/2015	205.00	41.00	0.00	1,691.25	169.13	1,860.38	53,722.96
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	DMF SCR	B16193RV 30/10/2013	0.00	0.00	0.00	-650.01	-65.01	-715.02	53,007.94
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	IMC SCR	B16193RV 30/10/2013	0.00	0.00	0.00	-21,615.00	-2,161.52	-23,776.52	29,231.42
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	SCR SCR	B16193RV 30/10/2013	0.00	0.00	0.00	-22,633.25	-2,263.25	-24,896.50	4,334.92
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	REF SCR	B16193RV 30/10/2013	0.00	0.00	0.00	-311.67	-31.17	-342.84	3,992.08
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	DMF SCR	B16193CN 30/10/2013	0.00	0.00	0.00	650.01	65.01	715.02	4,707.10
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	IMC SCR	B16193CN 30/10/2013	0.00	0.00	0.00	21,615.00	2,161.52	23,776.52	28,483.62
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	SCR SCR	B16193CN 30/10/2013	0.00	0.00	0.00	22,633.25	2,263.25	24,896.50	53,380.12
30/10/2013 ia	Fee Adjustment as per Bill B16193RV	REF SCR	B16193CN 30/10/2013	0.00	0.00	0.00	311.67	31.17	342.84	53,722.96
31/10/2013 12	Telephone call to Mr Sean Cooper re timing of Reply to ASIC's submissions	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	53,851.30
31/10/2013 19	Perusing a document - ASIC's Submissions	SCR SCR	B21820 29/05/2015	130.00	26.00	0.00	1,516.67	151.67	1,668.34	55,519.64
31/10/2013 11	Telephone call from Peter Schmidt; discussing his insights into ASIC position; tension between interest of LMIM in retaining office, and duty to evaluate the application by Trilogy in a dispassionate way; Norton Rose to confirm that there is no clearer power in LMIM to convene a meeting to resolve to wind up	SCR SCR	B21820 29/05/2015	25.00	5.00	0.00	291.67	29.17	320.84	55,840.48
31/10/2013 28	Miscellaneous - email to Ms Muller and Mr Park re conversation with Mr Schmidt, and call to Mr Park to discuss Mr Schmidt's suggestions	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	56,032.98

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
31/10/2013 12	Telephone call to Supreme Court Registry to obtain copy of draft order	REF SCR	B21820 29/05/2015	15.00	3.00	0.00	55.00	5.50	60.50	56,093.48
31/10/2013 13	Meeting in Office - with Ms Ilenna Copley regarding draft orders of Justice Lyons	REF SCR	B21820 29/05/2015	10.00	2.00	0.00	36.67	3.67	40.34	56,133.82
31/10/2013 20	Preparing a document - reviewing appeal submissions of ASIC; drafting detailed memorandum to respond to paragraphs of ASIC's submission. Emailing Mr Sean Cooper	IMC SCR	B21820 29/05/2015	330.00	66.00	0.00	2,722.50	272.25	2,994.75	59,128.57
1/11/2013 19	Perusing a document - memo from Mr Finch regarding the status of ASIC in litigation	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	59,256.91
1/11/2013 22	Preparing/dictating memo - to Mr Finch, regarding ASIC's views on the interpretation of the Corporations Act, and judicial dicta on same	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	59,385.25
1/11/2013 19	Perusing a document - memo from Mr Finch with summary of his research, notes for Submissions in reply to ASIC	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	59,770.25
1/11/2013 10	Reading email received from Mr Stephen Russell re: researches on weight of ASIC's view of the law	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	59,829.84
1/11/2013 17	Researching Law - on weight of ASIC's view of the law and relevant cases	DMF SCR	B21820 29/05/2015	60.00	12.00	0.00	325.00	32.50	357.50	60,187.34
1/11/2013 09	Preparing email to Mr Stephen Russell re: research findings	DMF SCR	B21820 29/05/2015	40.00	8.00	0.00	216.67	21.67	238.34	60,425.68
1/11/2013 12	Telephone call to Supreme Court Registry to obtain sealed orders	REF SCR	B21820 29/05/2015	10.00	2.00	0.00	36.67	3.67	40.34	60,466.02
1/11/2013 09	Preparing email to Supreme Court Registry to obtain sealed orders	REF SCR	B21820 29/05/2015	5.00	1.00	0.00	18.33	1.83	20.16	60,486.18

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Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
1/11/2013 28	Miscellaneous - obtaining/viewing draft orders of 2&7 May 2013 with a view to amending Russell's copy accordingly for the purpose of taking out sealed orders	REF SCR	B21820 29/05/2015	75.00	15.00	0.00	275.00	27.50	302.50	60,788.68
1/11/2013 12	Telephone call to Supreme Court Registry regarding orders	REF SCR	W3029 3/12/2013	10.00	2.00	0.00	36.67	3.67	40.34	60,829.02
1/11/2013 09	Preparing email to Supreme Court Registry regarding orders	REF SCR	W3029 3/12/2013	5.00	1.00	0.00	18.33	1.83	20.16	60,849.18
1/11/2013 28	Miscellaneous - obtaining/viewing draft orders of 2&7 May 2013 with a view to amending Russell's copy accordingly	REF SCR	W3029 3/12/2013	75.00	15.00	0.00	275.00	27.50	302.50	61,151.68
2/11/2013 20	Preparing a document - further drafting letter to ASIC chairman and Head of Legal regarding ASIC's conduct of matter; receiving email from Mr H Copley; telephone conversation with Court of Appeal registry; drafting draft index to appeal book; reading submissions of Mr Shotton; settling orders of Lyon J dated 2 and 7 May; discussing with Mr Stephen Russell letter to ASIC	IMC SCR	B21820 29/05/2015	210.00	42.00	0.00	1,732.50	173.25	1,905.75	63,057.43
3/11/2013 20	Preparing a document - draft outline of argument in reply to ASIC's outline of argument, including detailed research	SCR SCR	B21820 29/05/2015	705.00	141.00	0.00	8,225.00	822.50	9,047.50	72,104.93
4/11/2013 20	Preparing a document - draft outline in reply to ASIC's outline of argument	SCR SCR	B21820 29/05/2015	115.00	23.00	0.00	1,341.67	134.17	1,475.84	73,580.77
4/11/2013 19	Perusing a document - draft Notice of Contention from Tucker Cowen	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	73,773.27
4/11/2013 09	Preparing email to Mr Sheahan QC and Mr Cooper, copied to clients, containing detailed observations on draft Notice of Contention, research for same (re Orchard Aginvest and Re Stacks Managed	SCR SCR	B21820 29/05/2015	120.00	24.00	0.00	1,400.00	140.00	1,540.00	75,313.27

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale	Cost	WIP				
	Investments) and draft email to Tucker Cowen									
4/11/2013 19	Perusing a document - email from ASIC noting it does not object to the late Notice of Contention	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	75,377.43
4/11/2013 19	Perusing a document - Mr Cooper's draft outline of argument	SCR SCR	B21820 29/05/2015	60.00	12.00	0.00	700.00	70.00	770.00	76,147.43
4/11/2013 09	Preparing email to Mr Sheahan QC regarding Mr Cooper's draft	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	76,275.77
4/11/2013 12	Telephone call to Mr Sheahan QC, discussing the Notice of Contention and our client's proper and best approach to same	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	76,404.11
4/11/2013 12	Telephone call to Ms Muller, communicating Mr Sheahan's advice not to object to the lateness of the Notice of Contention, or say anything about any costs of same, receiving her instructions not to object to same, and also discussing Mr Cooper's revised draft outline of argument	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	76,596.61
4/11/2013 28	Miscellaneous - reviewing Ms Copley's detailed memo regarding the draft index to the appeal record, discussing Mr Tucker's suggested inclusions	SCR SCR	B21820 29/05/2015	20.00	4.00	0.00	233.33	23.33	256.66	76,853.27
4/11/2013 09	Preparing email to Tucker Cowen regarding late Notice of Objection	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	76,917.43
4/11/2013 10	Reading email received from Tucker Cowen with Application, and affidavits of Mr Tucker and Mr Whyte	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	76,981.59
4/11/2013 19	Perusing a document - Application to Court of Appeal, affidavit of Mr Tucker, and affidavit of Mr Whyte	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	77,174.09

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Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
4/11/2013 09	Preparing email to clients with material received from Tucker Cowen, and short commentary thereon	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	77,302.43
4/11/2013 20	Preparing a document - drafting email to respond to comments of Mr D Tucker regarding draft index to appeal book, emailing Mr S Cooper; telephone conversation with Mr S Cooper regarding index to appeal book; reading draft submission on appeal; discussing conduct of matter with Mr Stephen Russell; emailing Mr Stephen Russell regarding page 403; emailing Ms G Miller regarding certificates sought to be included by Mr Shotton; emailing Court of Appeal Registry regarding index to appeal book; receiving email from Mr D Tucker; receiving and considering material from Mr D Tucker	IMC SCR	B21820 29/05/2015	270.00	54.00	0.00	2,227.50	222.75	2,450.25	79,752.68
4/11/2013 09	Preparing email to Mr Schmidt regarding Norton Rose research on meeting for a winding-up resolution	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	79,816.84
4/11/2013 19	Perusing a document - memo from Mr Schmidt regarding power of a responsible entity to convene a meeting to consider winding-up	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	80,009.34
4/11/2013 22	Preparing/dictating memo - to counsel regarding Mr Schmidt's research note	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	80,073.50
5/11/2013 23	Reviewing or amending final outline of appellant's submissions in reply, received from Mr Sheahan QC, and serving same on ASIC and lodging in Court of Appeal	SCR SCR	B21820 29/05/2015	70.00	14.00	0.00	816.67	81.67	898.34	80,971.84
5/11/2013 28	Miscellaneous - prepare draft letter to ASIC chair and Chief Legal Officer re breach of Model Litigant Rules, and Australian Solicitors Conduct Rules	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	81,164.34

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
5/11/2013 09	Preparing email to Mr Copley regarding ASIC's website	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	81,228.50
5/11/2013 09	Preparing email to clients regarding emails to ASIC re website and proposed letter to chair of ASIC and Chief Legal Officer	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	81,292.66
5/11/2013 09	Preparing email to Tucker Cowen regarding lateness of second respondent's outline of argument	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	81,356.82
5/11/2013 09	Preparing email to counsel and clients with second respondent's outline of argument	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	81,420.98
5/11/2013 20	Preparing a document - preparing revised draft index to appeal book; perusing Notice of Contention served by Mr Shotton; drafting covering email	IMC SCR	B21820 29/05/2015	105.00	21.00	0.00	866.25	86.63	952.88	82,373.86
5/11/2013 20	Preparing a document - discussing with Mr Stephen Russell position of ASIC regarding meeting and correspondence with Piper Alderman; drafting letter to ASIC chairman and Head of Legal regarding ASIC's conduct of matter	IMC SCR	B21820 29/05/2015	170.00	34.00	0.00	1,402.50	140.25	1,542.75	83,916.61
6/11/2013 10	Reading email received from Mr Cooper regarding arrangements for preparation of first draft outline of argument in response to second respondent	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	83,980.77
6/11/2013 09	Preparing email to counsel advising them that we will prepare the first draft of the outline in light of commitments of Mr Cooper	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	84,044.93
6/11/2013 09	Preparing email to Mr Park and Ms Muller regarding Sofronoff's cross-examination in the Hyatt Coolum matter	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	84,109.09

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
7/11/2013 10	Reading email received from Ms Dunn with transcript of Mr Sofronoff's cross-examination of Ms Muller, and short email acknowledging receipt	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	84,173.25
7/11/2013 22	Preparing/dictating memo - Ms Copley, with instructions to peruse transcript	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	84,237.41
7/11/2013 19	Perusing a document - Shotton's Outline of Argument, including research on cases and statute references contained therein	SCR SCR	B21820 29/05/2015	245.00	49.00	0.00	2,858.33	285.83	3,144.16	87,381.57
7/11/2013 13	Meeting in Office - with Mr Stephen Russell re: Corporations Act research re: Powers of the court	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	87,441.16
7/11/2013 20	Preparing a document - memo to Mr Stephen Russell re: research on Corporations Act re: Powers of the court	DMF SCR	B21820 29/05/2015	100.00	20.00	0.00	541.67	54.17	595.84	88,037.00
7/11/2013 19	Perusing a document - reviewing transcript of cross examination of Ms G Muller by Mr W Sofronoff QC in Hyatt case	IMC SCR	B21820 29/05/2015	35.00	7.00	0.00	288.75	28.88	317.63	88,354.63
8/11/2013 12	Telephone call to Mr Sheahan QC to discuss proposed application for appointment of special purpose liquidators and effect on appeal	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	88,547.13
8/11/2013 12	Telephone call to Ms Muller and Mr Park to propose conference and discuss application for the appointment of special purpose liquidators	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	88,675.47
8/11/2013 17	Researching Law - special purpose liquidators	SCR SCR	B21820 29/05/2015	110.00	22.00	0.00	1,283.33	128.33	1,411.66	90,087.13
8/11/2013 20	Preparing a document - draft outline of argument in reply to second respondent	SCR SCR	B21820 29/05/2015	150.00	30.00	0.00	1,750.00	175.00	1,925.00	92,012.13
8/11/2013 23	Reviewing or amending memo to Mr Stephen Russell re: court powers under Corporations Act	DMF SCR	B21820 29/05/2015	60.00	12.00	0.00	325.00	32.50	357.50	92,369.63

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
8/11/2013 23	Reviewing or amending memo to Mr Stephen Russell re: courts powers under Corporations Act	DMF SCR	B21820 29/05/2015	50.00	10.00	0.00	270.83	27.08	297.91	92,667.54
8/11/2013 13	Meeting in Office - with Mr Stephen Russell re: Corporations Act research	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	92,727.13
8/11/2013 13	Meeting in Office - obtaining copies of orders handed up at trial; discussing conduct of matter with Mr Stephen Russell; attending during telephone conversation between Ms G Muller and Stephen Russell	IMC SCR	B21820 29/05/2015	35.00	7.00	0.00	288.75	28.88	317.63	93,044.76
11/11/2013 20	Preparing a document - draft outline of argument in reply to the submissions of the second respondent	SCR SCR	B21820 29/05/2015	710.00	142.00	0.00	8,283.33	828.33	9,111.66	102,156.42
11/11/2013 11	Telephone call from Mr Russell re: research task on actual vs potential conflicts	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	102,216.01
11/11/2013 17	Researching Law - actual vs potential conflicts	DMF SCR	B21820 29/05/2015	175.00	35.00	0.00	947.92	94.79	1,042.71	103,258.72
11/11/2013 22	Preparing/dictating memo - to Mr Stephen Russell re: actual vs potential conflicts	DMF SCR	B21820 29/05/2015	105.00	21.00	0.00	568.75	56.88	625.63	103,884.35
11/11/2013 11	Telephone call from Mr Stephen Russell re: research	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	103,943.94
11/11/2013 22	Preparing/dictating memo - to Mr Stephen Russell re: actual vs potential conflicts	DMF SCR	B21820 29/05/2015	30.00	6.00	0.00	162.50	16.25	178.75	104,122.69
11/11/2013 19	Perusing a document - telephone conversation with Mr Stephen Russell regarding Redland Companies reviewing evidence re: debt and Redland Companies; telephone conversation with Court of Appeal Paul regarding draft index, emailing Mr Stephen Russell regarding draft index to appeal book; settling orders of Lyons J to be sealed	IMC SCR	B21820 29/05/2015	65.00	13.00	0.00	536.25	53.63	589.88	104,712.57

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
11/11/2013 19	Perusing a document - considering primary documents and affidavit regarding management fees and percentage changes around 256; emailing Mr Stephen Russell regarding same; reading ASIC's appeal submissions; emailing Stephen Russell regarding response to specific aspects of ASIC's submissions	IMC SCR	B21820 29/05/2015	170.00	34.00	0.00	1,402.50	140.25	1,542.75	106,255.32
12/11/2013 20	Preparing a document - draft outline of argument in reply to the submissions of the second respondent (continued)	SCR SCR	B21820 29/05/2015	90.00	18.00	0.00	1,050.00	105.00	1,155.00	107,410.32
12/11/2013 23	Reviewing or amending email to parties regarding Appeal Index	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	175.00	17.50	192.50	107,602.82
12/11/2013 20	Preparing a document - draft outline of argument in reply to the submissions of the second respondent (continuing)	SCR SCR	B21820 29/05/2015	320.00	64.00	0.00	3,733.33	373.33	4,106.66	111,709.48
12/11/2013 13	Meeting in Office - with Mr Stephen Russell re: form of order	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	111,769.07
12/11/2013 09	Preparing email to Supreme Court Registry enclosing final orders for 2nd and 7th May, 2013	REF SCR	B21820 29/05/2015	10.00	2.00	0.00	36.67	3.67	40.34	111,809.41
12/11/2013 20	Preparing a document - arranging sealed copies of the orders of Lyons J; emailing ASIC and Tucker & Cowen regarding index to appeal book; drafting index to appeal book; collating documents for appeal book; reading draft submissions of Mr Shotton discussing with Mr Stephen Russell transcript hearing on 30 July 2013; emailing to obtain a copy of transcript; considering case authorities regarding conflict and seeking input of court and lawyers	IMC SCR	B21820 29/05/2015	275.00	55.00	0.00	2,268.75	226.88	2,495.63	114,305.04
13/11/2013 23	Reviewing or amending Mr Cooper's draft, making amendments regarding the issue of units to the B	SCR SCR	B21820 29/05/2015	30.00	6.00	0.00	350.00	35.00	385.00	114,690.04

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
	class members									
13/11/2013	Preparing email to Mr Sheahan QC and Mr Cooper with revised draft outline	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	114,754.20
09		SCR	29/05/2015							
13/11/2013	Miscellaneous - attendances with Ms Copley, correspondence with the solicitors for the respondents, and settling the index to the appeal record	SCR	B21820	30.00	6.00	0.00	350.00	35.00	385.00	115,139.20
28		SCR	29/05/2015							
13/11/2013	Miscellaneous - attending Court of Appeal Registry to have index to record approved	REF	B21820	40.00	8.00	0.00	146.67	14.67	161.34	115,300.54
28		SCR	29/05/2015							
13/11/2013	Preparing a document - reviewing case authorities regarding conflict and seeking guidance from independent advice; emailing parties regarding draft index; settling draft index and drafting correspondence	IMC	B21820	175.00	35.00	0.00	1,443.75	144.38	1,588.13	116,888.67
20		SCR	29/05/2015							
14/11/2013	Reviewing or amending outline of argument in reply to Mr Shotton's argument - final proof reading of the outline settled by Mr Sheahan QC, including missing transcript and evidence references	SCR	B21820	120.00	24.00	0.00	1,400.00	140.00	1,540.00	118,428.67
23		SCR	29/05/2015							
14/11/2013	Miscellaneous - final attendances re Index to Appeal Record	SCR	B21820	10.00	2.00	0.00	116.67	11.67	128.34	118,557.01
28		SCR	29/05/2015							
14/11/2013	Preparing email to clients with submissions in reply to Shotton's submissions	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	118,621.17
09		SCR	29/05/2015							
14/11/2013	Preparing email to counsel with final submissions in reply to Shotton's submissions	SCR	B21820	5.00	1.00	0.00	58.33	5.83	64.16	118,685.33
09		SCR	29/05/2015							
14/11/2013	Preparing a document - telephone conversation with Mr Stephen Russell regarding affidavit reference regarding Trilogy changing mind about consent; settling bundle of documents for appeal	IMC	B21820	190.00	38.00	0.00	1,567.50	156.75	1,724.25	120,409.58
20		SCR	29/05/2015							

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale	Cost	WIP				
	book; settling submission for service; drafting memorandum of instructions to Confidential Document Solutions regarding appeal book									
15/11/2013 19	Perusing a document - reading submission in reply to Mr Shotton's submission; serving filed submissions	IMC SCR	B21820 29/05/2015	35.00	7.00	0.00	288.75	28.88	317.63	120,727.21
18/11/2013 20	Preparing a document - preparing amendments to appeal book; telephone conversation with Confidential Document Solution, Adam, regarding correction of appeal book index; discuss amendments with Michael at Confidential Document Solutions; reviewing and amended index; emailing Nick Purser at CDS regarding index; dictating letter of service to ASIC and Tucker & Cowen; dictating letters to counsel and FTI; telephone call to Ms Gibbons; telephone call to Mr H Copley; settling appeal books for same and distribution	IMC SCR	B21820 29/05/2015	225.00	45.00	0.00	1,856.25	185.63	2,041.88	122,769.09
19/11/2013 20	Preparing a document - preparing folder of submission for counsel and others	IMC SCR	B21820 29/05/2015	20.00	4.00	0.00	165.00	16.50	181.50	122,950.59
20/11/2013 20	Preparing a document - preparing brief to counsel regarding submissions; emailing counsel regarding list of authorities; telephone conversation with Mr S Cooper regarding list of authorities	IMC SCR	B21820 29/05/2015	45.00	9.00	0.00	371.25	37.13	408.38	123,358.97
22/11/2013 20	Preparing a document - cross-referencing appellants' outlining of argument with pages of appeal book	IMC SCR	B21820 29/05/2015	170.00	34.00	0.00	1,402.50	140.25	1,542.75	124,901.72
22/11/2013 20	Preparing a document - emailing Mr Tucker regarding supplementary appeal book; discussing with Mr Stephen Russell affidavit used at trial; telephone conversation with Mr Sean Cooper of counsel; obtaining list of material; drafting email to Registrar regarding supplementary appeal book;	IMC SCR	B21820 29/05/2015	260.00	52.00	0.00	2,145.00	214.50	2,359.50	127,261.22

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
	telephone call conversation with Mr J Sheahan QC's chambers; receiving email from Mr J Sheahan QC; emailing indexes and position regarding cross-referencing to Mr J Sheahan QC									
25/11/2013 23	Reviewing or amending obtaining reported cases and settling citation in submission	REF SCR	B21820 29/05/2015	30.00	6.00	0.00	110.00	11.00	121.00	127,382.22
25/11/2013 20	Preparing a document - bundle of authorities	REF SCR	B21820 29/05/2015	45.00	9.00	0.00	165.00	16.50	181.50	127,563.72
25/11/2013 20	Preparing a document - preparing Part A authorities to be filed and copies for counsel and others; preparing copies of authorities to cross reference to appeal book; discussing with Mr Stephen Russell outline of argument and supplementary appeal book; emailing parties regarding supplementary appeal book; receiving email from Mr Tucker regarding provisions of Corporations Act; including references to Corporations Act in Part A list of authorities; emailing Mr S Cooper regarding references; receiving email from ASIC and replying; preparing brief of authorities of ASIC and Mr Shotton - Part A & B	IMC SCR	B21820 29/05/2015	460.00	92.00	0.00	3,795.00	379.50	4,174.50	131,738.22
26/11/2013 10	Reading email received from Tucker Cowen regarding supplementary appeal book	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	58.33	5.83	64.16	131,802.38
26/11/2013 09	Preparing email to Tucker Cowen regarding supplementary appeal book, including detailed analysis of the relevance to the appeal of the affidavit of S C Russell filed on 7 May, 2013	SCR SCR	B21820 29/05/2015	120.00	24.00	0.00	1,400.00	140.00	1,540.00	133,342.38
26/11/2013 20	Preparing a document - bundle of authorities	REF SCR	B21820 29/05/2015	20.00	4.00	0.00	73.33	7.33	80.66	133,423.04
27/11/2013 23	Reviewing or amending speaking notes, including numerous emails to and from Mr Sheahan QC and Mr Cooper, and preparation for the appeal	SCR SCR	B21820 29/05/2015	350.00	70.00	0.00	4,083.33	408.33	4,491.66	137,914.70

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
27/11/2013 13	Meeting in Office - with Mr Stephen Russell re: director's rights to use company funds re: notice of meeting and circulars to members and research case law	DMF SCR	B21820 29/05/2015	15.00	3.00	0.00	81.25	8.13	89.38	138,004.08
27/11/2013 17	Researching Law - Reviewing and considering the cases of Peel, Advance Bank and Campbell on the use of company funds in relation to general meetings of members	DMF SCR	B21820 29/05/2015	70.00	14.00	0.00	379.17	37.92	417.09	138,421.17
27/11/2013 13	Meeting in Office - with Mr Stephen Russell on the principles contained in the cases of Peel, Advance Bank and preparing an email to Counsel on those principles	DMF SCR	B21820 29/05/2015	20.00	4.00	0.00	108.33	10.83	119.16	138,540.33
27/11/2013 09	Preparing email to counsel re: copies of cases	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	138,599.92
27/11/2013 09	Preparing email to Mr Stephen Russell re: cases on ASIC as regulator	DMF SCR	B21820 29/05/2015	10.00	2.00	0.00	54.17	5.42	59.59	138,659.51
27/11/2013 13	Meeting in Office - with Ms Ilenna Copley regarding letter of service to ASIC and Tucker & Cowen	REF SCR	B21820 29/05/2015	5.00	1.00	0.00	18.33	1.83	20.16	138,679.67
27/11/2013 21	Preparing/dictating letter - enclosing supplementary appeal book to ASIC and Tucker & Cowen	REF SCR	B21820 29/05/2015	20.00	4.00	0.00	73.33	7.33	80.66	138,760.33
27/11/2013 28	Miscellaneous - serving supplementary appeal book on ASIC and Tucker & Cowen and delivery of same to Mr Sean Cooper of counsel	REF SCR	B21820 29/05/2015	45.00	9.00	0.00	165.00	16.50	181.50	138,941.83
27/11/2013 20	Preparing a document - receiving email from Mr D Tucker; settling cross-references for appeal book; telephone conversation with Mr S Cooper; receiving email from Registrar of the Court of Appeal; drafting email to Registrar; telephone conversation with Court of Appeal Registry	IMC SCR	B21820 29/05/2015	460.00	92.00	0.00	3,795.00	379.50	4,174.50	143,116.33

Matter 20131268 Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
	regarding hearing time; arranging Part B copies of authorities; arranging supplementary appeal book; discussing supplementary appeal book with Mr Stephen Russell; emailing ASIC and Tucker regarding cross-referenced outline of argument; collating for Mr S Cooper copies of correspondence regarding orders made 7 May 2013; preparing for hearing of appeal; brief to Mr J Sheahan QC; drafting list of actions to be undertaken; arranging filing of cross-referenced outlines of argument; emailing Registrar regarding supplementary appeal book; receiving and considering emails with Counsel; emailing regarding hearing time and supplementary appeal book									
28/11/2013 28	Miscellaneous - further preparation for appeal; discussions with Mr Sheahan QC	SCR SCR	B21820 29/05/2015	195.00	39.00	0.00	2,275.00	227.50	2,502.50	145,618.83
28/11/2013 24	Appearing in Court - Court of Appeal; morning session; instructing Mr Sheahan QC and Mr Cooper; contra Mr Sofronoff QC and Mr Forrest for ASIC; contra Mr Clothier QC and Mr Dietz for Shotton	SCR SCR	B21820 29/05/2015	180.00	36.00	0.00	2,100.00	210.00	2,310.00	147,928.83
28/11/2013 24	Appearing in Court - Court of Appeal; afternoon session	SCR SCR	B21820 29/05/2015	120.00	24.00	0.00	1,400.00	140.00	1,540.00	149,468.83
28/11/2013 12	Telephone call to Ms Muller, reporting on Mr Sheahan's views after the close of the appeal	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	116.67	11.67	128.34	149,597.17
28/11/2013 24	Appearing in Court - reviewing supplementary appeal book regarding paragraph 19; discussing matter to be undertaken with Mr Stephen Russell; preparing for and attending hearing of appeal before Fraser JA, Gotterson JA and Daubney J	IMC SCR	B21820 29/05/2015	515.00	103.00	0.00	4,248.75	424.88	4,673.63	154,270.80
29/11/2013 ia	Fee Adjustment as per Bill B16519RV	DMF SCR	B16519RV 29/11/2013	0.00	0.00	0.00	-7,989.62	-798.99	-8,788.61	145,482.19

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
29/11/2013	Fee Adjustment as per Bill B16519RV	IMC	B16519RV	0.00	0.00	0.00	-34,815.00	-3,481.55	-38,296.55	107,185.64
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16519RV	SCR	B16519RV	0.00	0.00	0.00	-50,691.63	-5,069.13	-55,760.76	51,424.88
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16519RV	REF	B16519RV	0.00	0.00	0.00	-1,540.00	-154.00	-1,694.00	49,730.88
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16519RV	DMF	B16519CN	0.00	0.00	0.00	7,989.62	798.99	8,788.61	58,519.49
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16519RV	IMC	B16519CN	0.00	0.00	0.00	34,815.00	3,481.55	38,296.55	96,816.04
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16519RV	SCR	B16519CN	0.00	0.00	0.00	50,691.63	5,069.13	55,760.76	152,576.80
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16519RV	REF	B16519CN	0.00	0.00	0.00	1,540.00	154.00	1,694.00	154,270.80
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	DMF	B16522RV	0.00	0.00	0.00	-7,989.62	-798.99	-8,788.61	145,482.19
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	IMC	B16522RV	0.00	0.00	0.00	-34,815.00	-3,481.55	-38,296.55	107,185.64
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	SCR	B16522RV	0.00	0.00	0.00	-50,691.63	-5,069.13	-55,760.76	51,424.88
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	REF	B16522RV	0.00	0.00	0.00	-1,210.00	-121.00	-1,331.00	50,093.88
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	DMF	B16522CN	0.00	0.00	0.00	7,989.62	798.99	8,788.61	58,882.49
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	IMC	B16522CN	0.00	0.00	0.00	34,815.00	3,481.55	38,296.55	97,179.04
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	SCR	B16522CN	0.00	0.00	0.00	50,691.63	5,069.13	55,760.76	152,939.80
ia		SCR	29/11/2013							
29/11/2013	Fee Adjustment as per Bill B16522RV	REF	B16522CN	0.00	0.00	0.00	1,210.00	121.00	1,331.00	154,270.80
ia		SCR	29/11/2013							
3/12/2013	Fees Written Off W3029	REF	W3029	0.00	0.00	0.00	-330.00	-33.00	-363.00	153,907.80
wo		SCR	3/12/2013							
9/12/2013	Reading email received from Mr John Park	IMC	B21820	20.00	4.00	0.00	165.00	16.50	181.50	154,089.30
10	regarding submission and transcript; collating	SCR	29/05/2015							

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Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale	Cost	WIP				
	electronic copies of outlines of argument and transcript and emailing to Mr John Park									
10/12/2013	Telephone call from Glen regarding costs position	IMC	B21820	10.00	2.00	0.00	82.50	8.25	90.75	154,180.05
11		SCR	29/05/2015							
20/01/2014	Preparing a document - Receiving email from Stephen Russell regarding calculation of appeal period; considering position and rules; emailing Stephen Russell regarding process and dates	IMC	B21820	100.00	20.00	0.00	825.00	82.50	907.50	155,087.55
20		SCR	29/05/2015							
10/03/2014	Preparing a document - Drafting letter to LMIM regarding disbursement only account to replace two earlier accounts	IMC	B21820	65.00	13.00	0.00	536.25	53.63	589.88	155,677.43
20		SCR	29/05/2015							
6/06/2014	Appearing in Court - Court of Appeal to receive judgment	SCR	B21820	40.00	8.00	0.00	466.67	46.67	513.34	156,190.77
24		SCR	29/05/2015							
6/06/2014	Meeting in Office - Mr Bender; reading judgment	SCR	B21820	60.00	12.00	0.00	700.00	70.00	770.00	156,960.77
13		SCR	29/05/2015							
6/06/2014	Preparing a document - draft press release for FTI	SCR	B21820	15.00	3.00	0.00	175.00	17.50	192.50	157,153.27
20		SCR	29/05/2015							
6/06/2014	Telephone call to Mr Park	SCR	B21820	10.00	2.00	0.00	116.67	11.67	128.34	157,281.61
12		SCR	29/05/2015							
6/06/2014	Reviewing or amending draft press release	SCR	B21820	10.00	2.00	0.00	116.67	11.67	128.34	157,409.95
23		SCR	29/05/2015							
17/06/2014	Preparing email to Mr Sheahan SC - detailed note regarding appeal from Court of Appeal judgment	SCR	B21820	120.00	24.00	0.00	1,400.00	140.00	1,540.00	158,949.95
09		SCR	29/05/2015							
17/06/2014	Telephone call to Mr Sheahan SC - consultation regarding appeal from judgment of the Court of Appeal	SCR	B21820	30.00	6.00	0.00	350.00	35.00	385.00	159,334.95
12		SCR	29/05/2015							
1/07/2014	Miscellaneous - review UCPR and commentary re assessment of costs; review UCPR fees regulation	TPR	B21820	90.00	18.00	0.00	180.00	18.00	198.00	159,532.95
28		SCR	29/05/2015							
2/07/2014	Perusing a document - Costs Statement of Second	TPR	B21820	165.00	33.00	0.00	330.00	33.00	363.00	159,895.95
19		SCR	29/05/2015							

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Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale	Cost	WIP				
	Respondent; consider and calculate potential objections									
8/07/2014 20	Preparing a document - objection to costs statement	TPR SCR	B21820 29/05/2015	15.00	3.00	0.00	30.00	3.00	33.00	159,928.95
9/07/2014 20	Preparing a document - settling draft objection to costs statement	TPR SCR	B21820 29/05/2015	50.00	10.00	0.00	100.00	10.00	110.00	160,038.95
15/07/2014 19	Perusing a document - consider further objections to costs statement	TPR SCR	B21820 29/05/2015	180.00	36.00	0.00	360.00	36.00	396.00	160,434.95
16/07/2014 20	Preparing a document - settle draft objection to costs statement for SCR review	TPR SCR	B21820 29/05/2015	135.00	27.00	0.00	270.00	27.00	297.00	160,731.95
21/07/2014 23	Reviewing or amending notice of objection to 2 respondents costs claim	MJM SCR	B21820 29/05/2015	70.00	14.00	0.00	525.00	52.50	577.50	161,309.45
21/07/2014 13	Meeting in Office - with Mr Miller reviewing costs statement and discussing amendments	TPR SCR	B21820 29/05/2015	55.00	11.00	0.00	110.00	11.00	121.00	161,430.45
21/07/2014 20	Preparing a document - settle notice of objection to costs statement	TPR SCR	B21820 29/05/2015	25.00	5.00	0.00	50.00	5.00	55.00	161,485.45
21/07/2014 21	Preparing/dictating letter - of service to Tucket and Cowan	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,496.45
29/07/2014 19	Perusing a document - Correspondence, offer and draft application from other side	TPR SCR	B21820 29/05/2015	10.00	2.00	0.00	20.00	2.00	22.00	161,518.45
29/07/2014 19	Perusing a document - letter from Registrar requesting consent to appoint costs assessor	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,529.45
29/07/2014 90	Email to SCPR regarding second respondent's offer to settle and progressing matter	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,540.45

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Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
30/07/2014 21	Preparing/dictating letter - counter-offer to Tucker & Cowen re costs assessment	TPR SCR	B21820 29/05/2015	10.00	2.00	0.00	20.00	2.00	22.00	161,562.45
31/07/2014 23	Reviewing or amending draft counter offer	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,573.45
5/08/2014 90	Email to SCR advising of proposed counter offer and whether objection to Mr Skuse should be made	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,584.45
5/08/2014 90	Email to Registrar consenting to appointment of costs assessor	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,595.45
6/08/2014 90	Email to Kelly Trenfield attaching draft counter offer	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,606.45
7/08/2014 10	Reading email received from David Tucker advising client declines offer	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,617.45
12/08/2014 10	Reading email received from Tucker & Cowen re appointment of Costs Assessor	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,628.45
12/08/2014 10	Reading email received from Supreme Court Registrar re Order for appointment of Costs Assessor	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,639.45
15/08/2014 90	Email to client regarding appointment of costs assessment	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,650.45
19/08/2014 10	Reading email received from costs assessor and Tucker and Cowen	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,661.45
19/08/2014 90	Email to costs assessor regarding directions	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,672.45
19/08/2014 15	Reading letter received from Mr Skuse re directions on costs assessment	SCPR SCR	B21820 29/05/2015	15.00	3.00	0.00	87.50	8.75	96.25	161,768.70
20/08/2014 09	Preparing email to Mr Skuse re costs directions	SCPR SCR	B21820 29/05/2015	15.00	3.00	0.00	87.50	8.75	96.25	161,864.95

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Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
1/09/2014 10	Reading email received from Ted Skuse regarding further submissions	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,875.95
5/09/2014 10	Reading email received from Mr Skuse regarding costs assessment	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,886.95
5/09/2014 17	Researching Law - procedure following assessment; effect of offer on assessment	TPR SCR	B21820 29/05/2015	10.00	2.00	0.00	20.00	2.00	22.00	161,908.95
5/09/2014 10	Reading email received from Ms Scherer attaching offers exchanged by the parties	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,919.95
5/09/2014 90	Email to Costs assessor confirming offers exchanged by the parties	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,930.95
15/09/2014 20	Preparing a document - email to clients regarding liability of costs assessment	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	161,941.95
17/09/2014 23	Reviewing or amending UCPR as to obligations to pay; letter to client regarding payment of costs assessment	TPR SCR	B21820 29/05/2015	10.00	2.00	0.00	20.00	2.00	22.00	161,963.95
19/09/2014 21	Preparing/dictating letter - to Tucker & Cowen, regarding indemnity for costs	SCR SCR	B21820 29/05/2015	45.00	9.00	0.00	562.50	56.25	618.75	162,582.70
19/09/2014 23	Reviewing or amending to Tucker & Cowen regarding indemnity for appeal costs	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	187.50	18.75	206.25	162,788.95
30/09/2014 15	Reading letter received from Tucker & Cowen regarding appeal costs	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	62.50	6.25	68.75	162,857.70
30/09/2014 10	Reading email received from Tucker & Cowen enclosing order for costs assessment	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,868.70
30/09/2014 21	Preparing/dictating letter - to Tucker & Cowen responding to letter of today requesting payment	TPR SCR	B21820 29/05/2015	10.00	2.00	0.00	20.00	2.00	22.00	162,890.70

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Description Appeal from decision of Dalton J

Date Type	Description	Author Partner	Bill Billed	Mins Scale Cost	Units	Non-Billable WIP	Amount	Tax	Total	Balance
30/09/2014 23	Reviewing or amending letter to Tucker and Cowen regarding costs assessment	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,901.70
8/10/2014 90	Email to Tucker & Cowen regarding enforcement of costs and requesting response to earlier letter of SCR	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,912.70
8/10/2014 15	Reading letter received from Tucker & Cowen regarding payment of costs	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,923.70
8/10/2014 90	Email to Tucker & Cowen attaching email of 19 September, 2014	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,934.70
15/10/2014 10	Reading email received from Tucker & Cowen in response to our letter dated 19 September, 2014	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,945.70
29/10/2014 15	Reading letter received from Tucker & Cowen re costs order	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	162,956.70
13/11/2014 21	Preparing/dictating letter - to Tucker & Cowen regarding indemnity for appeal costs	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	62.50	6.25	68.75	163,025.45
19/11/2014 10	Reading email received from Mr Schwarz regarding indemnity for appeal costs	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	62.50	6.25	68.75	163,094.20
26/11/2014 09	Preparing email to Mr Couper of Gadens regarding indemnity for appeal costs	SCR SCR	B21820 29/05/2015	10.00	2.00	0.00	125.00	12.50	137.50	163,231.70
31/01/2015 15	Reading letter received from Gadens regarding indemnity for Shotton's costs	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	62.50	6.25	68.75	163,300.45
31/01/2015 21	Preparing/dictating letter - to Gadens, detailed reasons for indemnity for Shotton	SCR SCR	B21820 29/05/2015	80.00	16.00	0.00	1,000.00	100.00	1,100.00	164,400.45
13/02/2015 19	Perusing a document - letter from Gadens dated 10 February, 2015	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	164,411.45

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Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
13/02/2015 21	Preparing/dictating letter - to Gadens in reply to 10 February, 2015 letter	TPR SCR	B21820 29/05/2015	5.00	1.00	0.00	10.00	1.00	11.00	164,422.45
13/02/2015 19	Perusing a document - correspondence dated 19 September, 2014 and 31 January, 2015	TPR SCR	B21820 29/05/2015	20.00	4.00	0.00	40.00	4.00	44.00	164,466.45
21/04/2015 17	Researching Law - Litigation costs incurred by a liquidator and the enforcement thereof	SCPR SCR	B21820 29/05/2015	40.00	8.00	0.00	250.00	25.00	275.00	164,741.45
22/04/2015 21	Preparing/dictating letter - to Tucker and Cowen re claim for appeal costs	SCPR SCR	B21820 29/05/2015	10.00	2.00	0.00	62.50	6.25	68.75	164,810.20
23/04/2015 23	Reviewing or amending letter to Tucker and Cowen regarding appeal costs order	AJT SCR	B21820 29/05/2015	5.00	1.00	0.00	49.58	4.96	54.54	164,864.74
23/04/2015 12	Telephone call to Mr O'Kearney regarding response to Tucker and Cowen	AJT SCR	B21820 29/05/2015	5.00	1.00	0.00	49.58	4.96	54.54	164,919.28
5/05/2015 09	Preparing email to Mr O'Kearney re Tucker and Cowen correspondence	SCPR SCR	B21820 29/05/2015	5.00	1.00	0.00	31.25	3.13	34.38	164,953.66
20/05/2015 15	Reading letter received from Tucker & Cowen dated 1 May 2015	SCR SCR	B21820 29/05/2015	15.00	3.00	0.00	187.50	18.75	206.25	165,159.91
20/05/2015 21	Preparing/dictating letter - Gadens, demanding response and cheque for Mr Shotton's costs	SCR SCR	B21820 29/05/2015	20.00	4.00	0.00	250.00	25.00	275.00	165,434.91
20/05/2015 09	Preparing email to FTI, giving update and copy of letter to Gadens	SCR SCR	B21820 29/05/2015	5.00	1.00	0.00	62.50	6.25	68.75	165,503.66
22/05/2015 15	Reading letter received from Gadens - payment of Shotton costs order	AJT SCR	B22299 15/07/2015	5.00	1.00	0.00	49.58	4.96	54.54	165,558.20
22/05/2015 09	Preparing email to Mr Park and Ms Trenfield reporting re payment of Shotton's costs order	AJT SCR	B22299 15/07/2015	5.00	1.00	0.00	49.58	4.96	54.54	165,612.74

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

Date	Description	Author	Bill	Mins	Units	Non-Billable	Amount	Tax	Total	Balance
Type		Partner	Billed	Scale Cost		WIP				
28/05/2015	Reading email received from Mr Park, regarding the liquidators' costs of the appeal	SCR	B22299	5.00	1.00	0.00	62.50	6.25	68.75	165,681.49
10		SCR	15/07/2015							
28/05/2015	Preparing email to Mr Park, advising as to timing of request to Mr Whyte for payment of appeal costs	SCR	B22299	5.00	1.00	0.00	62.50	6.25	68.75	165,750.24
09		SCR	15/07/2015							
28/05/2015	Preparing email to Ms Ogden, Gadens, enquiring if Mr Whyte has paid Tucker & Cowen	SCR	B22299	5.00	1.00	0.00	62.50	6.25	68.75	165,818.99
09		SCR	15/07/2015							
Totals				17,085.00	3,417.00	0.00	150,744.51	15,074.48	165,818.99	

Fees Summary by Author

Author	W.I.P. units	W.I.P.	Scale Cost	Non-Billable WIP	Total Units	Total	Total Scale Cost
AJT Ashley Tiplady					4.00	198.32	
DMF Derek Finch					319.00	8,639.63	
IMC Ilenna Copley					1,407.00	58,038.75	
MJM Michael Miller					14.00	525.00	
REF Renee Fitzpatrick					101.00	1,521.67	
SCPR Sean Russell					17.00	518.75	
SCR Stephen Russell					1,371.00	79,462.39	
TPR Tim Russell					184.00	1,840.00	
	0.00	0.00	0.00	0.00	3,417.00	150,744.51	0.00

Fees Summary by Type

Fee Type	W.I.P. units	W.I.P.	Scale Cost	Non-Billable WIP	Total Units	Total	Total Scale Cost
09 Preparing email to					160.00	7,939.94	
10 Reading email received from					47.00	1,922.46	
11 Telephone call from					27.00	1,384.59	
12 Telephone call to					105.00	4,708.76	
13 Meeting in Office -					65.00	2,261.26	
14 Meeting out of Office -					12.00	700.00	
15 Reading letter received from					18.00	784.15	
17 Researching Law -					187.00	6,126.25	

Matter **20131268** Client FTI Consulting (Australia)
Description Appeal from decision of Dalton J

19	Perusing a document -	349.00	14,236.67						
20	Preparing a document -	1,601.00	71,910.83						
21	Preparing/dictating letter -	68.00	3,587.49						
22	Preparing/dictating memo -	34.00	1,139.58						
23	Reviewing or amending	333.00	17,982.09						
24	Appearing in Court -	171.00	8,215.42						
27	Searching a Public Office -	1.00	58.33						
28	Miscellaneous -	215.00	7,851.69						
90	WIP Brought Forward	24.00	265.00						
ia	Invoice Adjustment								
wo	Write Off		-330.00						
		0.00	0.00	0.00	0.00	3,417.00	150,744.51	0.00	

RUSSELLS

29 May, 2015

Our Ref: Mr Russell
Your Ref: Mr Park

LM Investment Management Limited (In Liquidation)
C/- FTI Consulting (Australia) Pty Ltd
22 Market Street
BRISBANE QLD 4000

Dear Mr Park

**LM Investment Management Ltd as responsible entity of the LM First
Mortgage Income Fund -v- Bruce and others
Appeal to Court of Appeal from judgment of Dalton J**

I attach our final memo of fees in respect of the appeal to the Court of Appeal from the judgment of Dalton J, for your kind attention.

I confirm our advice that these fees are properly payable from the funds of the LM First Mortgage Income Fund.

I note that Mr Shotton's solicitors have claimed, and been paid, or are shortly to be paid, for their costs under the order of the Court of Appeal. Those costs were payable by the appellant, LMIM. Given that Mr Whyte has now acknowledged that the costs of the appeal are properly payable out of the Scheme Property that he holds, we will submit the bill to Mr Whyte for payment, along with all previous bills for outlays (including fees to counsel).

Thank you for entrusting the matter to us.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899
RussellsLaw.com.au

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RUSSELLS

ABN 38 332 782 534

LM Investment Management Limited (in
liquidation)
c/- FTI Consulting (Australia) Pty Ltd
22 Market Street
BRISBANE QLD 4000

Solicitor: Mr Russell
Email: SRussell@RussellsLaw.com.au
Your Ref: Mr Park

29 May, 2015

TAX INVOICE

Invoice No: B21820

MATTER NO: 20131268

Appeal from decision of Dalton J

[To our final professional fees of and incidental to acting on your behalf in this
matter from 20 September, 2013 to 20 May, 2015.]

Professional Fees	\$150,457.85
GST applied	\$15,045.81
Total Professional Fees inclusive of GST:	\$165,503.66

[Thank you for your instructions.

With compliments



[TERMS 14 DAYS NET

Unless you advise otherwise payment of this account will constitute your authority to
destroy the file relating to this matter after 7 years from the date the file is completed.

The following avenues are open to you under the *Legal Profession Act 2007 (Qld)* in the
event of a dispute in relation to legal costs:-

- (a) to apply for a costs assessment within 12 months of delivery of a bill, or
request for payment, or the date when the costs were paid, or such extended
time as may be permitted by the Court or Costs Assessor after considering
the reason for the delay (except sophisticated clients as defined in the *Legal
Profession Act 2007 (Qld)*); and
- (b) to apply to set aside the Costs Agreement within six years or other times as
the law permits.]

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000

Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534

RussellsLaw.com.au

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ACCOUNT DETAILS**PROFESSIONAL FEES**

Date	Description	Author
20/09/2013	Meeting out of Office - Mr Park, Ms Muller and Mr Bender, with Ms Copley to discuss prospects of success, and advisability of, appeal	SCR
20/09/2013	Reviewing or amending Draft grounds of Notice of Appeal, as prepared by Mr Cooper	SCR
21/09/2013	Preparing a document - Notice of Appeal	SCR
23/09/2013	Reviewing or amending Notice of Appeal	SCR
23/09/2013	Telephone call to Mr Bender	SCR
23/09/2013	Telephone call from Mr Park, Ms Muller and Mr Bender	SCR
23/09/2013	Email to Mr Sheahan QC and Mr Cooper - instructions to appeal confirmed	SCR
23/09/2013	Reviewing or amending Mr Sheahan's revised draft grounds for appeal	SCR
23/09/2013	Telephone call to Mr Sheahan QC regarding his email, parties to appeal, grounds of appeal and arrangements for settling revised grounds of appeal	SCR
23/09/2013	Miscellaneous - Various attendances on counsel and clients; final settling of Notice of Appeal	SCR
23/09/2013	Meeting in Office - discussing with Mr Derek Finch arrangements to file Notice of Appeal; telephone conversation with Mr Stephen Russell regarding Notice of Appeal; emailing Court of Appeal Registry regarding arrangements for filing Notice of Appeal; reading revised grounds of appeal from Counsel; telephone conversation with Mr S Cooper; emailing Counsel and Mr Stephen Russell regarding revised draft Notice of Appeal	IMC
23/09/2013	Miscellaneous - receiving and considering revised Notice of Appeal settled by Sheahan QC; signing Notice of Appeal for filing	IMC
23/09/2013	Meeting in Office - with Ms Ilenna Copley re filing of Notice of Appeal	DMF
23/09/2013	Telephone call from Mr Stephen Russell re filing	DMF
23/09/2013	Miscellaneous - arranging filing fees	DMF
23/09/2013	Miscellaneous - attending to filing of Notice of Appeal at Supreme Court Registry	DMF
23/09/2013	Miscellaneous - attending to copying of filed notice	DMF
23/09/2013	Preparing email to Mr Stephen Russell re copy of filed notice	DMF
24/09/2013	Preparing/dictating memo - to Ms Copley with draft application for expedition, and matters for evidence to support expedition application	SCR
24/09/2013	Reading email received from Mr Park	SCR
24/09/2013	Reviewing or amending Draft media responses	SCR
24/09/2013	Miscellaneous - serving Notice of Appeal on ASIC, Piper Alderman and Tucker & Cowen	REF
24/09/2013	Miscellaneous - attendance at Tucker & Cowen to Serve Notice of Appeal	REF
24/09/2013	Reviewing or amending settling letter to Mr Meakin re: bill	IMC

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
24/09/2013	Telephone call to receiving instructions from Mr Stephen Russell regarding expedition of appeal telephone conversation of Mr P Irvine; Court of Appeal Registrar; dictating and drafting affidavit of Ginette Muller and John Park in support of application on expedited appeal; further telephone conversations with Registrar Irvine; emailing mobile of appeal to parties; dictating letter to service; arranging physical service; emailing counsel regarding appeal date; emailing client regarding appeal date	IMC
26/09/2013	Reading letter received from Registrar Court of Appeal	SCR
26/09/2013	Miscellaneous - Reviewing email from Clayton Utz re costs	SCR
26/09/2013	Preparing/dictating letter - Registrar Court of Appeal, seeking expedition	SCR
26/09/2013	Preparing email to Mr Park and others re Whyte's statement no interim dividends	SCR
26/09/2013	Reading email received from Mr Bender - no such statement to him	SCR
26/09/2013	Telephone call from Mr Park - no such statement to his knowledge	SCR
26/09/2013	Reading email received from Ms Trenfield re Mr Whyte's intention not to make distributions	SCR
26/09/2013	Reviewing or amending Letter to Registrar Court of Appeal	SCR
26/09/2013	Telephone call from Mr Greg Litster re Notice of Appeal, him agreeing to support application for expedition, him seeking agreement to the appellant seeking no order as to costs against his clients, who propose to enter a submitting appearance only; me agreeing	SCR
26/09/2013	Preparing/dictating letter - for FTI to send without prejudice to Mr Shotton, offering to settle the appeal	SCR
26/09/2013	Reading letter received from Registrar Court of Appeal re timetable	SCR
26/09/2013	Preparing/dictating letter - Mr Sheahan QC and Mr Cooper re timetable	SCR
26/09/2013	Perusing a document - letter to Court of Appeal registrar regarding hearing	IMC
27/09/2013	Telephone call from Mr Bender and Mr Park (several) discussing the (possibly) imminent refinance by BOQ, and advising and taking instructions to send a letter to Tucker regarding the terms of any refinance	SCR
27/09/2013	Preparing/dictating letter - Mr Whyte re terms of any refinancing	SCR
27/09/2013	Telephone call from Mr Bender re appeal also to replace Whyte as a fallback	SCR
27/09/2013	Reviewing or amending draft letter to Mr Whyte	SCR
27/09/2013	Reading email received from Mr Copley of ASIC re appeal allegedly out of time	SCR
27/09/2013	Preparing email to Mr Copley - appeal not out of time; including research	SCR
27/09/2013	Reviewing or amending letter to Mr Whyte re refinance	SCR
27/09/2013	Reading email received from Mr Whyte - informing us that he has resigned as liquidator of Redland Bay	SCR
27/09/2013	Preparing email to Mr Whyte, pressing for confirmation re-finance	SCR
27/09/2013	Preparing email to Clients, re correspondence with Mr Whyte	SCR
27/09/2013	Reading email received from Mr Litster to Mr Copley re ASIC's recalcitrance	SCR

PROFESSIONAL FEES

Date	Description	Author
27/09/2013	Preparing email to Respondents' solicitors, re expedition of appeal	SCR
27/09/2013	Preparing email to Clients and counsel re status of expedition	SCR
27/09/2013	Preparing email to opposing solicitors re expedition	SCR
27/09/2013	Reading email received from Mr Schmidt, with case reference re appellate courts and findings of fact below	SCR
27/09/2013	Researching Law - Jew v Holloway & Anor [2013] VSCA 260 (20 September 2013)	SCR
27/09/2013	Perusing a document - receiving and considering email from Hugh Copley; considering operation of VCPR Rule 748; receiving and considering email from Mr Stephen Russell; drafting index to appeal record book	IMC
27/09/2013	Perusing a document - draft letter of offer from FTI to Mr Shotton	SCR
28/09/2013	Preparing email to Sean Cooper re Jew v Holliday	SCR
28/09/2013	Reading email received from Mr Litster to Mr Copley	SCR
28/09/2013	Searching a Public Office - ASIC Historical Company Extract and Whyte resignation and final accounts for re Redland Bay	SCR
30/09/2013	Preparing a document - drafting affidavit section of index to appeal record book; drafting index; arranging copies of affidavit for appeal book; arranging copies of tother documents in appeal book; emailing parties regarding material read to be included in index to appeal book; receiving email from Mr Stephen Russell regarding index; receiving index from Mr G Lister; discussing with Mr Stephen Russell; searches to be undertaken regarding Redland and David Whyte	IMC
30/09/2013	Preparing email to Mr Hugh Copley re expedition	SCR
30/09/2013	Reading email received from Mr Tucker - he is acting in the appeal	SCR
30/09/2013	Preparing email to Mr Tucker re expedition	SCR
30/09/2013	Preparing email to clients re status of other lawyers' instructions on expedition	SCR
30/09/2013	Telephone call to Ms Banton re appeal	SCR
30/09/2013	Preparing email to Ms Banton re appeal	SCR
30/09/2013	Reading email received from Mr Copley of ASIC	SCR
30/09/2013	Telephone call to Registrar of Court of Appeal	SCR
30/09/2013	Preparing email to other solicitors cc Registrar	SCR
30/09/2013	Preparing email to clients, updating them re expedition	SCR
30/09/2013	Miscellaneous - attendances with Ms Copley to settle Index to Appeal Books	SCR
01/10/2013	Other - perusing correspondence from and drawing correspondence to Tucker Cowen, ASIC and the Registrar of the Court of Appeal regarding expedition	SCR
01/10/2013	Telephone call to Mr Sean Cooper discussing court to be undertaken with Natasha, emailing Mr Sean Cooper regarding status of expediting appeal; telephone conversation with Gabriel Ash regarding list of material; perusing letter to registration	IMC
02/10/2013	Preparing email to Mr Whyte re terms of refinancing	SCR
03/10/2013	Reading letter received from Tucker Cowen re terms of refinancing	SCR
03/10/2013	Preparing email to Tucker Cowen acknowledging receipt and also letter to clients informing them of arrangements	SCR
03/10/2013	Reading email received from ASIC and other parties; arranging searches regarding Redlands companies and David Whyte	IMC

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
04/10/2013	Perusing a document - receiving and considering affidavits and other court documents regarding replacement of Mr David Whyte as liquidator of Redland companies	IMC
08/10/2013	Perusing a document - bundle of documents re the Redland Bay matters	SCR
08/10/2013	Reading email received from Registrar Court of Appeal	SCR
08/10/2013	Reading letter received from Registrar Court of Appeal	SCR
08/10/2013	Email with counsel regarding timing of revised timetable	SCR
08/10/2013	Preparing a document - initial draft outline of submissions	SCR
08/10/2013	Preparing a document - drafting index to appeal book regarding material of Bruce and Nunn; receiving email from Mr D Tucker regarding index; telephone conversation with S Cooper regarding brief	IMC
09/10/2013	Preparing a document - detailed memo to counsel regarding time for appeal, Osachy, and associated authorities, with suggested strategy for dealing with any application to strike out the appeal as being out of time	SCR
09/10/2013	Preparing a document - preparing brief to Mr S Cooper; emailing Mr S Cooper regarding brief; drafting index to appeal book	IMC
10/10/2013	Preparing/dictating memo - to Derek Finch for research on the status of ASIC in corporations litigation, for submissions	SCR
10/10/2013	Reading email received from Mr Stephen Russell re: Research task on the status of ASIC's views and interpretations of the Corporations Act	DMF
10/10/2013	Researching Law - cases on status of ASIC as "model litigant" and implications of special duty of fairness	DMF
10/10/2013	Reading letter received from D. Whyte to ASIC re: financial reports and auditing requirements	DMF
10/10/2013	Perusing a document - correspondence with D. Whyte and clients and ASIC re: financial reports and audit	DMF
10/10/2013	Preparing a document - memo to Mr Stephen Russell re: research on status of ASIC and special duty of fairness	DMF
10/10/2013	Researching Law - case of Environinvest Ltd v Misko re: auditing requirements	DMF
10/10/2013	Preparing email to Mr Stephen Russell re: Environinvest case and distinguishing case from FMIF and LM	DMF
10/10/2013	Researching Law - ASIC exemption orders and class orders re: financial reporting requirements and auditing requirements	DMF
10/10/2013	Preparing a document - reading emails and correspondence regarding requirements to prepare audited account; drafting index to appeal book; emailing draft index to Mr Stephen Russell for consideration; dictating and settling letter to Mr S Cooper enclosing exhibits	IMC
11/10/2013	Reviewing or amending draft outline of argument on appeal	SCR
11/10/2013	Researching Law - class orders and exemptions re: financial reporting and auditing requirements	DMF
11/10/2013	Preparing a document - email to Mr Stephen Russell re: powers of ASIC to exempt schemes from reporting requirements	DMF
11/10/2013	Reading email received from Mr Stephen Russell re: class orders, regulatory guides and further research	DMF
11/10/2013	Researching Law - class order 03/392 and regulatory guide 174	DMF
11/10/2013	Researching Law - re: ASIC exemptions under section 111AT of the Corporation Act	DMF

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
11/10/2013	Preparing email to Mr Stephen Russell re: ASIC's power to exempt schemes from compliance with Part 2M.3 of the Corporations Act	DMF
11/10/2013	Reading email received from receiving email from Mr Stephen Russell regarding notice of appeal for website; emailing ASIC regarding notice of appeal on website; emailing Mr Stephen Russell regarding correspondence to ASIC	IMC
12/10/2013	Reviewing or amending outline of argument for appeal	SCR
14/10/2013	Reviewing or amending outline of argument for appeal, with memoranda to counsel by email, for final settling	SCR
14/10/2013	Reviewing or amending outline of argument for appeal, as re-settled by Mr Sheahan QC, including detailed final proof read, inserting missing references to the evidence, and settling List of Authorities, and sending same by email to Court of Appeal and opposing solicitors	SCR
14/10/2013	Preparing a document - reviewing and drafting outline of submissions; considering amended version of submissions prepared by Mr J Sheahan QC; discussing and settling submission with Mr Stephen Russell discussing index to appeal book with Mr Stephen Russell	IMC
15/10/2013	Reading email received from Registrar Court of Appeal	SCR
15/10/2013	Preparing email to Registrar Court of Appeal	SCR
15/10/2013	Miscellaneous - preparing of authorities for filing, emailing parties on the list of authorities, drafting and settling letter of service to ASIC; telephone conversation with Haidee, Sheahan QC chambers settling draft index to appeal book	IMC
16/10/2013	Preparing email to Mr Sean Cooper regarding draft index to appeal book; further telephone conversation with Mr Sean Cooper	IMC
21/10/2013	Miscellaneous - reviewing Mr Cooper's recommendations regarding the appeal book and index	SCR
21/10/2013	Preparing a document - considering draft index to appeal book revised by Mr S Cooper suggesting removal of certain affidavits; emailing Mr Stephen Russell regarding counsel draft	IMC
22/10/2013	Miscellaneous - receiving email for Mr Stephen Russell; settling draft index to appeal book; draft index to parties for consideration; receiving email for David Tucker and replying	IMC
25/10/2013	Miscellaneous - review correspondence with Tucker regarding transcript, hearing on 7 May, and draft order sought on that date by LMIM	SCR
25/10/2013	Preparing a document - preparing appeal book; emailing Mr D Tucker regarding request for transcript; settling documents by extracts for appeal book	IMC
28/10/2013	Perusing a document - reviewing submission in preparation for receiving other parties submissions; receiving correspondence from the Court of Appeal registry regarding extension of time	IMC
29/10/2013	Researching Law - memo from Mr McQuade regarding Coote v Kelly, reading case; preparing memo to senior and junior counsel	SCR
29/10/2013	Perusing a document - reading ASIC submissions and dictating comments	IMC
30/10/2013	Perusing a document - circular regarding Whyte conduct	IMC
30/10/2013	Preparing a document - dictating comments regarding ASIC submissions; drafting memorandum regarding comments	IMC

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
31/10/2013	Telephone call to Mr Sean Cooper re timing of Reply to ASIC's submissions	SCR
31/10/2013	Perusing a document - ASIC's Submissions	SCR
31/10/2013	Telephone call from Peter Schmidt; discussing his insights into ASIC position; tension between interest of LMIM in retaining office, and duty to evaluate the application by Trilogy in a dispassionate way; Norton Rose to confirm that there is no clearer power in LMIM to convene a meeting to resolve to wind up	SCR
31/10/2013	Miscellaneous - email to Ms Muller and Mr Park re conversation with Mr Schmidt, and call to Mr Park to discuss Mr Schmidt's suggestions	SCR
31/10/2013	Telephone call to Supreme Court Registry to obtain copy of draft order	REF
31/10/2013	Meeting in Office - with Ms Ilenna Copley regarding draft orders of Justice Lyons	REF
31/10/2013	Preparing a document - reviewing appeal submissions of ASIC; drafting detailed memorandum to respond to paragraphs of ASIC's submission. Emailing Mr Sean Cooper	IMC
01/11/2013	Perusing a document - memo from Mr Finch regarding the status of ASIC in litigation	SCR
01/11/2013	Preparing/dictating memo - to Mr Finch, regarding ASIC's views on the interpretation of the Corporations Act, and judicial dicta on same	SCR
01/11/2013	Perusing a document - memo from Mr Finch with summary of his research, notes for Submissions in reply to ASIC	SCR
01/11/2013	Reading email received from Mr Stephen Russell re: researches on weight of ASIC's view of the law	DMF
01/11/2013	Researching Law - on weight of ASIC's view of the law and relevant cases	DMF
01/11/2013	Preparing email to Mr Stephen Russell re: research findings	DMF
01/11/2013	Telephone call to Supreme Court Registry to obtain sealed orders	REF
01/11/2013	Preparing email to Supreme Court Registry to obtain sealed orders	REF
01/11/2013	Miscellaneous - obtaining/viewing draft orders of 28/7 May 2013 with a view to amending Russell's copy accordingly for the purpose of taking out sealed orders	REF
02/11/2013	Preparing a document - further drafting letter to ASIC chairman and Head of Legal regarding ASIC's conduct of matter; receiving email from Mr H Copley; telephone conversation with Court of Appeal registry; drafting draft index to appeal book; reading submissions of Mr Shotton; settling orders of Lyon J dated 2 and 7 May; discussing with Mr Stephen Russell letter to ASIC	IMC
03/11/2013	Preparing a document - draft outline of argument in reply to ASIC's outline of argument, including detailed research	SCR
04/11/2013	Preparing a document - draft outline in reply to ASIC's outline of argument	SCR
04/11/2013	Perusing a document - draft Notice of Contention from Tucker Cowen	SCR
04/11/2013	Preparing email to Mr Sheahan QC and Mr Cooper, copied to clients, containing detailed observations on draft Notice of Contention, research for same (re Orchard Aginvest and Re Stacks Managed Investments) and draft email to Tucker Cowen	SCR

PROFESSIONAL FEES

Date	Description	Author
04/11/2013	Perusing a document - email from ASIC noting it does not object to the late Notice of Contention	SCR
04/11/2013	Perusing a document - Mr Cooper's draft outline of argument	SCR
04/11/2013	Preparing email to Mr Sheahan QC regarding Mr Cooper's draft	SCR
04/11/2013	Telephone call to Mr Sheahan QC, discussing the Notice of Contention and our client's proper and best approach to same	SCR
04/11/2013	Telephone call to Ms Muller, communicating Mr Sheahan's advice not to object to the lateness of the Notice of Contention, or say anything about any costs of same, receiving her instructions not to object to same, and also discussing Mr Cooper's revised draft outline of argument	SCR
04/11/2013	Miscellaneous - reviewing Ms Copley's detailed memo regarding the draft index to the appeal record, discussing Mr Tucker's suggested inclusions	SCR
04/11/2013	Preparing email to Tucker Cowen regarding late Notice of Objection	SCR
04/11/2013	Reading email received from Tucker Cowen with Application, and affidavits of Mr Tucker and Mr Whyte	SCR
04/11/2013	Perusing a document - Application to Court of Appeal, affidavit of Mr Tucker, and affidavit of Mr Whyte	SCR
04/11/2013	Preparing email to clients with material received from Tucker Cowen, and short commentary thereon	SCR
04/11/2013	Preparing a document - drafting email to respond to comments of Mr D Tucker regarding draft index to appeal book, emailing Mr S Cooper; telephone conversation with Mr S Cooper regarding index to appeal book; reading draft submission on appeal; discussing conduct of matter with Mr Stephen Russell; emailing Mr Stephen Russell regarding page 403; emailing Ms G Miller regarding certificates sought to be included by Mr Shotton; emailing Court of Appeal Registry regarding index to appeal book; receiving email from Mr D Tucker; receiving and considering material from Mr D Tucker	IMC
04/11/2013	Preparing email to Mr Schmidt regarding Norton Rose research on meeting for a winding-up resolution	SCR
04/11/2013	Perusing a document - memo from Mr Schmidt regarding power of a responsible entity to convene a meeting to consider winding-up	SCR
04/11/2013	Preparing/dictating memo - to counsel regarding Mr Schmidt's research note	SCR
05/11/2013	Reviewing or amending final outline of appellant's submissions in reply, received from Mr Sheahan QC, and serving same on ASIC and lodging in Court of Appeal	SCR
05/11/2013	Miscellaneous - prepare draft letter to ASIC chair and Chief Legal Officer re breach of Model Litigant Rules, and Australian Solicitors Conduct Rules	SCR
05/11/2013	Preparing email to Mr Copley regarding ASIC's website	SCR
05/11/2013	Preparing email to clients regarding emails to ASIC re website and proposed letter to chair of ASIC and Chief Legal Officer	SCR
05/11/2013	Preparing email to Tucker Cowen regarding lateness of second respondent's outline of argument	SCR
05/11/2013	Preparing email to counsel and clients with second respondent's outline of argument	SCR

PROFESSIONAL FEES

Date	Description	Author
05/11/2013	Preparing a document - preparing revised draft index to appeal book; perusing Notice of Contention served by Mr Shotton; drafting covering email	IMC
05/11/2013	Preparing a document - discussing with Mr Stephen Russell position of ASIC regarding meeting and correspondence with Piper Alderman; drafting letter to ASIC chairman and Head of Legal regarding ASIC's conduct of matter	IMC
06/11/2013	Reading email received from Mr Cooper regarding arrangements for preparation of first draft outline of argument in response to second respondent	SCR
06/11/2013	Preparing email to counsel advising them that we will prepare the first draft of the outline in light of commitments of Mr Cooper	SCR
06/11/2013	Preparing email to Mr Park and Ms Muller regarding Sofronoff's cross-examination in the Hyatt Coolum matter	SCR
07/11/2013	Reading email received from Ms Dunn with transcript of Mr Sofronoff's cross-examination of Ms Muller, and short email acknowledging receipt	SCR
07/11/2013	Preparing/dictating memo - Ms Copley, with instructions to peruse transcript	SCR
07/11/2013	Perusing a document - Shotton's Outline of Argument, including research on cases and statute references contained therein	SCR
07/11/2013	Meeting in Office - with Mr Stephen Russell re: Corporations Act research re: Powers of the court	DMF
07/11/2013	Preparing a document - memo to Mr Stephen Russell re: research on Corporations Act re: Powers of the court	DMF
07/11/2013	Perusing a document - reviewing transcript of cross examination of Ms G Muller by Mr W Sofronoff QC in Hyatt case	IMC
08/11/2013	Telephone call to Mr Sheahan QC to discuss proposed application for appointment of special purpose liquidators and effect on appeal	SCR
08/11/2013	Telephone call to Ms Muller and Mr Park to propose conference and discuss application for the appointment of special purpose liquidators	SCR
08/11/2013	Researching Law - special purpose liquidators	SCR
08/11/2013	Preparing a document - draft outline of argument in reply to second respondent	SCR
08/11/2013	Reviewing or amending memo to Mr Stephen Russell re: court powers under Corporations Act	DMF
08/11/2013	Reviewing or amending memo to Mr Stephen Russell re: courts powers under Corporations Act	DMF
08/11/2013	Meeting in Office - with Mr Stephen Russell re: Corporations Act research	DMF
08/11/2013	Meeting in Office - obtaining copies of orders handed up at trial; discussing conduct of matter with Mr Stephen Russell; attending during telephone conversation between Ms G Muller and Stephen Russell	IMC
11/11/2013	Preparing a document - draft outline of argument in reply to the submissions of the second respondent	SCR
11/11/2013	Telephone call from Mr Russell re: research task on actual vs potential conflicts	DMF
11/11/2013	Researching Law - actual vs potential conflicts	DMF
11/11/2013	Preparing/dictating memo - to Mr Stephen Russell re: actual vs potential conflicts	DMF
11/11/2013	Telephone call from Mr Stephen Russell re: research	DMF

PROFESSIONAL FEES

Date	Description	Author
11/11/2013	Preparing/dictating memo - to Mr Stephen Russell re: actual vs potential conflicts	DMF
11/11/2013	Perusing a document - telephone conversation with Mr Stephen Russell regarding Redland Companies reviewing evidence re: debt and Redland Companies; telephone conversation with Court of Appeal Paul regarding draft index, emailing Mr Stephen Russell regarding draft index to appeal book; settling orders of Lyons J to be sealed	IMC
11/11/2013	Perusing a document - considering primary documents and affidavit regarding management fees and percentage changes around 256; emailing Mr Stephen Russell regarding same; reading ASIC's appeal submissions; emailing Stephen Russell regarding response to specific aspects of ASIC's submissions	IMC
12/11/2013	Preparing a document - draft outline of argument in reply to the submissions of the second respondent (continued)	SCR
12/11/2013	Reviewing or amending email to parties regarding Appeal Index	SCR
12/11/2013	Preparing a document - draft outline of argument in reply to the submissions of the second respondent (continuing)	SCR
12/11/2013	Meeting in Office - with Mr Stephen Russell re: form of order	DMF
12/11/2013	Preparing email to Supreme Court Registry enclosing final orders for 2nd and 7th May, 2013	REF
12/11/2013	Preparing a document - arranging sealed copies of the orders of Lyons J; emailing ASIC and Tucker & Cowen regarding index to appeal book; drafting index to appeal book; collating documents for appeal book; reading draft submissions of Mr Shotton discussing with Mr Stephen Russell transcript hearing on 30 July 2013; emailing to obtain a copy of transcript; considering case authorities regarding conflict and seeking input of court and lawyers	IMC
13/11/2013	Reviewing or amending Mr Cooper's draft, making amendments regarding the issue of units to the B class members	SCR
13/11/2013	Preparing email to Mr Sheahan QC and Mr Cooper with revised draft outline	SCR
13/11/2013	Miscellaneous - attendances with Ms Copley, correspondence with the solicitors for the respondents, and settling the index to the appeal record	SCR
13/11/2013	Miscellaneous - attending Court of Appeal Registry to have index to record approved	REF
13/11/2013	Preparing a document - reviewing case authorities regarding conflict and seeking guidance from independent advice; emailing parties regarding draft index; settling draft index and drafting correspondence	IMC
14/11/2013	Reviewing or amending outline of argument in reply to Mr Shotton's argument - final proof reading of the outline settled by Mr Sheahan QC, including missing transcript and evidence references	SCR
14/11/2013	Miscellaneous - final attendances re Index to Appeal Record	SCR
14/11/2013	Preparing email to clients with submissions in reply to Shotton's submissions	SCR
14/11/2013	Preparing email to counsel with final submissions in reply to Shotton's submissions	SCR

PROFESSIONAL FEES

Date	Description	Author
14/11/2013	Preparing a document - telephone conversation with Mr Stephen Russell regarding affidavit reference regarding Trilogy changing mind about consent; settling bundle of documents for appeal book; settling submission for service; drafting memorandum of instructions to Confidential Document Solutions regarding appeal book	IMC
15/11/2013	Perusing a document - reading submission in reply to Mr Shotton's submission; serving filed submissions	IMC
18/11/2013	Preparing a document - preparing amendments to appeal book; telephone conversation with Confidential Document Solution, Adam, regarding correction of appeal book index; discuss amendments with Michael at Confidential Document Solutions; reviewing and amended index; emailing Nick Purser at CDS regarding index; dictating letter of service to ASIC and Tucker & Cowen; dictating letters to counsel and FTI; telephone call to Ms Gibbons; telephone call to Mr H Copley; settling appeal books for same and distribution	IMC
19/11/2013	Preparing a document - preparing folder of submission for counsel and others	IMC
20/11/2013	Preparing a document - preparing brief to counsel regarding submissions; emailing counsel regarding list of authorities; telephone conversation with Mr S Cooper regarding list of authorities	IMC
22/11/2013	Preparing a document - cross-referencing appellants' outlining of argument with pages of appeal book	IMC
22/11/2013	Preparing a document - emailing Mr Tucker regarding supplementary appeal book; discussing with Mr Stephen Russell affidavit used at trial; telephone conversation with Mr Sean Cooper of counsel; obtaining list of material; drafting email to Registrar regarding supplementary appeal book; telephone call conversation with Mr J Sheahan QC's chambers; receiving email from Mr J Sheahan QC; emailing indexes and position regarding cross-referencing to Mr J Sheahan QC	IMC
25/11/2013	Reviewing or amending obtaining reported cases and settling citation in submission	REF
25/11/2013	Preparing a document - bundle of authorities	REF
25/11/2013	Preparing a document - preparing Part A authorities to be filed and copies for counsel and others; preparing copies of authorities to cross reference to appeal book; discussing with Mr Stephen Russell outline of argument and supplementary appeal book; emailing parties regarding supplementary appeal book; receiving email from Mr Tucker regarding provisions of Corporations Act; including references to Corporations Act in Part A list of authorities; emailing Mr S Cooper regarding references; receiving email from ASIC and replying; preparing brief of authorities of ASIC and Mr Shotton - Part A & B	IMC
26/11/2013	Reading email received from Tucker Cowen regarding supplementary appeal book	SCR
26/11/2013	Preparing email to Tucker Cowen regarding supplementary appeal book, including detailed analysis of the relevance to the appeal of the affidavit of S C Russell filed on 7 May, 2013	SCR
26/11/2013	Preparing a document - bundle of authorities	REF
27/11/2013	Reviewing or amending speaking notes, including numerous emails to and from Mr Sheahan QC and Mr Cooper, and preparation for the appeal	SCR

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
27/11/2013	Meeting in Office - with Mr Stephen Russell re: director's rights to use company funds re: notice of meeting and circulars to members and research case law	DMF
27/11/2013	Researching Law - Reviewing and considering the cases of Peel, Advance Bank and Campbell on the use of company funds in relation to general meetings of members	DMF
27/11/2013	Meeting in Office - with Mr Stephen Russell on the principles contained in the cases of Peel, Advance Bank and preparing an email to Counsel on those principles	DMF
27/11/2013	Preparing email to counsel re: copies of cases	DMF
27/11/2013	Preparing email to Mr Stephen Russell re: cases on ASIC as regulator	DMF
27/11/2013	Meeting in Office - with Ms Ilenna Copley regarding letter of service to ASIC and Tucker & Cowen	REF
27/11/2013	Preparing/dictating letter - enclosing supplementary appeal book to ASIC and Tucker & Cowen	REF
27/11/2013	Miscellaneous - serving supplementary appeal book on ASIC and Tucker & Cowen and delivery of same to Mr Sean Cooper of counsel	REF
27/11/2013	Preparing a document - receiving email from Mr D Tucker; settling cross-references for appeal book; telephone conversation with Mr S Cooper; receiving email from Registrar of the Court of Appeal; drafting email to Registrar; telephone conversation with Court of Appeal Registry regarding hearing time; arranging Part B copies of authorities; arranging supplementary appeal book; discussing supplementary appeal book with Mr Stephen Russell; emailing ASIC and Tucker regarding cross-referenced outline of argument; collating for Mr S Cooper copies of correspondence regarding orders made 7 May 2013; preparing for hearing of appeal; brief to Mr J Sheahan QC; drafting list of actions to be undertaken; arranging filing of cross-referenced outlines of argument; emailing Registrar regarding supplementary appeal book; receiving and considering emails with Counsel; emailing regarding hearing time and supplementary appeal book	IMC
28/11/2013	Miscellaneous - further preparation for appeal; discussions with Mr Sheahan QC	SCR
28/11/2013	Appearing in Court - Court of Appeal; morning session; instructing Mr Sheahan QC and Mr Cooper; contra Mr Sofronoff QC and Mr Forrest for ASIC; contra Mr Clothier QC and Mr Dietz for Shotton	SCR
28/11/2013	Appearing in Court - Court of Appeal; afternoon session	SCR
28/11/2013	Telephone call to Ms Muller, reporting on Mr Sheahan's views after the close of the appeal	SCR
28/11/2013	Appearing in Court - reviewing supplementary appeal book regarding paragraph 19; discussing matter to be undertaken with Mr Stephen Russell; preparing for and attending hearing of appeal before Fraser JA, Gotterson JA and Daubney J	IMC
09/12/2013	Reading email received from Mr John Park regarding submission and transcript; collating electronic copies of outlines of argument and transcript and emailing to Mr John Park	IMC
10/12/2013	Telephone call from Glen regarding costs position	IMC

PROFESSIONAL FEES

Date	Description	Author
20/01/2014	Preparing a document - Receiving email from Stephen Russell regarding calculation of appeal period; considering position and rules; emailing Stephen Russell regarding process and dates	IMC
10/03/2014	Preparing a document - Drafting letter to LMIM regarding disbursement only account to replace two earlier accounts	IMC
06/06/2014	Appearing in Court - Court of Appeal to receive judgment	SCR
06/06/2014	Meeting in Office - Mr Bender; reading judgment	SCR
06/06/2014	Preparing a document - draft press release for FTI	SCR
06/06/2014	Telephone call to Mr Park	SCR
06/06/2014	Reviewing or amending draft press release	SCR
17/06/2014	Preparing email to Mr Sheahan SC - detailed note regarding appeal from Court of Appeal judgment	SCR
17/06/2014	Telephone call to Mr Sheahan SC - consultation regarding appeal from judgment of the Court of Appeal	SCR
01/07/2014	Miscellaneous - review UCPR and commentary re assessment of costs; review UCPR fees regulation	TPR
02/07/2014	Preparing a document - Costs Statement of Second Respondent; consider and calculate potential objections	TPR
08/07/2014	Preparing a document - objection to costs statement	TPR
09/07/2014	Preparing a document - settling draft objection to costs statement	TPR
15/07/2014	Perusing a document - consider further objections to costs statement	TPR
16/07/2014	Preparing a document - settle draft objection to costs statement for SCR review	TPR
21/07/2014	Reviewing or amending notice of objection to 2 respondents costs claim	MJM
21/07/2014	Meeting in Office - with Mr Miller reviewing costs statement and discussing amendments	TPR
21/07/2014	Preparing a document - settle notice of objection to costs statement	TPR
21/07/2014	Preparing/dictating letter - of service to Tucket and Cowan	TPR
29/07/2014	Perusing a document - Correspondence, offer and draft application from other side	TPR
29/07/2014	Perusing a document - letter from Registrar requesting consent to appoint costs assessor	TPR
29/07/2014	Email to SCPR regarding second respondent's offer to settle and progressing matter	TPR
30/07/2014	Preparing/dictating letter - counter-offer to Tucker & Cowen re costs assessment	TPR
31/07/2014	Reviewing or amending draft counter offer	TPR
05/08/2014	Email to SCR advising of proposed counter offer and whether objection to Mr Skuse should be made	TPR
05/08/2014	Email to Registrar consenting to appointment of costs assessor	TPR
06/08/2014	Email to Kelly Trenfield attaching draft counter offer	TPR
07/08/2014	Reading email received from David Tucker advising client declines offer	TPR
12/08/2014	Reading email received from Tucker & Cowen re appointment of Costs Assessor	TPR
12/08/2014	Reading email received from Supreme Court Registrar re Order for appointment of Costs Assessor	TPR
15/08/2014	Email to client regarding appointment of costs assessment	TPR
19/08/2014	Reading email received from costs assessor and Tucker and Cowen	TPR
19/08/2014	Email to costs assessor regarding directions	TPR

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
19/08/2014	Reading letter received from Mr Skuse re directions on costs assessment	SCPR
20/08/2014	Preparing email to Mr Skuse re costs directions	SCPR
01/09/2014	Reading email received from Ted Skuse regarding further submissions	TPR
05/09/2014	Reading email received from Mr Skuse regarding costs assessment	TPR
05/09/2014	Researching Law - procedure following assessment; effect of offer on assessment	TPR
05/09/2014	Reading email received from Ms Scherer attaching offers exchanged by the parties	TPR
05/09/2014	Email to Costs assessor confirming offers exchanged by the parties	TPR
15/09/2014	Preparing a document - email to clients regarding liability of costs assessment	TPR
17/09/2014	Reviewing or amending UCPR as to obligations to pay; letter to client regarding payment of costs assessment	TPR
19/09/2014	Preparing/dictating letter - to Tucker & Cowen, regarding indemnity for costs	SCR
19/09/2014	Reviewing or amending to Tucker & Cowen regarding indemnity for appeal costs	SCR
30/09/2014	Reading letter received from Tucker & Cowen regarding appeal costs	SCR
30/09/2014	Reading email received from Tucker & Cowen enclosing order for costs assessment	TPR
30/09/2014	Preparing/dictating letter - to Tucker & Cowen responding to letter of today requesting payment	TPR
30/09/2014	Reviewing or amending letter to Tucker and Cowen regarding costs assessment	TPR
08/10/2014	Email to Tucker & Cowen regarding enforcement of costs and requesting response to earlier letter of SCR	TPR
08/10/2014	Reading letter received from Tucker & Cowen regarding payment of costs	TPR
08/10/2014	Email to Tucker & Cowen attaching email of 19 September, 2014	TPR
15/10/2014	Reading email received from Tucker & Cowen in response to our letter dated 19 September, 2014	TPR
29/10/2014	Reading letter received from Tucker & Cowen re costs order	TPR
13/11/2014	Preparing/dictating letter - to Tucker & Cowen regarding indemnity for appeal costs	SCR
19/11/2014	Reading email received from Mr Schwarz regarding indemnity for appeal costs	SCR
26/11/2014	Preparing email to Mr Couper of Gadens regarding indemnity for appeal costs	SCR
31/01/2015	Reading letter received from Gadens regarding indemnity for Shotton's costs	SCR
31/01/2015	Preparing/dictating letter - to Gadens, detailed reasons for indemnity for Shotton	SCR
13/02/2015	Perusing a document - letter from Gadens dated 10 February, 2015	TPR
13/02/2015	Preparing/dictating letter - to Gadens in reply to 10 February, 2015 letter	TPR
13/02/2015	Perusing a document - correspondence dated 19 September, 2014 and 31 January, 2015	TPR
21/04/2015	Researching Law - Litigation costs incurred by a liquidator and the enforcement thereof	SCPR

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

PROFESSIONAL FEES

Date	Description	Author
22/04/2015	Preparing/dictating letter - to Tucker and Cowen re claim for appeal costs	SCPR
23/04/2015	Reviewing or amending letter to Tucker and Cowen regarding appeal costs order	AJT
23/04/2015	Telephone call to Mr O'Kearney regarding response to Tucker and Cowen	AJT
05/05/2015	Preparing email to Mr O'Kearney re Tucker and Cowen correspondence	SCPR
20/05/2015	Reading letter received from Tucker & Cowen dated 1 May 2015	SCR
20/05/2015	Preparing/dictating letter - Gadens, demanding response and cheque for Mr Shotton's costs	SCR
20/05/2015	Preparing email to FTI, giving update and copy of letter to Gadens	SCR

FEE EARNER SUMMARY

	Amount	
Ashley Tiplady	\$99.16	
Derek Finch	\$8,639.63	
Ilenna Copley	\$58,038.75	
Michael Miller	\$525.00	
Renee Fitzpatrick	\$1,521.67	
Sean Russell	\$175.00	
Sean Russell	\$343.75	
Stephen Russell	\$0.00	
Stephen Russell	\$76,649.89	
Stephen Russell	\$2,625.00	
Tim Russell	\$1,840.00	
	<hr/>	
	\$150,457.85	
GST applied		\$15,045.81
Total Professional Fees		<hr/> \$165,503.66 <hr/>

LM Investment Management Limited RE: Appeal from decision of Dalton
(in liquidation) J

REMITTANCE ADVICE

Invoice Date: 29 May 2015
Our Ref: SCR:20131268:B21820 Tax Invoice B21820
Payor: LM Investment Management Limited (in liquidation)

Please choose a payment method and return this advice to our office.

1. PAYMENT BY CHEQUE

Please quote reference

SCR : 20131268 : Bill No. B21820

Please return this advice with your cheque payable to Russells Solicitors General Account for:

Payment of this invoice – by 12 June, 2015	\$165,503.66
TOTAL	\$165,503.66

Russells
GPO Box 1402
BRISBANE QLD 4001

OR

2. PAYMENT BY BANK TRANSFER

Please quote reference

SCR : 20131268 : Bill No. B21820

Please fax this advice to 07 3004 8899 or email trusumeci@RussellsLaw.com.au stating the invoice number and the amount paid.

Payment of this invoice – by 12 June, 2015	\$165,503.66	Swift Code (overseas transfer only):
TOTAL	\$165,503.66	MACQAU2S

Bank: Macquarie Bank BSB: 184-446
Account: 3019-12010
Account Name: Russells Solicitors General Account

OR

3. PAYMENT BY CREDIT CARD

Please quote reference

SCR : 20131268 : Bill No. B21820

Card Number: _____ Please circle one:

Expiry Date: _____ Amex / Visa / MasterCard

Payment of this invoice – by 12 June, 2015	\$165,503.66
TOTAL	\$165,503.66

Name on Card: _____

Signature: _____

RUSSELLS

FTI Consulting (Australia) Pty Ltd
LM Investment Management Limited (in
liquidation)
c/- FTI Consulting (Australia) Pty Ltd
22 Market Street
BRISBANE QLD 4000

Account Ref: 20131268
Solicitor: Mr Russell

Trust Statement of Account as at 29/05/2015

MATTER NO: 20131268

Appeal from decision of Dalton J

Date	Type	Ref	Payee/Payer Details	Debit	Credit	Balance
10/01/2014	DD	9514	FTI Payment of bill nos B16611 from FTI		\$68,051.08	\$68,051.08
13/01/2014	PY	3678	Mr J C Sheahan SC Counsel's fees for preparation, travel, appearance in Court; airfares; accommodation; travel expenses (transfers and taxis)	\$37,017.41		\$31,033.67
13/01/2014	PY	3679	Mr Sean Cooper Barrister's Fees	\$12,540.00		\$18,493.67
13/01/2014	PY	3681	Mr Sean Cooper Payment of Barrister's Fee dated 25 October 2013	\$8,151.00		\$10,342.67
15/01/2014	PY	3684	Mr J C Sheahan SC Counsel's tax invoice for preparation of Appeal on 4 November; Preparation of Appeal on 5 November; and settling Submissions on 14 November, 2013	\$5,005.00		\$5,337.67
22/01/2014	PY	3719	Mr Sean Cooper Counsel's fees - Mr Sean Cooper	\$3,344.00		\$1,993.67
10/02/2014	J3	5379	T20 Russells Firm Control Transfer to office on a/c of Costs/Disbs of Bill B16611	\$1,993.67		
19/03/2014	DD	9912	FTI Consulting Payment of bill no. B17294 from FTI Consulting		\$30,481.94	\$30,481.94
20/03/2014	PY	3987	Mr J C Sheahan SC Payment of Barrister's Fee - Tax Invoice No. 946	\$18,095.00		\$12,386.94
20/03/2014	PY	3988	The Manager, Confidential Document	\$4,335.50		\$8,051.44

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000

Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534

RussellsLaw.com.au

SCR_20131268_103.docm

LM Investment Management Limited
(in liquidation)

RE: Appeal from decision of Dalton J

Date	Type	Ref	Payee/Payer Details	Debit	Credit	Balance
20/03/2014	PY	3989	Solutions Preparing and copying Appeal Books Mr J C Sheahan SC	\$5,005.00		\$3,046.44
20/03/2014	PY	3990	Barrister's Fee The Manager, Confidential Document Solutions Photocopying Supplementary Appeal Book	\$216.70		\$2,829.74
20/03/2014	J3	5656	T20 Russells Firm Control Transfer to office on a/c of Costs/Disbs of Bill B17294	\$2,829.74		
28/03/2014	RV	3989RV	Mr J C Sheahan SC Account overpaid		\$5,005.00	\$5,005.00
11/04/2014	J3	5854	T20 LM Investment Management Ltd Issues regarding liquidation Transferring money from 20131268 LM Investment Management Ltd Appeal from decision of Dalton J to 20130737 LM Investment re Issues regarding liquidation to pay balance bill no. B17263	\$4,881.25		\$123.75
11/04/2014	J3	5855	T20 LM Investment Management Ltd MIF Indemnity Transferring funds from 20131268 LM Investment Management Appeal from decision of Dalton J to 20131259 LM Investment re MIF Indemnity to pay Part B17488	\$123.75		
11/04/2014	J3	5856	T20 LM Investment Management Ltd MIF Indemnity Transferring funds from 20131259 LM Investments re MIF Indemnity to LM Investment Appeal from decision of Dalton J to allow credit note to be issued on Bill No B17294		\$123.75	\$123.75
11/04/2014	J3	5857	T20 LM Investment Management Ltd Issues regarding liquidation Transferring money from 20130737 LM Investment Issues		\$4,881.25	\$5,005.00

LM Investment Management Limited
(in liquidation)

RE: Appeal from decision of Dalton J

Date	Type	Ref	Payee/Payer Details	Debit	Credit	Balance
11/04/2014	PY	4109	regarding liquidation to LM Investment Appeal from decision of Dalton J Mr J C Sheahan SC Drawing cheque to clear anticipated which were duplicated when billed. Cheque to be bank back into trust to clear debt	\$5,005.00		
14/04/2014	CQ	10133	Russells Solicitors Law Practice Trust Account Rebanking cheque to clear debt when an anticipated to J Sheehan was duplicated on two bills B17294 and B16611 from Russells Trust Account		\$5,005.00	\$5,005.00
17/04/2014	J3	5882	T20 LM Investment Management Ltd Issues regarding liquidation Transferring money from 20131268 LM Investment re Appeal from Decision of Dalton J to 20130737 LM Investments Issues regarding liquidation	\$4,881.25		\$123.75
17/04/2014	J3	5883	T20 LM Investment Management Ltd MIF Indemnity Transferring money from 20131268 LM Investment Management re Appeal from Decision of Dalton J to 20131259 LM Investment Management re MIF Indemnity to part pay B17488	\$123.75		
Balance of Trust Account						\$0.00

Scott Couper

From: Jacqueline Ogden
Sent: 24/02/2016 6:47 PM
To: srussell@russellsLaw.com.au; ATiplady@RussellsLaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]
Attachments: Letter to Russells (24_02_16).PDF

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

24 February 2016

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

gadens.com

Attention: Stephen Russell and Ashley Tiplady

By email: **SRussell@RussellsLaw.com.au**; **ATiplady@RussellsLaw.com.au**;
ORIGINAL BY EXPRESS POST

Dear Colleagues

LM Investment Management Limited ("LMIM") in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF")

We continue to act for David Whyte, the court appointed receiver of the property of the FMIF.

We refer to your recent correspondence of 10 February 2016 and the Order of Justice Jackson on 17 December 2015 (**Order**).

We note that pursuant to the terms of the Order:

- (a) by paragraph 4, your clients were directed to identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, expense or liability incurred by your clients in acting as administrators or liquidators of LMIM insofar as the expense or liability was or is incurred in connection with LMIM acting as responsible entity for the FMIF (being known as an **Eligible Claim** under the terms of the Order);
- (b) by paragraph 8(a), within 14 days of receipt of an Eligible Claim our client is directed to request any further material or information he reasonably considers necessary to assess the Eligible Claim;
- (c) by paragraph 7(b), your clients must provide such reasonably requested further information to our client within 14 days of receipt of a request from our client;
- (d) by paragraph 8(b), within 30 days of receipt of the further information requested in accordance with paragraph 8(a) above, our client is directed to:
 - a. accept the Eligible Claim as one for which LMIM has a right to be indemnified from the property of the FMIF;
 - b. reject the Eligible Claim; or
 - c. accept part of it and reject part of it;

and give to your clients written notice of his determination; and

- (e) by paragraph 8(c), if our client rejects the Eligible Claim, whether in whole or in part, he is directed to provide your clients with written reasons for his decision within 7 days of giving notice of his determination.

So that our client may consider your clients' claim in respect of their appeal costs and pursuant to paragraph 8(a) of the Order, would you please provide the following further information:

- (a) confirmation that the claim is a Recoupment Indemnity Claim as described in paragraph 4(e) of the Order;
 - (b) confirmation that LMIM is registered for GST and is able to recover GST;
 - (c) provide us with a copy of all invoices supporting those costs included in the Fee Ledger dated 10 February 2016 as well as a Fee Ledger for Invoice B21820 dated 29 May 2015 showing, amongst other things, the amount of time spent by each author in relation to each task billed;
 - (d) provide us with a copy of all invoices for the disbursements claimed, including all invoices supporting those payments made from your trust account and referred to in the Trust Account Statement dated 29 May 2015, including:
 - i. the invoices issued by Mr John Sheahan of Queen's Counsel;
 - ii. the invoices issued by Mr Sean Cooper of Counsel;
 - iii. the invoices issued by Confidential Document Solutions; and
 - iv. invoices issued by you which were paid from the monies held in your trust account, including bills numbered B17294, B17263, B17488, B16611, as well as any invoices supporting the disbursements in those bills;
 - (e) clarification as to whether the following three invoices also form part of the appeal costs, noting that they were included amongst the invoices provided under cover of your clients' letter dated 15 February 2016 which notified of our client of the Administration Indemnity Claims and Recoupment Indemnity Claims pursuant to paragraph 5 of the Order. Further, we note that in the spreadsheet enclosed with that letter it identified that the following three invoices as costs incurred in respect of the appeal:
 - i. Russells' invoice numbered B17294 and dated 10 March 2014;
 - ii. Russells' invoice numbered B22299 and dated 15 July 2015; and
 - iii. Mr John Sheehan QC invoice numbered 1042 and dated 11 September 2014.
- If the above invoices are included as part of your clients' claim in respect of their appeal costs, would you please:
- i. provide us with a copy of the costs agreement with your clients in respect of each invoice;
 - ii. provide us with a copy of any invoices for the disbursements included in the invoices; and
 - iii. clarify whether these invoices formed part of the assessment of costs by Mr Hartwell. If they did not, explain why there were not included;
- (f) provide us with a copy of the instructions to the costs assessor and a copy of the tax invoice from the assessor in relation to the assessor's fees of \$9,068.68 which we note the assessor has included as a disbursement in the certificate of assessment;
 - (g) provide us with a copy of the costs agreement with your clients in respect of each invoice claimed (including those which were paid from the monies held in your trust account);
 - (h) provide us with your clients' explanation as to why they say the appeal costs claimed were:
 - i. properly and reasonably incurred by the liquidators on behalf of LMIM;
 - ii. for the benefit of the FMIF;

- iii. incurred in the administration of the trust and/or in the performance of LMIM's duties as trustee.

In particular, and by way of an example, please explain why the costs claimed in respect of considering the position of ASIC as a "model litigant", research regarding ASIC's position and the costs incurred in preparing a letter to ASIC's chairman and Chief Legal Officer regarding a breach of the "Model Litigant Rules" and the "Australian Solicitors Conduct Rules" are appeal costs properly claimable having regard to those elements set out in sub-paragraph (h) above.


We otherwise note your advice that the Fee Ledger dated 10 February 2016 and the Invoice numbered B21820 dated 29 May 2015 comprise a complete accounting of all attendances in respect of the costs assessed.

Upon receipt of all of the further information sought above, our client will consider the claim in accordance with the terms of the Order.

For completeness we note, as you are aware, that Her Honour Justice Dalton ordered on 20 December 2013 that LMIM was indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to the Supreme Court Proceeding 3383 of 2013, excluding any reserved costs. We understand your clients now seek an indemnity for 100 per cent of their legal costs incurred in respect of the Appeal Court Proceedings 8895 of 2013 (**Appeal Proceedings**). In our letter of 22 May 2015, we advised you that the fact of Mr Shotton's costs being paid from the FMIF should not be taken as an indication or agreement that any other costs incurred in respect of the Appeal Proceedings will be paid from the FMIF.

We note that our client has liberty to apply to the Court for direction in respect of any question arising in connection with his consideration or payment of an Eligible Claim. We reserve our client's right in this regard.

Yours faithfully


Jacqueline Ogden
Senior Associate

Scott Couper

From: Jacqueline Ogden
Sent: 10/03/2016 5:30 PM
To: srussell@russellsLaw.com.au; ATiplady@RussellsLaw.com.au
Cc: Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]
Attachments: Letter to Russells (10_03_16).PDF

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

10 March 2016

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

Attention: Stephen Russell and Ashley Tiplady

gadens.com

By email: SRussell@RussellsLaw.com.au; ATiplady@RussellsLaw.com.au;
ORIGINAL BY EXPRESS POST

Dear Colleagues

LM Investment Management Limited ("LMIM") in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF")

We continue to act for David Whyte, the court appointed receiver of the property of the FMIF.

We refer to your correspondence of 10 February 2016, our response of 24 February 2016 and the Order of Justice Jackson dated 17 December 2015 (**Order**). A copy of our correspondence of 24 February 2016 is **enclosed** for your ease of reference.

In our letter of 24 February 2016 and in accordance with paragraph 8(a) of the Order, we requested further information from your clients in respect of their claim for an indemnity from the FMIF in respect of their appeal costs.

The Order provides in paragraph 7(b) that your clients **must** provide such reasonably requested further information to our client within 14 days of receipt of a request from our client.

As such, by the terms of the Order your clients were required to provide the requested information to our client within 14 days of a request being made by our client, that is, by yesterday, 9 March 2016.

Your clients have not responded to our client's request within the timeframe required under the Order.

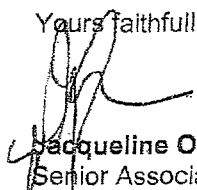
Until this requested information is provided our client is not in a position to consider your clients' claim further.

We note that in accordance with paragraph 8(b) of the Order, our client's determination of your client's claim is not due until 30 days after receipt of the further information.

Would you please provide the requested information **by return**.

For completeness, we note that our client has liberty to apply to the Court for directions in respect of any question arising in connection with his consideration or payment of an Eligible Claim. We reserve our client's right in this regard.

Yours faithfully


Jacqueline Ogden
Senior Associate

Enc.

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BNEDOC5 16556950_1.docx

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

24 February 2016

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

Attention: Stephen Russell and Ashley Tiplady

gadens.com

By email: SRussell@RussellsLaw.com.au; ATiplady@RussellsLaw.com.au;
ORIGINAL BY EXPRESS POST

Dear Colleagues

LM Investment Management Limited ("LMIM") in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF")

We continue to act for David Whyte, the court appointed receiver of the property of the FMIF.

We refer to your recent correspondence of 10 February 2016 and the Order of Justice Jackson on 17 December 2015 (**Order**).

We note that pursuant to the terms of the Order:

- (a) by paragraph 4, your clients were directed to identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, expense or liability incurred by your clients in acting as administrators or liquidators of LMIM insofar as the expense or liability was or is incurred in connection with LMIM acting as responsible entity for the FMIF (being known as an **Eligible Claim** under the terms of the Order);
- (b) by paragraph 8(a), within 14 days of receipt of an Eligible Claim our client is directed to request any further material or information he reasonably considers necessary to assess the Eligible Claim;
- (c) by paragraph 7(b), your clients must provide such reasonably requested further information to our client within 14 days of receipt of a request from our client;
- (d) by paragraph 8(b), within 30 days of receipt of the further information requested in accordance with paragraph 8(a) above, our client is directed to:
 - a. accept the Eligible Claim as one for which LMIM has a right to be indemnified from the property of the FMIF;
 - b. reject the Eligible Claim; or
 - c. accept part of it and reject part of it;

and give to your clients written notice of his determination; and

- (e) by paragraph 8(c), if our client rejects the Eligible Claim, whether in whole or in part, he is directed to provide your clients with written reasons for his decision within 7 days of giving notice of his determination.

So that our client may consider your clients' claim in respect of their appeal costs and pursuant to paragraph 8(a) of the Order, would you please provide the following further information:

- (a) confirmation that the claim is a Recoupment Indemnity Claim as described in paragraph 4(e) of the Order;
 - (b) confirmation that LMIM is registered for GST and is able to recover GST;
 - (c) provide us with a copy of all invoices supporting those costs included in the Fee Ledger dated 10 February 2016 as well as a Fee Ledger for Invoice B21820 dated 29 May 2015 showing, amongst other things, the amount of time spent by each author in relation to each task billed;
 - (d) provide us with a copy of all invoices for the disbursements claimed, including all invoices supporting those payments made from your trust account and referred to in the Trust Account Statement dated 29 May 2015, including:
 - i. the invoices issued by Mr John Sheehan of Queen's Counsel;
 - ii. the invoices issued by Mr Sean Cooper of Counsel;
 - iii. the invoices issued by Confidential Document Solutions; and
 - iv. invoices issued by you which were paid from the monies held in your trust account, including bills numbered B17294, B17263, B17488, B16611, as well as any invoices supporting the disbursements in those bills;
 - (e) clarification as to whether the following three invoices also form part of the appeal costs, noting that they were included amongst the invoices provided under cover of your clients' letter dated 15 February 2016 which notified of our client of the Administration Indemnity Claims and Recoupment Indemnity Claims pursuant to paragraph 5 of the Order. Further, we note that in the spreadsheet enclosed with that letter it identified that the following three invoices as costs incurred in respect of the appeal:
 - i. Russells' invoice numbered B17294 and dated 10 March 2014;
 - ii. Russells' invoice numbered B22299 and dated 15 July 2015; and
 - iii. Mr John Sheehan QC invoice numbered 1042 and dated 11 September 2014.
- If the above invoices are included as part of your clients' claim in respect of their appeal costs, would you please:
- i. provide us with a copy of the costs agreement with your clients in respect of each invoice;
 - ii. provide us with a copy of any invoices for the disbursements included in the invoices; and
 - iii. clarify whether these invoices formed part of the assessment of costs by Mr Hartwell. If they did not, explain why there were not included;
- (f) provide us with a copy of the instructions to the costs assessor and a copy of the tax invoice from the assessor in relation to the assessor's fees of \$9,068.68 which we note the assessor has included as a disbursement in the certificate of assessment;
 - (g) provide us with a copy of the costs agreement with your clients in respect of each invoice claimed (including those which were paid from the monies held in your trust account);
 - (h) provide us with your clients' explanation as to why they say the appeal costs claimed were:
 - i. properly and reasonably incurred by the liquidators on behalf of LMIM;
 - ii. for the benefit of the FMIF;

- iii. incurred in the administration of the trust and/or in the performance of LMIM's duties as trustee.

In particular, and by way of an example, please explain why the costs claimed in respect of considering the position of ASIC as a "model litigant", research regarding ASIC's position and the costs incurred in preparing a letter to ASIC's chairman and Chief Legal Officer regarding a breach of the "Model Litigant Rules" and the "Australian Solicitors Conduct Rules" are appeal costs properly claimable having regard to those elements set out in sub-paragraph (h) above.

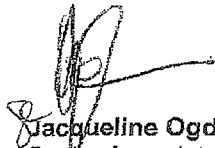
We otherwise note your advice that the Fee Ledger dated 10 February 2016 and the Invoice numbered B21820 dated 29 May 2015 comprise a complete accounting of all attendances in respect of the costs assessed.

Upon receipt of all of the further information sought above, our client will consider the claim in accordance with the terms of the Order.

For completeness we note, as you are aware, that Her Honour Justice Dalton ordered on 20 December 2013 that LMIM was indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to the Supreme Court Proceeding 3383 of 2013, excluding any reserved costs. We understand your clients now seek an indemnity for 100 per cent of their legal costs incurred in respect of the Appeal Court Proceedings 8895 of 2013 (**Appeal Proceedings**). In our letter of 22 May 2015, we advised you that the fact of Mr Shotton's costs being paid from the FMIF should not be taken as an indication or agreement that any other costs incurred in respect of the Appeal Proceedings will be paid from the FMIF.

We note that our client has liberty to apply to the Court for direction in respect of any question arising in connection with his consideration or payment of an Eligible Claim. We reserve our client's right in this regard.

Yours faithfully


Jacqueline Ogden
Senior Associate

Liam Roberts

From: Stephen Russell <srussell@russellslaw.com.au>
Sent: 11/03/2016 3:19 PM
To: Scott Couper
Cc: Ashley Tiplady; Jacqueline Ogden; Sean Russell
Subject: RE: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~
Attachments: SCR_20131268_110.pdf; Appeal Invoices.pdf; Professional Services Agreement.pdf; Judgment of Jackson J QSC15-283.pdf; Letters to Gadens 31.01.2015 and 20.05.2015.pdf; Draft letter to ASIC.pdf

Dear colleagues

Please find attached our letter to you dated 11 March 2016 and the documents referred to therein.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
srussell@russellslaw.com.au

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: Thursday, 10 March 2016 5:30 PM
To: Stephen Russell; Ashley Tiplady
Cc: Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Senior Associate | [gadens](http://gadens.com)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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RUSSELLS

11 March, 2016

Our Ref: Mr Russell
Your Ref: Mr Couper / Ms Ogden

Gadens
Lawyers
BRISBANE

email: Scott.Couper@gadens.com
Jacqueline.Ogden@gadens.com

Dear Colleagues

LM Investment Management Limited (receivers and managers appointed) (in liquidation) ("LMIM") as responsible entity of the LM First Mortgage Investment Fund ("FMIF") -v- Bruce and Others - CA 8895 of 2013

We acknowledge receipt of your letter dated 24 February, 2016.

Commencing at the top of the second page of your letter under reply, there are a number of requests said to be requested for the purpose of enabling Mr Whyte to consider his attitude in respect of LMIM's claim against the FMIF for reimbursement of the sum of \$241,453.54, notified to you in our letter dated 10 February, 2016. Without debating whether the information and documents so requested are in fact requested *bona fide* for that purpose, but reserving our clients' position in that respect, we respond as follows, adopting the paragraph enumeration of your letter under reply:-

- a) No. The claim is (obviously) an Administration Indemnity Claim.
- b) Yes, as Mr Whyte well knows, the appellant LMIM as Responsible Entity of LM First Mortgage Income Fund, is registered for GST and holds ABN 66 482 247 488.
- c) We attach the following invoices:-

Creditor	Invoice Number	Date
Sean Couper	N/A	25.10.2013
John C Sheahan SC	973	15.11.2013
Sean Couper	N/A	19.11.2013
Sean Couper	N/A	29.11.2013
John C Sheahan S	978	10.12.2013
Confidential Document Solutions	00018666	15.11.2013

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Creditor	Invoice Number	Date
Confidential Document Solutions	00018765	27.11.2013

We previously raised, and sent to our clients, invoices at various stages on this matter. However, we withdrew these invoices owing to the combative attitude of Mr Whyte. The invoice to our clients, pursuant to which this claim is made is the invoice for the legal costs which have been assessed and which we sent to you under cover of our letter dated 10 February, 2016.

At the same time, we have sent you the entire work in progress ledger.

Accordingly, there are no other invoices supporting the costs which are the subject of our clients' claim.

- d) All supplied – see paragraph (c) above.
- e) See answer above. We attach our fee agreement dated 12 April, 2013 (which governed the appeal).
- f) We did not issue "instructions to the costs assessor". We applied for an order that the costs of the appeal be assessed under the *Legal Profession Act 2007*. The court appointed Mr Hartwell to assess the costs. We have not received any tax invoice from Mr Hartwell. The fees are payable pursuant to UCPR 732, which applies by virtue of UCPR 743I.
- g) Unnecessary repetition – dealt with above.
- h) We do not understand the provenance of the three criteria as to the right of indemnity which you attribute to our clients.

LMIM was sued by Trilogy, seeking to unseat it as Responsible Entity of the FMIF. Other opportunists joined the fray, also seeking to have their own nominees unseat LMIM as Responsible Entity.

As we explained in our letters to you dated 30 January, 2015 and 20 May, 2015, LMIM's appeal was undoubtedly for the benefit of the FMIF, since, had it succeeded, it would have saved the members millions of dollars in duplicated costs, the administration of the winding up of the FMIF would have been much simpler and, it now seems also undeniable, the members would have received interim distributions much sooner.

We commend to your client's attention, the reasons for judgment of Jackson J delivered on 15 October 2015 in the proceedings BS3508 of 2015. We attach the reasons.

That judgment, for the most part, vindicates the stance which the administrators and liquidators have adopted, contrary to Mr Whyte's immovable commitment to the proposition that the liquidators should do literally nothing in relation to the winding up of the FMIF.

The judgment also provides ample support for the propositions just mentioned; namely, that had the appeal succeeded, a great deal of duplicated cost to the members would have been avoided and the

administration of the winding up of the FMIF would have been quicker, simpler and cheaper.

However, those matters need not be debated at least for the purpose of the present application. As with the entitlement of LMIM (the Appellant) to an indemnity from the FMIF in respect of the costs payable to Mr Shotton, so too is LMIM entitled to an indemnity from the FMIF in respect of its own legal expenses of the appeal. Clause 18.5 of the Constitution, particularly in the context of the attempts by LMIM to save money for the members, provides sufficient, indeed ample, support for its right of indemnity. We attach those letters to you dated 31 January, 2015 and 20 May, 2015.

Finally, we refer to your enquiries under the rubric "in particular and by way of example" in this paragraph. The order of Jackson J made on 17 December, 2015, does not permit Mr Whyte to pick and choose examples along the way. His obligation under subparagraph 8(a) of the order is to ask for any further information he reasonably considers necessary to assess a relevant claim.

Your client's particular enquiry concerns the conduct by ASIC of the appeal.

Senior counsel retained by LMIM advised, after receipt of ASIC's written submissions, of a concern as to the professional conduct of solicitors engaged by ASIC. Pursuant to Mr Sheahan's advice, we drafted a letter to the chairman and also the chief legal officer of ASIC seeking their intervention, by way of a withdrawal of ASIC's submissions. That draft letter accompanies this letter.

Senior and junior counsel considered the matter; ultimately they advised our clients to withhold the letter, preferring to try to resolve the matter with Senior Counsel engaged for ASIC, (Mr Sofronoff QC).

Ultimately, the allegations by the solicitors engaged within ASIC and by both barristers retained by it in the proceedings before Dalton J were all discredited. Every single criticism of the conduct of the case by the liquidators (so called over zealotness, unnecessary expert evidence, unnecessary affidavits, etc) were all upheld by the Court of Appeal.

Further, paragraph [58] of the reasons of Fraser JA also vindicated LMIM's approach. His Honour found that :-

... the primary judge did not hold that the administrators had breached their duties of the appellant has Responsible Entity ... or that they had in fact breached an applicable statutory duty, or that they had intentionally preferred their own interests to the interests of the members in a situation that the administrators were conscious that there was a conflict between those different interests.

Those findings defeated all of the submissions which were the subject of the concern of Sheahan SC and the draft letter to the chief legal officer of ASIC and its chairman.

Finally, we refer to the penultimate paragraph of your letter, in which you make some observations about the payment of Mr Shotton's costs. It is true that in your letter of 22 May, 2015, you argued that the fact that Mr Whyte had decided

to pay Tucker and Cowen should not be taken as an indication or an agreement (on the part of Mr Whyte) that any other costs incurred in respect of the Appeal proceedings would be paid from the FMIF.

In instituting and conducting the appeal, LMIM incurred expenses or liabilities of two kinds. The first was a liability for its own legal costs. The second was a liability for the costs of one of the respondents to the appeal – a Mr Shotton

One may have wondered why Mr Shotton would have felt it necessary to participate in the appeal.

However that may be, the fact is that Mr Whyte decided that LMIM's liability to Mr Shotton's solicitors, Tucker and Cowen, under the appeal, was one to which the Scheme Property of the FMIF properly responded.

There is no logical basis for any distinction between LMIM's own legal costs in that appeal, and those of a successful respondent in that appeal.

We and our clients agree that Mr Whyte was right to pay LMIM's liability to Mr Shotton under the appeal and now look forward to him doing the right thing in relation to LMIM's own costs of the appeal.

In our view, if Mr Whyte is to discharge the well known duty to act impartially and dispassionately, inherent in his appointment as a receiver by the court and his status as an officer of LMIM, he will pay this claim immediately.

Yours faithfully



Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Scott Couper

From: Jacqueline Ogden
Sent: 07/04/2016 11:10 AM
To: srussell@russellslaw.com.au; ATiplady@RussellsLaw.com.au
Cc: SeanRussell@russellslaw.com.au; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

Dear Colleagues,

We refer to the further information provided on 11 March 2016, as requested by our client pursuant to the orders of Justice Jackson of 17 December 2015.

Our client is presently considering this further information.

As your clients are aware, Justice Jackson is due to shortly deliver his judgment in proceedings 3508 of 2015 in respect of your clients' claim for an indemnity from the LM First Mortgage Income Fund (**FMIF**) in respect of their remuneration as administrators and liquidators of LM Investment Management Limited.

We are instructed that the judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, given proceedings 3508 of 2015 sought approval for your clients' remuneration in respect of the appeal proceedings. For this reason, our client proposes that the parties await delivery of this judgment as it is likely to inform a determination of your clients' claim.

Accordingly, our client proposes that he deliver his determination in respect of your clients' claim within **7 days** of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

Our client contends that your clients will not suffer any prejudice in respect of this short delay, particularly given our client has agreed to deliver his determination promptly, within 7 days of receipt of his Honour's judgment.

Our client, like yours, are concerned to resolve this issue at minimum cost to the FMIF and, with that view, we have proposed the above approach in order to facilitate the timely and cost effective resolution of this issue.

Please confirm your clients agree to the above approach on the basis our client has agreed to deliver his determination within 7 days of receipt of his Honour's judgment as proposed above.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Scott Couper

From: Stephen Russell <srussell@russellslaw.com.au>
Sent: 08/04/2016 10:24 AM
To: Jacqueline Ogden
Cc: Sean Russell; Scott Couper; Ashley Tiplady
Subject: RE: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~

Importance: High

Dear colleagues

His Honour's orders of 17 December 2015 could not be clearer.

None of the issues (if there are any) relating to the payment of LMIM's legal costs of the appeal were before his Honour in 3805 of 2015. The parties – your client especially – have had a full hearing of that and many other matters; your client has had ample opportunity to litigate what he wishes to litigate.

Following a full hearing (and with your client's consent to the machinery provisions) his Honour made the order of 17 December 2015, from which there has been no appeal.

Consequently, it is not possible that anything which falls from his Honour in the judgment he is currently considering will be of any assistance at all to Mr Whyte in the formation of his attitude to the claim which we made on 10 February 2016. He has already paid some of the legal costs of the appeal under one Certificate of Assessment. He has only one other to pay.

Our clients will oppose any application for an extension of time for the payment and for any decision, on the basis that such an application is pointless. The liquidators trust that unitholders' funds will not be expended on any such application and that we will receive a cheque within 30 days of our letter dated and sent to you on 11 March 2016 – that is, by Sunday 10 April 2016. Since the time limited by subparagraph 8(b) of the order is expressed inclusively, it requires a decision and any payment by today, Friday 8 April 2016.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
srussell@russellslaw.com.au

Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: Thursday, 7 April 2016 11:10 AM
To: Stephen Russell; Ashley Tiplady
Cc: Sean Russell; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

Dear Colleagues,

We refer to the further information provided on 11 March 2016, as requested by our client pursuant to the orders of Justice Jackson of 17 December 2015.

Our client is presently considering this further information.

As your clients are aware, Justice Jackson is due to shortly deliver his judgment in proceedings 3508 of 2015 in respect of your clients' claim for an indemnity from the LM First Mortgage Income Fund (**FMIF**) in respect of their remuneration as administrators and liquidators of LM Investment Management Limited.

We are instructed that the judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, given proceedings 3508 of 2015 sought approval for your clients' remuneration in respect of the appeal proceedings. For this reason, our client proposes that the parties await delivery of this judgment as it is likely to inform a determination of your clients' claim.

Accordingly, our client proposes that he deliver his determination in respect of your clients' claim within 7 days of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

Our client contends that your clients will not suffer any prejudice in respect of this short delay, particularly given our client has agreed to deliver his determination promptly, within 7 days of receipt of his Honour's judgment.

Our client, like yours, are concerned to resolve this issue at minimum cost to the FMIF and, with that view, we have proposed the above approach in order to facilitate the timely and cost effective resolution of this issue.

Please confirm your clients agree to the above approach on the basis our client has agreed to deliver his determination within 7 days of receipt of his Honour's judgment as proposed above.

Yours faithfully,

Jacqueline Ogden | Senior Associate | [gadens](mailto:jacqueline.ogden@gadens.com)
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Scott Couper

From: Jacqueline Ogden
Sent: 11/04/2016 12:17 PM
To: Stephen Russell
Cc: Sean Russell; Ashley Tiplady; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF") [GQ-BD.FID1006751]

Dear Colleagues,

We refer to your correspondence **below**.

Our client is of the view that his Honour's judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, and as such, that the parties should await delivery of this judgment as it is likely to inform a determination of your clients' claim. It is clear from your correspondence that your clients do not share that view.

Nevertheless, as stated in our email of 7 April 2016, our client is concerned to resolve this issue at minimum cost to the FMIF and, with that view, he has proposed the approach set out in our email of 7 April 2016 in order to facilitate the timely and cost effective resolution of this issue.

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From: Stephen Russell [<mailto:srussell@russellslaw.com.au>]
Sent: 08/04/2016 10:24 AM
To: Jacqueline Ogden
Cc: Sean Russell; Scott Couper; Ashley Tiplady
Subject: RE: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~
Importance: High

Dear colleagues

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Managing Partner

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Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]

Sent: Thursday, 7 April 2016 11:10 AM

To: Stephen Russell; Ashley Tiplady

Cc: Sean Russell; Scott Couper

Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

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Sent: 13/04/2016 4:25 PM
To: Jacqueline Ogden; Scott Couper
Cc: Sean Russell; Ashley Tiplady
Subject: Re: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~

Dear colleagues

We have still not heard from you and Mr Whyte has still not even provided any advice as to his current opinion with reasons.

We have therefore today personally served on him another copy of the order, endorsed as required by UCPR 665.

We emphasise that, in accordance with the plainly expressed exhortations which have fallen from Jackson J, our clients do not intend to resort to court processes unless they have no other alternative. Our clients regard it as unthinkable that professional people with excellent reputations such as those enjoyed by Mr Whyte and his firm would simply ignore an order of the court.

It did, however, seem that it was appropriate at least to emphasise to Mr Whyte the potential seriousness of his present position.

Our clients are confident that there will be no need to commence proceedings for contempt. Indeed they have no intention of doing so. They are confident that, having served the order endorsed as it is, he will either pay the liability or give us a statement of reasons for declining to do so. Or, if he still maintains that he should not be called on finally to decide his attitude to paying the liability, please state his current view and the reasons therefor. He must have an opinion, because the Judge may say nothing about the appeal or the liability for this claim. (As you know, in our view this is the only possibility.)

Any of these three will be satisfactory and will enable our clients to decide what to do.

Please also feel free to call us to discuss the matter so that the parties can make progress without the need to return to court - we are happy to speak without prejudice if you wish.

Yours faithfully

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----- Original message -----

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Date: 12/04/2016 9:23 am (GMT+10:00)
To: Stephen Russell <srussell@russellslaw.com.au>

Cc: Sean Russell <SeanRussell@russellslaw.com.au>, Ashley Tiplady <atiplady@russellslaw.com.au>, Scott Couper <Scott.Couper@gadens.com>
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2. Why Mr Whyte did not adduce any evidence or make any submissions in relation to these matters in proceedings BS3508 of 2015.

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Further, your client should not regard our email of 8 April 2016 as advice that our clients think it would be right for Mr Whyte to spend unitholders' funds on any such application – especially where he refuses to comply with the order as best he can at the moment. In our view, he will be compelled to disclose his current attitude were he to bring such an application, so he should save everyone the bother and state his present attitude. We must also add that it is a matter of some concern that he did not put Tucker & Cowen to this trouble and expense when he paid trust money to them for their assessed costs of the appeal.

Thank you for offering your client's undertaking; however, there is no need for your client's undertaking – the order already obliges him to do that which he has offered to undertake doing. Nonetheless, if we

receive a satisfactory response, our clients will consent to an order extending time for this decision and payment.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
srussell@russellslaw.com.au

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: Monday, 11 April 2016 12:17 PM
To: Stephen Russell
Cc: Sean Russell; Ashley Tiplady; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF") [GQ-BD.FID1006751]

Dear Colleagues,

We refer to your correspondence **below**.

Our client is of the view that his Honour's judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, and as such, that the parties should await delivery of this judgment as it is likely to inform a determination of your clients' claim. It is clear from your correspondence that your clients do not share that view.

Nevertheless, as stated in our email of 7 April 2016, our client is concerned to resolve this issue at minimum cost to the FMIF and, with that view, he has proposed the approach set out in our email of 7 April 2016 in order to facilitate the timely and cost effective resolution of this issue.

Our client will, if necessary, apply to the Court pursuant to paragraph 10 of the Order to seek directions in respect of any questions arising in connection with his consideration of your clients' claim and we reserve our client's right in that regard. However, our client's view is that any such application would be premature until such time as he has had an opportunity to consider the judgment which is shortly to be delivered in 3508 of 2015.

In light of the above, and given the parties' concern to resolve this matter at minimum cost to the FMIF, please confirm your clients agree not to take any steps adverse to our client without first giving this office 7 days' written notice of your clients' intention to do so.

We otherwise confirm our client undertakes to deliver his determination in respect of your clients' claim within 7 days of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

From: Stephen Russell [mailto:srussell@russellslaw.com.au]

Sent: 08/04/2016 10:24 AM

To: Jacqueline Ogden

Cc: Sean Russell; Scott Couper; Ashley Tiplady

Subject: RE: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~

Importance: High

Dear colleagues

His Honour's orders of 17 December 2015 could not be clearer.

None of the issues (if there are any) relating to the payment of LMIM's legal costs of the appeal were before his Honour in 3805 of 2015. The parties – your client especially – have had a full hearing of that and many other matters; your client has had ample opportunity to litigate what he wishes to litigate.

Following a full hearing (and with your client's consent to the machinery provisions) his Honour made the order of 17 December 2015, from which there has been no appeal.

Consequently, it is not possible that anything which falls from his Honour in the judgment he is currently considering will be of any assistance at all to Mr Whyte in the formation of his attitude to the claim which we made on 10 February 2016. He has already paid some of the legal costs of the appeal under one Certificate of Assessment. He has only one other to pay.

Our clients will oppose any application for an extension of time for the payment and for any decision, on the basis that such an application is pointless. The liquidators trust that unitholders' funds will not be expended on any such application and that we will receive a cheque within 30 days of our letter dated and sent to you on 11 March 2016 – that is, by Sunday 10 April 2016. Since the time limited by subparagraph 8(b) of the order is expressed inclusively, it requires a decision and any payment by today, Friday 8 April 2016.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
srussell@russellslaw.com.au

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000

From: Jacqueline Ogden [mailto:Jacqueline.Ogden@gadens.com]

Sent: Thursday, 7 April 2016 11:10 AM

To: Stephen Russell; Ashley Tiplady

Cc: Sean Russell; Scott Couper

Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

Dear Colleagues,

We refer to the further information provided on 11 March 2016, as requested by our client pursuant to the orders of Justice Jackson of 17 December 2015.

Our client is presently considering this further information.

As your clients are aware, Justice Jackson is due to shortly deliver his judgment in proceedings 3508 of 2015 in respect of your clients' claim for an indemnity from the LM First Mortgage Income Fund (**FMIF**) in respect of their remuneration as administrators and liquidators of LM Investment Management Limited.

We are instructed that the judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, given proceedings 3508 of 2015 sought approval for your clients' remuneration in respect of the appeal proceedings. For this reason, our client proposes that the parties await delivery of this judgment as it is likely to inform a determination of your clients' claim.

Accordingly, our client proposes that he deliver his determination in respect of your clients' claim within **7 days** of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

Our client contends that your clients will not suffer any prejudice in respect of this short delay, particularly given our client has agreed to deliver his determination promptly, within 7 days of receipt of his Honour's judgment.

Our client, like yours, are concerned to resolve this issue at minimum cost to the FMIF and, with that view, we have proposed the above approach in order to facilitate the timely and cost effective resolution of this issue.

Please confirm your clients agree to the above approach on the basis our client has agreed to deliver his determination within 7 days of receipt of his Honour's judgment as proposed above.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

Scott Couper

From: Jacqueline Ogden
Sent: 14/04/2016 11:49 AM
To: srussell@russellslaw.com.au; ATiplady@RussellsLaw.com.au
Cc: SeanRussell@russellslaw.com.au; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF") [GQ-BD.FID1006751]

Dear Colleagues,

We refer to your email **below**, our email to you a moment ago with our client's notice to the liquidator pursuant to the Order and the order of Justice Jackson of 17 December 2015 (**Order**).

It is surprising that your clients took the steps of serving our client with another copy of the Order yesterday, endorsed under rule 665 of the UCPR, in circumstances where we have been writing to you in relation to this matter and had advised you only the day prior that we were seeking instructions and would respond to you as soon as possible. As such, we would have expected that you would have given our client prior notice of your clients' intention to take such a step.

It is incorrect to say that our client has ignored the order of the Court or that such step was appropriate in order to emphasise the potential seriousness of his position. Indeed, our recent correspondence to you is evidence of our client's commitment to complying with the Order. Further, we note that we wrote to you on 7 April 2016 (before the time under the Order expired) to propose our client's considered and reasonable approach for providing his determination to your clients (which approach our client considered was in the interests of the FMIF and would minimise the costs to the FMIF). Your clients have not contended that they will suffer any prejudice in respect of this short delay. To take the step of serving the Order endorsed under rule 665 was unnecessary and has led to the incurring of unnecessary costs.

In light of the fact that your clients had not accepted the approach proposed by our client, and has now served an endorsed order, our client has now taken steps which strictly comply with the terms of the Order and our client will provide his reasons within 7 days as required by the Order. We note, however, this matter is not straightforward or without complexities and it may be that an application under paragraph 10 of the Order will be required by our client.

However, as stated to you in our previous correspondence, our client remains of the view that his Honour's judgment in 3508 of 2015 will touch on matters the subject of your clients' claim for an indemnity in respect of the appeal costs. In light of this, and being concerned to resolve this matter at minimum cost to the FMIF, our client proposed the approach set out in our email of 7 April 2016 as he considered that such an application would be premature until such time as our client has had an opportunity to consider the judgment. It is unfortunate that your clients chose to take the step they did.

We will revert to you further shortly as indicated above.

Yours faithfully,

Jacqueline Ogden | Senior Associate | jogden@gadens.com
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

From: Stephen Russell [<mailto:srussell@russellslaw.com.au>]

Sent: 13/04/2016 4:25 PM

To: Jacqueline Ogden; Scott Couper

Cc: Sean Russell; Ashley Tiplady

Subject: Re: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~

Dear colleagues

We have still not heard from you and Mr Whyte has still not even provided any advice as to his current opinion with reasons.

We have therefore today personally served on him another copy of the order, endorsed as required by UCPR 665.

We emphasise that, in accordance with the plainly expressed exhortations which have fallen from Jackson J, our clients do not intend to resort to court processes unless they have no other alternative. Our clients regard it as unthinkable that professional people with excellent reputations such as those enjoyed by Mr Whyte and his firm would simply ignore an order of the court.

It did, however, seem that it was appropriate at least to emphasise to Mr Whyte the potential seriousness of his present position.

Our clients are confident that there will be no need to commence proceedings for contempt. Indeed they have no intention of doing so. They are confident that, having served the order endorsed as it is, he will either pay the liability or give us a statement of reasons for declining to do so. Or, if he still maintains that he should not be called on finally to decide his attitude to paying the liability, please state his current view and the reasons therefor. He must have an opinion, because the Judge may say nothing about the appeal or the liability for this claim. (As you know, in our view this is the only possibility.)

Any of these three will be satisfactory and will enable our clients to decide what to do.

Please also feel free to call us to discuss the matter so that the parties can make progress without the need to return to court - we are happy to speak without prejudice if you wish.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810

Mobile 0418 392 015

srussell@russellslaw.com.au

----- Original message -----

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>

Date: 12/04/2016 9:23 am (GMT+10:00)

To: Stephen Russell <srussell@russellslaw.com.au>

Cc: Sean Russell <SeanRussell@russellslaw.com.au>, Ashley Tiplady <atiplady@russellslaw.com.au>,
Scott Couper <Scott.Couper@gadens.com>

Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

Dear Colleagues,

We refer to your email **below**.

We are seeking our client's further instructions in respect of your email below and will respond as soon as possible.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

From: Stephen Russell [<mailto:srussell@russellslaw.com.au>]

Sent: 11/04/2016 1:26 PM

To: Jacqueline Ogden

Cc: Sean Russell; Ashley Tiplady; Scott Couper

Subject: RE: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF") ~20131268~

Importance: High

Dear Ms Ogden

To enable us to consider your client's contention that there should be further delay, please advise, by return:-

1. Mr Whyte's current view as to the claim for payment and reasons for that view (subject to reading the judgment he seeks to read); and
2. Why Mr Whyte did not adduce any evidence or make any submissions in relation to these matters in proceedings BS3508 of 2015.

Obviously, if, as we expect, the reasons for judgment say nothing of assistance concerning this liability, it is pointless waiting. If Mr Whyte has already decided not to pay the liability; or if he has other reasons, yet to be disclosed, why he is disinclined to pay the liability, as he obviously is, he should at least comply with the order to that extent. We note that the order requires him at least to state his reasons in any event and we are concerned that he is, without good reason, not disclosing his attitude, when he consented to an order that he should do just that.

Further, your client should not regard our email of 8 April 2016 as advice that our clients think it would be right for Mr Whyte to spend unitholders' funds on any such application – especially where he refuses to comply with the order as best he can at the moment. In our view, he will be compelled to disclose his current attitude were he to bring such an application, so he should save everyone the bother and state his present attitude. We must also add that it is a matter of some concern that he did not put Tucker & Cowen to this trouble and expense when he paid trust money to them for their assessed costs of the appeal.

Thank you for offering your client's undertaking; however, there is no need for your client's undertaking – the order already obliges him to do that which he has offered to undertake doing. Nonetheless, if we receive a satisfactory response, our clients will consent to an order extending time for this decision and payment.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

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Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

From: Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]
Sent: Monday, 11 April 2016 12:17 PM
To: Stephen Russell
Cc: Sean Russell; Ashley Tiplady; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF") [GQ-BD.FID1006751]

Dear Colleagues,

We refer to your correspondence **below**.

Our client is of the view that his Honour's judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, and as such, that the parties should await delivery of this judgment as it is likely to inform a determination of your clients' claim. It is clear from your correspondence that your clients do not share that view.

Nevertheless, as stated in our email of 7 April 2016, our client is concerned to resolve this issue at minimum cost to the FMIF and, with that view, he has proposed the approach set out in our email of 7 April 2016 in order to facilitate the timely and cost effective resolution of this issue.

Our client will, if necessary, apply to the Court pursuant to paragraph 10 of the Order to seek directions in respect of any questions arising in connection with his consideration of your clients' claim and we reserve our client's right in that regard. However, our client's view is that any such application would be premature until such time as he has had an opportunity to consider the judgment which is shortly to be delivered in 3508 of 2015.

In light of the above, and given the parties' concern to resolve this matter at minimum cost to the FMIF, please confirm your clients agree not to take any steps adverse to our client without first giving this office 7 days' written notice of your clients' intention to do so.

We otherwise confirm our client undertakes to deliver his determination in respect of your clients' claim within 7 days of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

Yours faithfully,

Jacqueline Ogden | Senior Associate | jacqueline.ogden@gadens.com
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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From: Stephen Russell [<mailto:srussell@russellslaw.com.au>]

Sent: 08/04/2016 10:24 AM

To: Jacqueline Ogden

Cc: Sean Russell; Scott Couper; Ashley Tiplady

Subject: RE: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ~20131268~

Importance: High

Dear colleagues

His Honour's orders of 17 December 2015 could not be clearer.

None of the issues (if there are any) relating to the payment of LMIM's legal costs of the appeal were before his Honour in 3805 of 2015. The parties – your client especially – have had a full hearing of that and many other matters; your client has had ample opportunity to litigate what he wishes to litigate.

Following a full hearing (and with your client's consent to the machinery provisions) his Honour made the order of 17 December 2015, from which there has been no appeal.

Consequently, it is not possible that anything which falls from his Honour in the judgment he is currently considering will be of any assistance at all to Mr Whyte in the formation of his attitude to the claim which we made on 10 February 2016. He has already paid some of the legal costs of the appeal under one Certificate of Assessment. He has only one other to pay.

Our clients will oppose any application for an extension of time for the payment and for any decision, on the basis that such an application is pointless. The liquidators trust that unitholders' funds will not be expended on any such application and that we will receive a cheque within 30 days of our letter dated and sent to you on 11 March 2016 – that is, by Sunday 10 April 2016. Since the time limited by subparagraph 8(b) of the order is expressed inclusively, it requires a decision and any payment by today, Friday 8 April 2016.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

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RussellsLaw.com.au

From: Jacqueline Ogden [mailto:Jacqueline.Ogden@gadens.com]

Sent: Thursday, 7 April 2016 11:10 AM

To: Stephen Russell; Ashley Tiplady

Cc: Sean Russell; Scott Couper

Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]

Dear Colleagues,

We refer to the further information provided on 11 March 2016, as requested by our client pursuant to the orders of Justice Jackson of 17 December 2015.

Our client is presently considering this further information.

As your clients are aware, Justice Jackson is due to shortly deliver his judgment in proceedings 3508 of 2015 in respect of your clients' claim for an indemnity from the LM First Mortgage Income Fund (FMIF) in respect of their remuneration as administrators and liquidators of LM Investment Management Limited.

We are instructed that the judgment will touch on matters the subject of your client's claim for an indemnity in respect of the appeal costs, given proceedings 3508 of 2015 sought approval for your clients' remuneration in respect of the appeal proceedings. For this reason, our client proposes that the parties await delivery of this judgment as it is likely to inform a determination of your clients' claim.

Accordingly, our client proposes that he deliver his determination in respect of your clients' claim within **7 days** of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

Our client contends that your clients will not suffer any prejudice in respect of this short delay, particularly given our client has agreed to deliver his determination promptly, within 7 days of receipt of his Honour's judgment.

Our client, like yours, are concerned to resolve this issue at minimum cost to the FMIF and, with that view, we have proposed the above approach in order to facilitate the timely and cost effective resolution of this issue.

Please confirm your clients agree to the above approach on the basis our client has agreed to deliver his determination within 7 days of receipt of his Honour's judgment as proposed above.

Yours faithfully,

Jacqueline Ogden | Senior Associate | jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
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Liam Roberts

From: Jacqueline Ogden <Jacqueline.Ogden@gadens.com>
Sent: 14/04/2016 11:47 AM
To: srussell@russellslaw.com.au; ATiplady@RussellsLaw.com.au
Cc: SeanRussell@russellslaw.com.au; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]
Attachments: Letter to Russells Law - 14.04.16.pdf

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

14 April 2016

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

gadens.com

Attention: Stephen Russell and Ashley Tiplady

By email: SRussell@RussellsLaw.com.au; ATiplady@RussellsLaw.com.au;

Dear Colleagues

LM Investment Management Limited ("LMIM") in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF")

We continue to act for David Whyte, the court appointed receiver of the property of the FMIF.

We refer to our recent correspondence in this matter and the Order of Justice Jackson dated 17 December 2015 (**Order**). Our client apologises for the short delay in providing his response. However, we note that your client was two days late in providing the further information required by Mr Whyte pursuant to paragraph 7(b) of the Order.

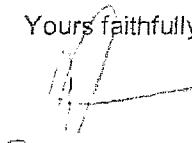
In accordance with paragraph 8(b) of the Order, we are instructed to advise that our client rejects your client's claim notified to Mr Whyte under cover of the letter dated 10 February 2016 pursuant to paragraph 6 of the Order.

In accordance with paragraph 8(c) of the Order, our client will provide your client liquidators with written reasons for his decision within 7 days.

We note that under the terms of the Order your clients may, within 28 days of receiving notification of our client's reasons for rejecting the claim, apply to the Court for directions as to whether or not the claim is one for which LMIM has a right of indemnity out of the scheme property of the FMIF.

The time for making such an application does not commence until our client's reasons are received, which as we have noted above, will be within 7 days.

Yours faithfully


Jacqueline Ogden
Senior Associate

Scott Couper

From: Jacqueline Ogden
Sent: 21/04/2016 5:44 PM
To: srussell@russellslaw.com.au; ATiplady@RussellsLaw.com.au
Cc: SeanRussell@russellslaw.com.au; Scott Couper
Subject: LM Investment Management Limited in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) [GQ-BD.FID1006751]
Attachments: Letter to Russells with written reasons in accordance with order Jackson J of 17 December 2015 (21_0.PDF)

Dear Colleagues,

Please see **attached** letter for your attention.

Yours faithfully,

Jacqueline Ogden | Senior Associate | gadens
jacqueline.ogden@gadens.com | T +61 7 3231 1688 | F +61 7 3229 5850
Level 11, 111 Eagle Street, Brisbane, QLD, Australia 4000

gadens.com

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Think before you print.

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

21 April 2016

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

gadens.com

Attention: Stephen Russell and Ashley Tiplady

By email: SRussell@RussellsLaw.com.au; ATiplady@RussellsLaw.com.au;

Dear Colleagues

LM Investment Management Limited ("LMIM") in its capacity as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) (Receivers and Managers Appointed) ("FMIF")

We continue to act for David Whyte, the court appointed receiver of the property of the FMIF.

We refer to our recent correspondence in this matter; in particular, our letter of 14 April 2016, and the Order of Justice Jackson dated 17 December 2015 (**Order**).

Pursuant to paragraph 8(c) of the Order we hereby provide our client's written reasons for his decision to reject your clients' claim notified to Mr Whyte under cover of the letter dated 10 February 2016 pursuant to paragraph 6 of the **Order**.

As your clients are aware, the relevant background to this matter is that:

1. By order dated 21 August 2013 Justice Dalton in proceedings numbered 3383 of 2013:
 - a. directed LMIM in its capacity as responsible entity of the FMIF to wind up the FMIF;
 - b. appointed our client as receiver of the property of the FMIF and person responsible for ensuring the FMIF is wound up in accordance with its constitution.
2. On 23 September 2013, LMIM filed a notice of appeal in respect of the orders of Justice Dalton of 26 August 2013 (**Appeal Proceedings**).
3. The appeal was heard on 28 November 2013. Judgment was reserved.
4. On 20 December 2013, Justice Dalton published her decision in respect of the costs of the proceedings numbered 3383 of 2013. Her Honour ordered that *inter alia* LMIM be indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to the proceeding, excluding any reserved costs. That judgment has not been appealed.
5. The appeal judgment was delivered on 6 June 2014. The appeal was dismissed and the court ordered that the appellant (being LMIM as RE for the FMIF) pay the respondents' costs of the appeal.
6. On 10 February 2016 your clients notified our client of your clients' claim for an indemnity from the property of the FMIF in respect of the legal costs incurred in the Appeal Proceedings on behalf of the appellant, in the amount of \$241,453.54.
7. On 7 April 2016 we wrote to you and advised you that our client proposed that the parties await delivery of Justice Jackson's judgment in proceedings 3508 of 2015 as our client was of the view that the judgment will touch on matters the subject of your client's claim for an indemnity in

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respect of the appeal costs (given proceedings 3508 of 2015 sought approval for your clients' remuneration in respect of the Appeal Proceedings). As such, our client was of the view that it was likely to inform a determination of your clients' claim. Our client proposed that he deliver his determination in respect of your clients' claim within 7 days of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

8. On 8 April 2016 and 11 April 2016 we corresponded further with you in relation to this matter wherein we reiterated our client's proposal and sought your clients' agreement that they would not take any steps adverse to our client without first giving our office 7 days' written notice of your clients' intention to do so. On 11 April 2016 you responded to seek that our client advise his current view as to the claim for payment and reasons for that view (subject to reading the judgment) and an explanation as to why Mr Whyte did not adduce any evidence or make any submissions in relation to these matters in proceedings BS3508 of 2015. On 12 April 2016 we advised you that we were seeking our client's further instructions and would respond as soon as possible.
9. Notwithstanding our advice of 12 April 2016, on 13 April 2016 your clients took the (surprising) step of serving our client with another copy of the Order, endorsed under rule 665 of the UCPR.
10. Given the above, we wrote to you on 14 April 2016 and advised your clients in accordance with paragraph 8(b) of the Order that our client rejected the claim notified to Mr Whyte under cover of the letter dated 10 February 2016 pursuant to paragraph 6 of the Order.

Given this background and that this matter is not straightforward or without complexities our client has rejected your clients' claim as he is not in a position to accept your clients' claim at this time for the following reasons:

- (a) there were numerous adverse findings and comments made by her Honour Justice Dalton in the judgment delivered on 8 August 2013, many of which were upheld on appeal;
- (b) by the judgment delivered on 20 December 2013 her Honour Justice Dalton ordered that LMIM be indemnified from the FMIF only to the extent of 20 per cent of its costs of and incidental to the proceeding, excluding any reserved costs;
- (c) our client has made submissions to his Honour Justice Jackson in proceedings 3508 of 2015 in relation to the remuneration sought by your clients in relation to the work performed by them in resisting and appealing the proceedings which resulted in Justice Dalton's order of 21 August 2013 pursuant to which our client was appointed receiver of the FMIF and person responsible. In this regard, we refer you to:
 - i. paragraphs 2(a), 6 and 50(a) of our client's supplementary submissions in proceedings numbered 3508 of 2015; and
 - ii. paragraphs 14(c) and (d) of our client's affidavit sworn 11 March 2016 in proceedings numbered 3508 of 2015;
- (d) for the reasons set out above, our client remains of the view that his Honour's judgment in 3508 of 2015 will touch on matters the subject of your clients' claim for an indemnity in respect of the appeal costs. That is, our client wishes to ensure that your clients' claim for remuneration and your clients' claim for their legal costs in relation to the Appeal Proceedings are dealt with in a consistent manner, in accordance with his Honour's direction in that regard. In those circumstances, our client considers it appropriate for him to await that judgment before making a final determination of your clients' claim or making an application under paragraph 10 of the Order.

As previously advised, our client's view is that any application for directions would be premature until such time as he has had an opportunity to consider the judgment which is shortly to be delivered in 3508 of 2015.

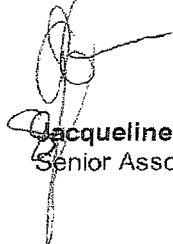
~~We therefore repeat our previous proposal that the parties agree to our client delivering a final determination (together with written reasons) in respect of your clients' claim within 7 days of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.~~

Your clients have not identified any prejudice that they will suffer in respect of the short delay if our client was to deliver a final determination as proposed above. The only prejudice we can presently identify is that your clients may be precluded from applying to the Court for directions pursuant to paragraph 9(a) of the Order (which application is to be made within 28 days of receiving our client's reasons for rejecting any claim) if the judgment is not delivered within that time period. In order to alleviate any concerns your clients may have in this regard, our client agrees that the 28 days will not commence until delivery of our client's final determination and written reasons (being, within 7 days of receipt of Justice Jackson's judgment).

If your clients are not minded to agree to the approach proposed above, we reserve our client's rights in respect of any application made by your clients under the Order.

Further, we note that you have provided us with a copy of the invoices listed in your letter of 11 March 2016 and confirmed that no other invoices support the costs which are the subject of your clients' claim. Those invoices total \$70,609.61. However, we note that the disbursements were assessed at \$77,179.88. Could you please explain the basis for the difference in the amount of the invoices and the assessed disbursements?

Yours faithfully



Jacqueline Ogden
Senior Associate