

**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**

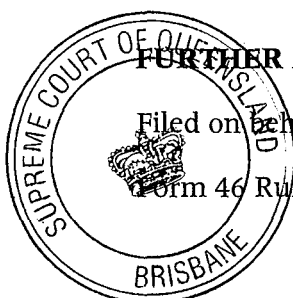
**JOHN RICHARD PARK** of 22 Market Street, Brisbane, Queensland, Official

Liquidator and Chartered Accountant states on oath:-

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**FURTHER AFFIDAVIT OF JOHN RICHARD PARK**

Filed on behalf of the Applicants  
Form 46 Rule 431

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

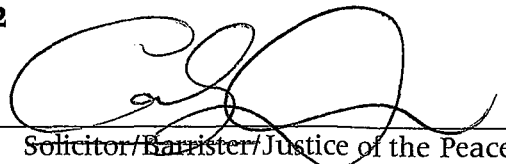
1. I am an official liquidator and chartered accountant. I am the first named First Applicant in this proceeding.
2. I make this affidavit in support of the applicants' application filed in this proceeding on 20 May, 2016 pursuant to the regime set out in the orders of Jackson J in this proceeding dated 17 December, 2015 ("**the Application**"). I am authorised by the other Applicants to do so.
3. Now produced and shown to me and marked "**JRP-5**" is an indexed, paginated bundle of documents to which I shall refer in this affidavit. References to numbers in [ ] are references to the page numbers of JRP-5.
4. Much of the background to the Application, particularly concerning my and Ms Muller's and the Respondent's appointment to our respective roles concerning the Second Applicant ("**LMIM**") is contained in earlier affidavits I have sworn in these proceedings ("**my Earlier Affidavits**"), in particular:-
- (a) my affidavit filed on 22 April, 2015 (corrected in some minor respects by my affidavit filed 11 June, 2015); and
  - (b) my affidavit filed on 28 January, 2016.
5. I crave leave to refer to those affidavits in respect of the background facts and circumstances to the Application.
6. Similarly, there have been a number of decisions and orders which frame the current Application. In particular, following the delivery of his Honour's reasons in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte* [2015] QSC 283

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(**"the Powers Judgment"**), Justice Jackson made orders on 17 December, 2015 (**"the Order"**) concerning, *inter alia*, my and Ms Muller's right of indemnity out of the assets of the LM First Mortgage Income Fund (**"FMIF"**).

7. A copy of the Order appears at [1] to [7].

8. A copy of the constitution of the FMIF at the time of my appointment appears at [8] to [47].

### **The Indemnity Regime**

9. Paragraphs 4 to 10 of the Order set down a process by which the Applicants and the Respondent identify and assess claims for indemnity or recoupment from the FMIF assets of the (called in the Order and hereafter, **"Eligible Claims"**).

10. In substantial part, that process has been followed and has resulted in the Respondent accepting some Eligible Claims, denying others and the parties agreeing to defer some, pending the outcome of decisions currently reserved by this Court.

11. I set out below the relevant course of conduct by which those Eligible Claims were made and considered. Before doing so, I note that the Respondent appointed solicitors, Tucker & Cowen to deal with the majority of the Eligible Claims and another firm, Gadens, to deal with one particular category of those Eligible Claims.

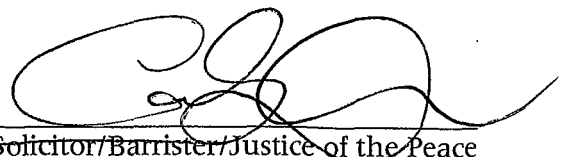
12. I believe (for reasons which will become apparent when I address the particular claims in further detail below) that was done because Tucker & Cowen had a potential conflict in acting in respect of one particular Eligible Claim. I make no

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criticism of the Respondent in appointing two firms to act in that way. I made this observation simply to explain why there are two 'streams' of correspondence by which the claims were advanced and assessed.

13. The process set out in the Order occurred as follows:-
- (a) on 10 February, 2016, my solicitors, Russells, wrote to Gadens making a claim pursuant to paragraph 5 of the Order for the expenses incurred in the Appeal (a term I define below), a copy of which appears at [48] to [50];
  - (b) on 15 February, 2016, I caused a letter to be sent to the Respondent notifying Mr Whyte of the other Eligible Claims pursuant to paragraph 5 of the Order, a copy of which appears at [51] to [57];
  - (c) on 24 February, 2016, Gadens responded to Russells' correspondence regarding the expenses of the Appeal and sought further information pursuant to paragraph 8(a) of the Order, a copy of which appears at [58] to [61];
  - (d) on 29 February, 2016, I received a letter from the Respondent requesting further information pursuant to paragraph 8(a) of the Order about the Eligible Claims raised in my letter of 15 February, 2016, a copy of which appears at [62] to [81];
  - (e) on 11 March, 2016, Russells responded to Gadens' request for further information about the expenses of the Appeal pursuant to paragraph 7(b) of the Order, a copy of which appears at [82] to [87];
  - (f) on 24 March, 2016, Russells responded to the Respondent's request for further information about the other Eligible Claims pursuant to paragraph 7(b) of the Order, a copy of which appears at [88] to [96];



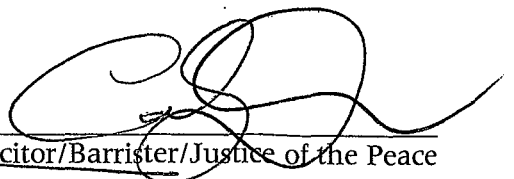
- (g) on 14 April, 2016, Gadens wrote to Russells notifying them that the Respondent had rejected the claim for the expenses of the Appeal pursuant to paragraph 8(b)(ii) of the Order, a copy of which appears at [97] to [98];
- (h) on 21 April, 2016, Gadens wrote to Russells providing reasons for the Respondent's rejection of the claim for the expenses of the Appeal pursuant to paragraph 8(c) of the Order, a copy of which appears at [99] to [101];
- (i) on 22 April, 2016, I received a letter from the Respondent notifying me that some of the other Eligible Claims had been accepted and some had been rejected pursuant to paragraph 8(b) of the Order, a copy of which appears at [102] to [104];
- (j) on 27 April, 2016, I received a letter from the Respondent providing me with reasons for the Respondent's rejection of some of the other Eligible Claims pursuant to paragraph 8(c) of the Order, a copy of which appears at [105] to [111].

14. I have not exhibited to this affidavit all of the invoices and underlying source documents which were included in the correspondence referred to in paragraphs 13(a), 13(b), 13(e) and 13(f) herein because the documents run to several hundred pages. I have instructed my solicitors to provide a paginated bundle of that material to Mr Whyte's solicitors and invite them to identify which pages of the bundle might be relevant or in dispute and necessary for the Court's consideration of this Application. Such pages as will be identified by Mr Whyte's solicitors can be made available for tender during the hearing of the Application.

15. Since that correspondence, my solicitors have exchanged further correspondence with Tucker and Cowen in an effort to resolve the matters which remain in dispute. Copies of those pieces of correspondence appear at [112] to [127].



Signed



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## The Issues

16. In broad terms, the following categories of Eligible Claims are the subject of this Application:-

- (a) the legal costs of the Appeal (\$241,453.54 claimed);
- (b) the legal costs of calculating and enforcing the right of indemnity (\$3,751.91 claimed);
- (c) the legal costs of the Federal Court books and records issues (\$15,513.11 claimed);
- (d) the cost of Mr Hartwell's appointment to assess the legal expenses I have incurred (\$6,279.86 claimed); and
- (e) the premiums for a policy of professional indemnity insurance I caused to be taken out (\$61,391.78 claimed).

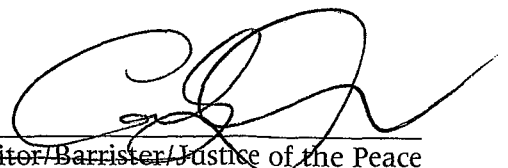
17. I will deal with each issue in more detail in turn below.

18. I am aware that some of these categories of expense, in particular, those referred to in paragraphs 16(b) and 16(d) above, are relatively insignificant in terms of quantum. I bring the Application in respect of those categories because:-

- (a) I have notified Mr Whyte of further Eligible Claims being made pursuant to paragraph 6 of the Order ("**the Further Claims**") in the future;
- (b) I am hopeful that the resolution of the Application will assist the Respondent in assessing the Further Claims, given many of the categories in the Application overlap with those in the Further Claims, and therefore costs will be saved in the long run;
- (c) I believe that those costs were reasonably and necessarily incurred in my capacity as the liquidator of LMIM and that those costs are properly payable from the assets of the FMIF.



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19. The Respondent and I have agreed to delay any request for information or decision from the Respondent in respect of the Further Claims pending the resolution of the Application.

20. I accept that the resolution of the Application will not be determinative or formally binding on the Respondent regarding the Further Claims, but I remain hopeful that the determination of the Application will assist the parties to avoid costly and time consuming disputes in the future.

*The Appeal – Background*

21. The Respondent was appointed as receiver of the assets of the FMIF and to take responsibility for ensuring the FMIF is wound up in accordance with its constitution by an order of Justice Dalton dated 21 August, 2013. The relevant circumstances pertaining to that appointment are set out in my Earlier Affidavits.


22. The Applicants appealed that decision ("**the Appeal**"). The Appeal was dismissed by the Court of Appeal (Coram: Fraser and Gotterson JJA and Daubney J). The Court of Appeal gave its reasons in *LM Investment Management Limited (in liq) v Bruce and Ors* [2014] QCA 136, a copy of which appears at [128] to [174].

23. The Second Respondent in the Appeal was Mr Roger Shotton, a member of the FMIF, for whom Tucker & Cowen acted (both in the Appeal and in the proceedings before Dalton J). LMIM was ordered to pay the respondents' (including Mr Shotton's) costs of the Appeal.

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24. While the Appeal was dismissed, I believe it was a necessary and reasonable step for Ms Muller and I to have caused LMIM to take in seeking to protect the interests of the FMIF primarily because of a concern that I held about the costs of having two insolvency practitioners appointed to the FMIF.

25. In particular, I was concerned that there would be duplication of effort, increased administrative expense and the potential for disputes between the insolvency practitioners about administrative matters which might result in the FMIF bearing the costs of two sets of insolvency practitioners in respect of the one issue.

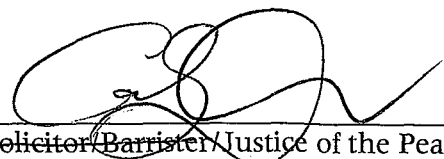
26. On 17 June, 2014, following the delivery of the Court of Appeal's reasons on 6 June, 2014, Mr David Tucker of Tucker & Cowen wrote to Russells concerning Mr Shotton's costs of the appeal, a copy of which letter appears at [175] to [176]. Therein, Mr Tucker asked whether LMIM intended to seek indemnity out of the FMIF for its costs.

27. On 30 June, 2014, Tucker & Cowen delivered a costs statement to Russells in respect of Mr Shotton's costs. Following an assessment conducted by Mr Edward Skuse, a registered costs assessor, Mr Shotton's costs of the Appeal were assessed as being \$87,841.20. At [177] to [178] is a copy of Mr Skuse's certificate.

28. On 19 September, 2014, Russells responded to Tucker & Cowen's letter dated 17 June, 2014 notifying them that my and Ms Muller's position was that LMIM was entitled to a full indemnity out of the FMIF in respect of Mr Shotton's costs of the Appeal. A copy of that letter appears at [179] to [182].



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29. On 15 October, 2014 Russells received further correspondence from Mr Tucker, who invited LMIM to take up the question of an indemnity with the Respondent and noted that Tucker & Cowen only acted for Mr Shotton. A copy of that letter appears at [183] to [184].

30. Following some further correspondence to clarify that issue, on 26 November, 2014, Gadens wrote to Russells inviting them to set out the basis of the right of indemnity. Russells did so on 31 January, 2015. Copies of those letters appear at [185] to [187] and [188] to [194] respectively.

31. Again, following some additional correspondence which I do not consider to be of relevance to the issues on this Application, on 1 May, 2015, Tucker & Cowen wrote to Russells demanding payment of Mr Shotton's costs of the appeal and asking that LMIM seek an indemnity from the Respondent. That letter, a copy of which appears at [195] to [199] provided, in part:-

*"It seems to us that these costs are plainly within the terms of the indemnity in the Constitution of the FMIF ... The commencement and prosecution of the appeal and the subsequent costs order seems to plainly fall within the terms of that indemnity. Moreover, the costs order would also fall within the indemnity at general law.*

*The only manner in which the LM First Mortgage Fund [sic] could deny liability is if the provisions of clause 19.1(c) applied, such that your client acted negligently, fraudulently or in breach of trust. We are unaware of any circumstances to suggest that. Nor are we aware of anyone so contending."*

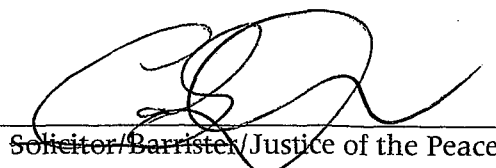
32. The above comments in the Tucker and Cowen letter also reflect my understanding of the relevant principles.

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33. On 20 May, 2015, Russells sent a copy of that correspondence to Gadens and asked that Mr Whyte pay Mr Shotton's costs of the Appeal from the FMIF or provide his reasons for refusing to do so. A copy of that letter appears at [200] to [204].

34. On 22 May, 2015, Gadens wrote to Russells and stated that the Respondent would agree to pay Mr Shotton's costs of the Appeal to Tucker & Cowen. A copy of the letter appears at [205] to [206].

35. That letter further provided:-

*"...we note that the fact that 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."*

36. The balance of the correspondence regarding LMIM's costs of the Appeal is referred to in paragraphs 13(a), 13(c), 13(e), 13(g) and 13(h) herein.

*The Appeal – Quantum of legal costs*

37. The correspondence from Russells to Gadens claiming the costs of the Appeal as an Eligible Claim pursuant to the Order, which is referred to in paragraphs 13(a) and 13(j) herein and appears at [48] to [50] and [105] to [111] respectively, annexed the documents which show the calculation of the quantum of those costs.

38. My intention in instructing that Mr Hartwell be retained was to ensure that, where an appropriate mechanism existed (e.g. as with the assessment of



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solicitors' bills under the *Legal Profession Act 2007*), an independent third party had reviewed my and Ms Muller's expenses and found them to be reasonable.

39. I had hoped that having those bills assessed would facilitate a cost effective resolution of my and Ms Muller's claim for expenses against the FMIF. Indeed, I considered acting in that way to be necessary and in the best interests of the members of the FMIF. In this respect, I crave leave to refer to the affidavit of Mr Stephen Russell filed in Supreme Court of Queensland proceeding 3383 of 2013 on 19 October, 2015.

40. Mr Stephen Hartwell was engaged to assess the Appeal costs under the *Legal Profession Act 2007*. Mr Hartwell assessed those costs as follows:-

Professional Fees	\$164,273.66
Disbursements	\$77,179.88
<b>Total</b>	<b>\$241,453.54</b>

41. A copy of Mr Hartwell's certificate pursuant to Rule 737 of the *Uniform Civil Procedure Rules 1999* dated 1 February, 2016 appears at [207].

*The Right of Indemnity*

42. I have taken legal advice concerning LMIM's right of indemnity and, without intending to waive privilege in respect of that advice, believe that a trustee's costs of calculating and enforcing its right of indemnity forms a part of that right of indemnity and is recoverable against trust assets.

43. Russells issued LMIM with the following invoices relating to their matter number 20131259 (being a matter concerning LMIM's right of indemnity against the FMIF:-

Invoice Number	Invoice Date	Amount
B17488	28/03/2014	\$1,585.85
B18884	26/08/2014	\$566.48
B19396	29/09/2014	\$3,327.09
B24316	29/01/2016	\$1,920.42
<b>Total</b>		<b>\$7,399.84</b>

44. Copies of those invoices are included in Russells' correspondence to Tucker & Cowen referred to in paragraph 13(b) and appear at [51] to [57].

45. Mr Hartwell assessed invoices B17488, B18884 and B19396 pursuant to the *Legal Profession Act 2007*. A copy of his certificate in that respect is at [208].

46. Following the exchange of correspondence referred to in paragraphs 13(b), 13(d) and 13(f) herein:-

- (a) I agreed not to press the indemnity claim with respect to particular entries in respect of tax invoice number B17488 to a value of \$320.83 (including GST);
- (b) I agreed not to press the indemnity claim with respect to particular entries in B19396 to a value of \$137.50 (including GST); and
- (c) the parties agreed to defer a decision by the Respondent in respect of the balance of B19396 until after this Court delivers its reserved decision in my and Ms Muller's application for remuneration.



47. Accordingly, the amounts which the Respondent rejected, and in respect of which directions are sought in this Application, are:-

Invoice Number	Invoice Date	Rejected Amount
B17488	28/03/2014	\$1,265.01
B18884	26/08/2014	\$566.48
B24316	29/01/2016	\$1,920.42
<b>Total</b>		<b>\$3,751.91</b>

48. These tax invoices reflect LMIM's legal costs in taking advice on several discrete issues:-

- (a) in respect of tax invoices B17488 and B18884: considering and advising upon the proper quantum of the costs orders made in the proceedings before Dalton J and, subsequently, the Appeal, and whether and how those costs could form part of LMIM's right of indemnity against the FMIF;
- (b) in respect of tax invoices B24316: calculating and considering the Eligible Claims pursuant to the Order and assessing whether those claims fall within LMIM's right of indemnity.

49. I believe that these costs were reasonable and necessarily incurred in the course of assessing, calculating and enforcing LMIM's right of indemnity out of the assets of the FMIF.

*Books and Records*

50. Several applications have been made to this Court regarding the books and records of LMIM. The Eligible Claims under this category are related, but distinct.

51. Most of those applications arose from the fact that LMIM did not maintain separate books and records for each of the several registered managed investment schemes and trusts of which it was the responsible entity or trustee. It was, following Ms Muller's and my appointment to LMIM, impracticable to separate the books and records of any particular fund.

52. This problem was solved, for the most part, by directions from the Court approving a regime which involved producing the entirety of the books and records of LMIM to Korda Mentha Pty Ltd, the trustee of the LM Managed Performance Fund and to the Respondent upon undertakings being given by numerous individuals not to seek out the books and records of the other funds.

53. By an originating process and statement of claim in Federal Court Proceedings QUD 596 of 2014 ("**the ASIC Proceedings**"), the Australian Securities and Investments Commission ("**ASIC**") commenced civil penalty proceedings against the directors of LMIM.

54. Prior to commencing the proceedings ASIC had obtained copies of all of the books and records of LMIM (i.e. documents which relate to various trusts of which LMIM was the responsible entity/trustee) by requiring those documents to be produced pursuant to sections 19(2)(a), 30 and 33 of the *Australian Securities and Investments Commission Act 2001* (C'th) ("**ASIC Act**").

55. On 26 May, 2015, my firm received correspondence from ASIC:-

- (a) indicating that the ASIC had been ordered to give discovery in the ASIC Proceedings;

- (b) notifying LMIM that the documents which may be produced may include documents obtained pursuant to the ASIC Act; and
- (c) inviting LMIM to assert any claim for legal professional privilege or otherwise object to the disclosure of the documents.

56. A copy of that letter appears at [209] to [211].

57. I sought advice from Russells regarding LMIM's response to that correspondence from ASIC.

58. On 9 June, 2016, Russells responded to ASIC's correspondence requesting that ASIC identify the specific documents they intended to disclose. A copy of that letter is at [212] to [216].

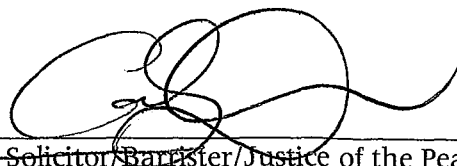
59. On 6 July, 2016, ASIC responded with a list of documents it intended to disclose in the ASIC Proceedings and provided some further information about the steps it was taking to identify potentially privileged documents. A copy of that letter is at [217] to [219]. I do not exhibit the list of documents because it totals approximately 4,000 page when printed.

60. On 14 July, 2015, Russells wrote to ASIC setting out objections to ASIC's proposed disclosure of LMIM's documents. A copy of that letter is at [220] to [221].

61. Some further correspondence with ASIC about those objections followed, which I do not exhibit because they are not of any particular relevance to this application.



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62. On 23 July, 2015, Gadens, on behalf of the Respondent wrote to Russells and enquired whether Ms Muller and I intended to object to ASIC producing documents in the ASIC Proceedings and notified them that the Respondent did not intend to do so. A copy of that letter is at [222].

63. On 27 July, 2015, Russells wrote to Gadens informing them of our objections and requesting that they confirm my understanding of the matter, which was that claims for privilege were LMIM's (and therefore my and Ms Muller's) to make, including over trust documents which related to the various trusts of which LMIM was the responsible entity or trustee, including the FMIF. A copy of that letter is at [223] to [225].

64. Following that correspondence, Russells and Gadens engaged in some further correspondence regarding the issue. Copies of that correspondence appears at [226] to [258].

65. Essentially, Gadens contended that the amendments to the discovery plan in the ASIC Proceedings would limit documents to those that could not be relevant to the FMIF. It followed, they said, that no indemnity from the FMIF could exist.

66. Our position was that the documents, on their face, could not be excluded from relating to any of the Funds and so the Funds should each bear a proportion of the costs involved in reviewing the documents and identifying any particular documents to be challenged.

  
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67. On 9 October, 2015, the ASIC sent to Russells a copy of a draft amended discovery plan for the proceedings, a copy of which appears at [259] to [330].

I understand that plan was subsequently approved for use in the ASIC Proceedings.

68. The plan provided, in summary, for keyword searches and categories of documents to be extracted from the LMIM database, identified for all parties and then an objection process to be followed.

69. Annexure A to the plan set out the keywords that ASIC had used in its search of the database. Relevantly for the FMIF, those search terms included:-

(a) by item number 4 of table A:-

*[LMIM or "LM Investment" or \*MIF or "First Mortgage Income" or "Managed Performance Fund" or MPF or LMA or "LM Administration"] AND ["management fee\*" or "mgmt fee\*" or revenue or "balance sheet\*" or "financial position" or "financial statement\*" or \*solven\* or impair\* or "cash flow\*" or cashflow\* or "account statement\*" or "bank statement\*" or "ledger\*" or "LM Group position" or "general journal\*" or "cash at bank" or "avg balance\*"]*  
(Emphasis added)

(b) by item number 10 of table A:-

*[Drake] AND [LMA or "LM Administration" or "LMA Trust" or "Administration Trust"] AND ["general ledger" or "GL"] AND [loan or drawing\* or "financial statement\*"]*

(c) by item number 12 of table A:-

*[Drake or Mulder or Hoven or Tickner or Darcy] AND ["personal leave" or "annual leave" or "sick leave" or holiday\*" or "travel expense\*"]*

(d) by item number 13 of table A:-

*[Drake or Mulder or Hoven or Tickner or Darcy or Barnett or Fischer or King or Chalmers] AND ["employment agreement" or "consultancy agreement\*" or "letter of offer\*" or "contract of employment\*" or "offer of employment\*" or "employment contract\*"]*

(e) by item number 17 of table A:-

*[LMIM or "LM Investment"] AND ["annual report" or "financial report\*" or "financial statement\*" or "balance sheet\*"]*

(f) by item number 4 of table B:-

*[LMIM or "LM Investment" or \*MIF or "First Mortgage Income" or "Managed Performance Fund" or MPF or LMA or "LM Administration"] AND ["management fee\*" or "mgmt fee\*" or "financial position" or \*solven\* or impair\* or "LM Group position" NOT [redemption or hardship or frozen or "closed funds"]](Emphasis added)*

(g) by item number 10 of table B:-

*[Drake] AND [LMA or "LM Administration" or "LMA Trust" or "Administration Trust"] AND ["general ledger" or "GL"] AND [loan or drawing\* or "financial statement\*"]*

(h) by item number 12 of table B:-

*[Drake or Mulder or Hoven or Tickner or Darcy] AND ["personal leave" or "annual leave" or "sick leave" or holiday\*" or "travel expense\*"] NOT ["Jeremy Holiday"]*

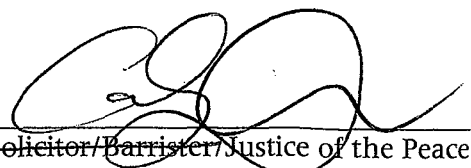
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70. Each of those search terms refer either expressly to the FMIF or are so broad as to potentially encompass any fund or the funds management business of LMIM, which may have therefore included the FMIF.

71. Based on my experiences with the earlier books and records issues, I had formed the view that protecting legal professional privilege in the documents of LMIM was necessarily a task that affected the interests of all of the Funds, including the FMIF. I believe that the conduct required by the parties pursuant to the disclosure plan was consistent with that view.

72. Accordingly, I have claimed the legal costs relating to that review as an expense necessary for the protection of all of the Funds. Only a portion of that expense is sought from the FMIF. I intend to claim such costs in the proportion which is approved in the Remuneration Application presently reserved before the Court (if any).

*Books and Records - Quantum*

73. Russells issued LMIM with the following tax invoices relating to their matter number 20131545, the Books and Records matter, which were claimed as Eligible Claims:-

Invoice Number	Invoice Date	Claimed Amount
B18011	29/05/2014	\$774.48
B18603	28/07/2014	\$4,810.64
B21563	30/04/2015	\$7,200.64
B21751	29/05/2015	\$4,786.74
B22024	30/06/2015	\$8,579.32

B22832	31/08/2015	\$3,525.82
B23055	30/09/2015	\$1,390.62
B23460	30/10/2015	\$4,646.14
B23746	30/11/2015	\$5,857.84
<b>Total</b>		<b>\$41,572.24</b>

74. Copies of those tax invoices were included under cover of Russells' correspondence to Tucker & Cowen referred to in paragraph 13(b).

75. Mr Hartwell assessed tax invoices B18011, B18603, B21563, B21751 and B22024 pursuant to the *Legal Profession Act 2007*. A copy of his certificate in that respect is at [331].

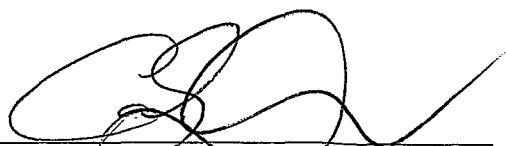
76. Following the exchange of correspondence referred to in paragraphs 13(b), 13(d) and 13(f) herein, I agreed not to press the claim with respect to particular entries in respect of B18603 to a value of \$6,286.24 (excluding GST). The Respondent accepted some of those Eligible Claims.

77. Accordingly, the amounts which the Respondent rejected, and in respect of which directions are sought in this Application, are:-

<b>Invoice Number</b>	<b>Invoice Date</b>	<b>Rejected Amount</b>
B18603	28/07/2014	\$92.69
B22832	31/08/2015	\$3,525.82
B23055	30/09/2015	\$1,390.62
B23460	30/10/2015	\$4,646.14
B23746	30/11/2015	\$5,857.84
<b>Total</b>		<b>\$15,513.11</b>

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Signed

  
~~Solicitor/Barrister/Justice of the Peace~~



78. I believe those costs were reasonable and necessarily incurred in the course of seeking to protect LMIM's (including the FMIF's) confidentiality and privilege in the ASIC Proceedings.

*Respondent's Remuneration*

79. Russells issued LMIM with the following tax invoices relating to their matter numbers 20140653 and 20141556, relating to the Respondent's various applications for approval of his remuneration, which were claimed as Eligible Claims:-

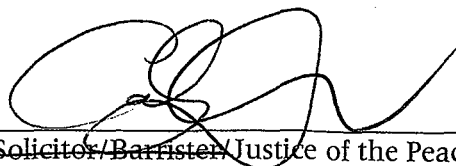
Invoice Number	Invoice Date	Amount
B18111	05/06/2014	\$12,848.43
B18258	25/06/2014	\$3,300.00
B18535	18/07/2014	\$3,134.11
B18824	20/08/2014	\$26,685.63
B20178	22/12/2014	\$6,863.52
B20191	22/12/2014	\$23,563.49
B22048	29/06/2015	\$3,367.86
B23946	21/12/2015	\$2,371.86
<b>Total</b>		<b>\$82,134.90</b>

80. Copies of these tax invoices were included under cover of Russells' correspondence to Tucker & Cowen referred to in paragraph 13(b).

81. Mr Hartwell assessed tax invoices B18824 and B20191 pursuant to the *Legal Profession Act 2007*. A copy of his certificate in that respect is at [332] to [333].



Signed



Solicitor/Barrister/Justice of the Peace

82. The Respondent accepted the majority of those Eligible Claims, excepting claims in the sum of \$11,950.00 in invoices B18824 and B20191, which I no longer press.

83. Accordingly, there is no express dispute remaining in respect of the amounts which the Respondent rejected, and in respect of which directions are sought in this Application, are:-

Invoice Number	Invoice Date	Rejected Amount
B18824	20/08/2014	\$9,750.00
B20191	22/12/2014	\$2,200.00
Total		\$11,950.00

*Costs Assessment – Mr Hartwell*


84. As has been alluded to above, I instructed Russells to engage Mr Stephen Hartwell to assess some of Russells' bills pursuant to the *Legal Profession Act 2007* ("LPA").

85. I have been, throughout the period of the Respondent's appointment to the FMIF (along with the appointment of Deutsche Bank's receivers, McGrath Nichol), conscious of the cost burden placed on the FMIF by having three separate sets of insolvency practitioners appointed to the FMIF.

86. I have not caused our legal fees to be assessed since Mr Hartwell's assessment because:-

- (a) the Respondent has refused to indemnify me and Ms Muller for the costs of Mr Hartwell's assessment and LMIM in its own right does not have sufficient resources to incur further costs in that respect; and

  
Signed

  
Solicitor/Barrister/Justice of the Peace

(b) the Respondent has conducted his own review of the Eligible Claims, without overt reference to Mr Hartwell's assessment, so I do not believe he has considered the assessments (at least, he has not referred to doing so in the reasons he has provided to me).

87. Part of the Eligible Claims advanced against the FMIF were Mr Hartwell's fees in assessing those invoices which ultimately became Eligible Claims themselves. No claim for Mr Hartwell's fee was made where those costs did not relate to an Eligible Claim.

88. Mr Hartwell's fees were paid up-front by LMIM in a lump sum of \$56,000.00. Mr Hartwell, in each of his costs certificates (which appear at [207], [208], [331] and [332] to [333]) has apportioned his fee across each matter.

89. The Respondent has rejected the claimed amount for Mr Hartwell's fee of \$6,279.86.

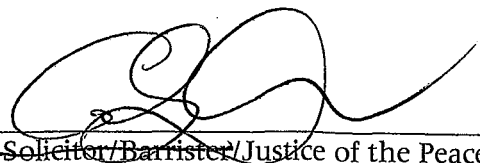
90. Given this amount relates only to those matters in respect of which a claim against the FMIF was maintained, and the total claimed against the FMIF is quite small compared with Mr Hartwell's total fee, I believe the quantum of the claim is reasonable.

#### *Insurance Premiums*

91. Following my and Ms Muller's appointment, I took advice from the firm of insurance brokers, Arthur J Gallagher, about the potential liability which might arise as a result of the appointment.



Signed



~~Solicitor/Barrister/Justice of the Peace~~

92. Following the receipt of that advice, Ms Muller and I took out a policy of professional indemnity insurance, underwritten by certain underwriters at Lloyds of London.

93. Copies of the invoices for the premiums for that insurance were sent to Tucker and Cowen under cover of Russells' letter referred to in subparagraph 13(f) for the sum of \$80,125.00.

94. The risk insured against under the policy was any civil liability in connection with the 'Professional Business' on a claims made basis.

95. 'Professional Business' was defined to be acting as manager and administrator of various funds, including the FMIF.

96. Because the policy was a 'claims made' policy, I have caused it to be renewed annually in order to maintain appropriate cover.

97. It is also because the policy is a 'claims made' policy that I believe it is necessary to maintain the cover despite the Respondent's appointment and the consequent reduction (though not elimination) of my and Ms Muller's role in managing and administering the FMIF (following the decision of this Honourable Court in the Powers Judgment).

98. Claims against LMIM and Ms Muller and I to which the policy may respond may continue to be made into the future.

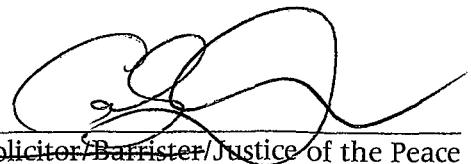
99. One such claim has been foreshadowed Mr Whyte himself.

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Signed



Solicitor/Barrister/Justice of the Peace

100. At [334] to [336] is a copy of a letter from the Respondent's solicitors dated 11 May, 2016, foreshadowing the claim. Although there has been further correspondence, no formal claim has yet been made by the issue of any proceedings but, if it were, then the insurance may be needed by me to respond to that claim.


101. Having taken specialist advice about the policy and having obtained a policy specifically adapted to the circumstances of LMIM, I believe the quantum of the premium to be reasonable.

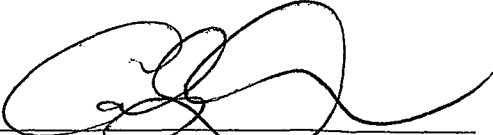
102. The premium for the insurance policy which remains the subject of an Eligible Claim is as follows:-

Invoice Number	Invoice Date	Amount
289543	2/11/2015	\$55,050.00
289547	2/11/2015	\$25,075.00
Total		\$80,125.00

103. Because the policy does not relate solely to the FMIF but also to the Other Funds which LMIM managed and administered (principally, in terms of active funds management after my and Ms Muller's appointment, the FMIF and the LM Australian Income Fund), I have only sought to claim a portion of that premium from the FMIF.

104. Accordingly, the amount which the Respondent rejected, and in respect of which directions are sought in this Application, is \$61,391.78, being 76.62% of the funds under management at the time the invoices were issued. In that respect I crave leave to refer to my Earlier Affidavits.

  
Signed

  
Solicitor/Barrister/Justice of the Peace


105. That claim is made on the basis of the Remuneration Application which is currently reserved. If the Court finds that a different percentage is appropriate (assuming that any is), that is the percentage to apply to this premium.

106. All the facts and circumstances 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 **JOHN RICHARD PARK** on 18<sup>th</sup> October, 2016 at Brisbane in the presence of:



Deponent



~~Solicitor/Barrister/Justice of the Peace~~



**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**

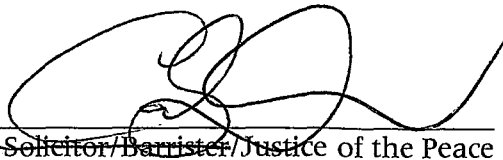
**AND**

**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**

Bound and marked "**JRP-5**" are pages 1 to 222 to the exhibits to the Affidavit of  
**JOHN RICHARD PARK** sworn <sup>10<sup>th</sup></sup> 8 October, 2016:



Deponent

Solicitor/Barrister/Justice of the Peace



**CERTIFICATE OF EXHIBIT**

Filed on behalf of the Applicants

Form 47 Rule 435

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

**SUPREME COURT OF QUEENSLAND**

**REGISTRY: Brisbane**  
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**INDEX TO EXHIBIT "JRP-5"**

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Correspondence from Gadens to Russells	24/02/2016	58-61

**INDEX TO EXHIBITS TO "JRP-5"**

Filed on behalf of the Applicants

Form 47 Rule 435

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899



<b>Description</b>	<b>Date</b>	<b>Page No.</b>
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Duplicate

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.

ORDER

Form 59 R.661

Filed on behalf of the Respondent

Tucker + Cowen Solicitors  
15 Adelaide Street  
BRISBANE, QLD 4001

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 601NF(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](http://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](http://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](http://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](http://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](http://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](http://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](http://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

**LM INVESTMENT MANAGEMENT LIMITED**

**ABN 68 077 208 461**

**Australian Financial Services Licensee 220281**

**AND**

**THE MEMBERS AS THEY ARE CONSTITUTED**

**FROM TIME TO TIME OF THE**

**LM FIRST MORTGAGE INCOME FUND**

**ARSN 089 343 288**

**REPLACEMENT  
CONSTITUTION**

DEED made this 10 day of April 2008

**BETWEEN:** LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 9 Beach Road, Surfers Paradise in the State of Queensland (the Responsible Entity hereinafter referred to as the "RE")

**AND:** All those persons who from time to time apply for Units and are accepted as Unitholders of the Scheme ("the Members")

**WHEREAS:**

- A. The RE holds a responsible entity's licence from the ASIC.
- B. The RE established a pooled mortgage unit trust called the LM Mortgage Income Fund on 28 September 1999. From 31 May 2007 the LM Mortgage Income Fund will be known as the LM First Mortgage Income Fund.
- C. By applying to invest in this Scheme through a PDS a person will become a Member and be bound by this Constitution.
- D. Clause 26.1(b) and section 601GC(1)(b) of the Law allow the RE to modify or repeal and replace the Constitution where the RE reasonably considers the change will not adversely affect Members' rights. The RE is satisfied the amendments contemplated by this replacement Constitution will not adversely affect Members' rights.
- E. Accordingly with effect from the date of this deed poll, the existing constitution of the Scheme is repealed and replaced with this Constitution.
- F. This Constitution is made with the intent that the benefits and obligations hereof will enure not only to the RE but also to the extent provided herein to every person who is or becomes a Member.

**IT IS AGREED:**

**1. DICTIONARY AND INTERPRETATION**

**1.1 Dictionary of Terms**

In this Constitution:

"Accounting Standards" means the accounting standards and practices determined under clause 1.3;

"Adviser" means the financial adviser who has offered Unit/s in this Scheme to a Member;

"Applicant" anyone who submits an application for Unit/s in the Scheme in accordance with the PDS;

"Application" means a request from a Member to the RE to issue Units in a managed investment scheme pursuant to an Arrangement;

"Application Form" an application in writing for Unit/s in the Scheme attached to the PDS.

"Application Money" the amount received from an Applicant when lodging the

Application in respect of the Units applied for in accordance with the PDS;

"Arrangement" means a written arrangement between the RE and a Member that sets out the circumstances in which Applications for Units in registered schemes operated by the RE, may be accepted;

"ASIC" the Australian Securities and Investments Commission;

"ASIC Instrument" means:

- (a) an exemption or modification granted by ASIC in accordance with Part 5C.11 of the Law; or
- (b) any other instrument issued by ASIC under a power conferred on ASIC which relates to the RE or the Scheme.

"Auditor" means the auditor of the Scheme appointed by the RE under clause 27.1 and shall be qualified to act as a registered scheme auditor pursuant to the Law;

"Authorised Investments" means

- (a) monies deposited (whether secured or unsecured) with a Bank, or any corporation related to a Bank or other corporation or monies deposited with any trustee company, fund, bills of exchange, certificates of deposit and negotiable certificates of deposit issued by a Bank or similar instrument accepted and endorsed by a Bank;
- (b) any investments the time being authorised by the laws of the Commonwealth of Australia or any State or Territory thereof for the investment of trust funds;
- (c) monies deposited with an authorised short term money market dealer as such expression is used in section 65 of the Law;
- (d) any investment in or acquisition of cash, stocks, bonds, notes or other securities or derivatives issued by the Government of Australia, any other country, any company, corporation, body corporate, association, firm, mutual fund or unit trust;
- (e) any investment in or acquisition of options, entitlements or rights to any of the securities or derivatives referred to in clause (d) of this provision;
- (f) real property or interests in real property whether by acquisition of units in unit trusts or otherwise;
- (g) interests in any registered managed investment scheme (as defined in the Law) including but not limited to any scheme of which the RE acts as RE;

- (h) making loans to any person or company with or without interest, whether secured or unsecured, and for any period whatsoever; and
- (i) the acquisition of foreign currencies, hedging contracts, commodity contracts of any kind which are quoted on a financial market (as defined in the Law).

"Bank" has the meaning given to an ADI in section 5 of the Banking Act 1959 (Cth) and also includes an ADI constituted by or under a law of the State or Territory and a foreign ADI as that term is defined in section 5 of the Banking Act 1959 (Cth).

"Borrower" any person who applies to the Scheme to borrow Scheme Property and who is approved by the RE;

"Business Day" any day on which trading Banks are generally open for business on the Gold Coast, Queensland;

"Class" means a class of Units, being Units which have the same rights.

"Commencement Date" means the date of registration of the Scheme;

"Compliance Committee" the Compliance Committee of the RE.

"Compliance Plan" means the Compliance Plan for the Scheme lodged at the ASIC on Scheme registration;

"Constitution" this document including any Schedule, Annexure or Amendments to it and which also means the Unit Trust Deed;

"Custodian" Permanent Trustee Australia Limited ACN 008 412 913;

"Custody Agreement" an agreement dated the 4th day of February, 1998 and any further amendments entered into between the Custodian and the RE;

"Development Loan" a loan to fund the construction of a building on mortgaged property which is to be drawn down before completion of the building;

"Differential Fee Arrangement" means an arrangement pursuant to Class Order [CO 03/217] which provides an exemption from S601FC(1)(d) of the Law in relation to differential fee arrangements offered to investors investing in the Fund as a Wholesale Investor, within the meaning of Wholesale Client in Section 761G of the Corporations Act;

"Distributable Income" has the meaning given in clause 11.3;

"Distribution Period" is the relevant period referred to in clause 12.1;

"Dollars", "A\$" and "\$" mean the lawful currency of the Commonwealth of Australia;

"Extraordinary Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by

at least 50% of the total votes that may be cast by Members entitled to vote on the resolution (including Members who are not present in person or by proxy);  
"Financial Year" means the period of 12 months ending on the 30<sup>th</sup> day of June in each year during the continuance of this Constitution and includes the period commencing on the date the trust was established and expiring on the next succeeding 30<sup>th</sup> day of June and any period between the 30<sup>th</sup> day of June last occurring before the termination of the trust and the termination of the trust;

"FICS" means the Financial Industry Complaints Service Limited;

"GST" means a tax, impost or duty on goods, services or other things imposed by any fiscal, national, state, territory or local authority or entity and whether presently imposed or novel, together with interest or penalties either before or after the date of this Constitution;

"Income" means all amounts which are, or would be recognised as, income by the application of the Accounting Standards;

"Issue Price" means the price at which a Unit is issued calculated in accordance with clause 6.

"Investment Term" means the initial fixed investment term selected by the Member when they invest in the Scheme for a fixed term, and any subsequent fixed term for the investment where the investment is rolled over for that subsequent term, but does not include any fixed term under a Savings Plan Investment (and the initial fixed investment term and each subsequent fixed term will each be a separate Investment Term, and not a longer combined Investment Term);

"Law" means the Corporations Act 2001 and the Corporations Regulations.

"Lender" means the RE on behalf of the Members lending Scheme Property through the Scheme;

"Lending Rules" means the rules detailed in clauses 13.2 and 13.3;

"Liabilities" means at any time the aggregate of the following at that time as calculated by the RE in accordance with the Accounting Standards:

- (a) Each liability, excluding Unit Holder Liability, of the RE in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (b) Each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (c) Other appropriate provisions in accordance with the applicable Accounting Standards.

"Liquid Scheme" means a registered scheme that has liquid assets which

account for at least 80% of the value of scheme property.

"LMM" means Law Mortgage Management Pty Ltd ACN 055 691 426;

"LVR" means loan to valuation ratio and is the ratio of the amount of a loan to the valuation of the property offered as security for a loan in the Scheme;

"Member" in relation to a Unit, means the person registered as the holder of that Unit (including joint holders).

"Minimum Investment" means the minimum investment disclosed in the PDS from time to time unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment;

"Minimum Subscription" means any minimum amount of Application Money of a particular currency required by the RE to be received in respect of one or more Applicants, before the Application(s) will be accepted by the RE;

"Mortgages" in all mortgages held by the Scheme the Mortgagee will be the Custodian as agent for the RE;

"Mortgage Lending Valuation Policy" means the RE's mortgage lending valuation policy as detailed in the Compliance Plan;

"Net Fund Value" at any time, means the value of the Scheme Property less the Liabilities at that time.

"Power" means any right, power, authority, discretion or remedy conferred on the RE by this Constitution or any applicable law;

"Promoter" for the purpose of the Law the promoter of this Scheme is the RE;

"PDS" means a Product Disclosure Statement or any Supplementary Product Disclosure Statement for the Scheme;

"Register" means the register of Members maintained by the RE under clause 22;

"Responsible Entity" or "RE" means the company named in the ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE and who is also the Trustee of the Scheme;

"Savings Plan Investment" means an Australian dollar investment described as the "LM Savings Plan" in the PDS, with terms and conditions as disclosed in the PDS;

"Scheme" means a managed investment scheme to be known as the "LM First Mortgage Income Fund" that is to be registered under s601EB of the Law and also means the Trust;

"Scheme Property" means assets of the Scheme including but not limited to:

- (a) contributions of money or money's worth to the Scheme; and
- (b) money that forms part of the Scheme assets under the provisions of the Law; and

- (c) money borrowed or raised by the RE for the purposes of the Scheme;  
and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d);

**"Scheme Valuation Policy"** means the scheme valuation policy as detailed in the Compliance Plan;

**"Security Property"** means any property offered by a Borrower as security for a Mortgage in the Scheme;

**"Special Resolution"** means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution;

**"Subscription Account"** an account opened and maintained by the RE into which is deposited all Application Moneys;

**"Tax"** includes, but is not limited to:

- (a) stamp duty, excise and penalties relating to these amounts which are imposed on the RE in respect of any assets in the Scheme;
- (b) taxes and duties and penalties relating to these items imposed as a result of any payment made to or by the RE under this Constitution;
- (c) taxes imposed or assessed upon:
  - (i) any Application Money;
  - (ii) distributions of income to Members, capital gains, profits or any other amounts in respect of the Scheme; or
  - (iii) the RE in respect of its capacity as responsible entity of the Scheme;
- (d) imposts, financial institutions duties, debts tax, withholding tax, land tax or other property taxes charged by any proper authority in any jurisdiction in Australia in respect of any matter in relation to the Scheme, and every kind of tax, duty, rate, levy, deduction and charge including any GST;

**"Tax Act"** means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);

**"Trustee"** means the RE;

**"Uncontrolled Event"** means an act of God, strike, lock out or other interference with work, war (declared or undeclared), blockage, disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction,



embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the party relying on the Uncontrolled Event; "Unit" means an undivided interest in the Scheme Property created and issued under this Constitution;

"Unit Holder Liability" means the liability of the Scheme to the Members for their undivided interest in the Scheme Property;

"Unit Holding" means the number of Units in the Scheme held by a Member as evidenced in the Register of Unit holders;

"Unit Holding Statement" means a statement issued by the RE to a Member pursuant to clause 5.9;

"Valuation Date" means the date which is the last day of each month or any date during each month at the RE's discretion or the date on which the RE determines there has been a material change in the value of the Scheme Property;

"Withdrawal Notice" means:

- (a) for a Savings Plan Investment, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE, provided that only 4 such notices may be given within any 12 month period, and any notices in excess of this number will not be valid unless otherwise determined by the RE in its discretion;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE;
- (c) for all investments for an Investment Term, a notice in writing given by a Member and received by the RE before the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE,

and provided that if a notice in writing as referred to above is not received before 12 noon on a Business Day, the notice will be deemed to be received on

the next Business Day;

"Withdrawal Notice Period" means:

- (a) for a Savings Plan Investment by a Member, the period commencing 1 Business Day after the first 12 month period of the Savings Plan Investment has expired, and continuing throughout the term of the Savings Plan Investment;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, any period when the Member owns Units; or
- (c) for all investments for an Investment Term, the period commencing 5 Business Days before the expiry of the relevant Investment Term (and where an Investment Term is created by the rollover of an existing Investment, means the period commencing 5 Business Days before the expiry of that subsequent investment Term); or
- (d) any other time period as determined by the RE.

"Withdrawal Price" means the price at which a Unit is redeemed calculated in accordance with Clause 8.

## 1.2 Interpretation

In this Constitution, unless the context otherwise requires:

- (a) headings and underlining are for convenience only and do not affect the interpretation of this Constitution;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing a gender include any gender;
- (d) other parts of speech and grammatical forms of a word or phrase defined in this Constitution have a corresponding meaning;
- (e) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;
- (f) a reference to any thing includes a part of that thing;
- (g) a reference to a part, clause, party, annexure, exhibit or schedule is a reference to a part and clause of, and a party, annexure exhibit and schedule to, this Constitution;
- (h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (i) a reference to a document includes all amendments or supplements to,

or replacements or novations of, that document;

- (j) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day except that any amount payable on demand where the demand is made on a day which is not a Business Day must be paid on the next succeeding Business Day;
- (k) a reference to an agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
- (l) a reference to a document includes any agreement in writing, or any statement, notice, deed, instrument or other document of any kind;
- (m) a reference to a body (including, without limitation, an institute, association or authority), whether statutory or not:
  - (i) which ceases to exist; or
  - (ii) whose powers or functions are transferred to another body;  
is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (n) a reference to any date means any time up to 5.00 pm (Queensland time) on that date; and
- (o) a reference to dealing with a Unit includes any subscription, withdrawal, sale, assignment, encumbrance, or other disposition whether by act or omission and whether affecting the legal or equitable interest in the Unit.

### 1.3 Accounting Standards

In respect of any accounting practice relevant to this Constitution, the following accounting standards apply as if the Scheme were a company in accordance with:

- (a) the accounting standards required under the Law; and
- (b) If no accounting standard applies under clause 1.3(a), the accounting practice determined by the RE.

## 2. ESTABLISHMENT OF TRUST

### 2.1 Trustee

The RE continues to act as trustee of the Scheme.

### s801FC(2) 2.2 Role of Trustee

The RE recognises that it continues to hold the Scheme Property on trust for the Members.

### s801FB(2) 2.3 Appointment of Custodian

- (a) The RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE.

- (b) The Custodian holds the Scheme Property as agent of the RE for the term of the Scheme on terms and conditions as detailed in the Custody Agreement.

**2.4 Name of Trust**

The name of the trust and Scheme is the LM First Mortgage Income Fund or any other name that the RE may determine from time to time.

**2.5 Initial Issue**

The Scheme commenced at such time after the Commencement Date when LMM or its nominee paid \$100.00 to the RE to establish the Scheme Property. The RE issued to LMM or its nominee 100 Units in return for that payment.

**3.**

**UNITS AND MEMBERS**

**3.1 Units**

The beneficial interest in Scheme Property is divided into Units. Unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Members under this Constitution.

**3.2 Classes**

Different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion. Such rights and obligations may, but need not be, referred to in the PDS. If the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units. Without limitation, the RE may distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the RE treats the different Classes fairly.

**3.3 Fractions**

Fractions of a Unit may not be issued. When any calculations under this Constitution would result in the issue of a fraction of a Unit, the number of Units to be issued must be rounded down to the nearest whole Unit.

**3.4 Equal value**

At any time, all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.

**3.5 Interest**

A Unit confers an interest in the Scheme Property as a whole. No Unit confers any interest in any particular asset of the Scheme Property.

**3.6 Consolidation and re-division**

- (a) Subject to clause 3.6(b) the RE may at any time divide the Scheme Property into any number of Units other than the number into which the Scheme Property is for the time being divided.
- (b) A division of a kind referred to in clause 3.6(a) must not change the ratio of Units in a Class registered in the name of any Member to the Units on issue in the Class.

**3.7 Rights attaching to Units**

- (a) A Member holds a Unit subject to the rights and obligations attaching to that Unit and (if applicable) pursuant to any Differential Fee Arrangement.
- (b) Each Member agrees not to:
  - (i) interfere with any rights or powers of the RE under this Constitution;
  - (ii) purport to exercise a right in respect of the Scheme Property or claim any interest in an asset of the Scheme Property (for example, by lodging a caveat affecting an asset of the Scheme Property); or
  - (iii) require an asset of the Scheme Property to be transferred to the Member.

**3.8 Conditions**

The RE may impose such conditions on the issue of Units as it determines including that the Member may not give effect to any mortgage, charge, lien, or other encumbrances other than as expressly permitted by the RE.

**3.9 Rollover of Investments**

If the Member has invested for an Investment Term, and fails to complete and return a Withdrawal Notice before the start of the relevant Withdrawal Notice period that applies to the Investment Term, the Member will be deemed to have elected to renew their investment in the Scheme as specified in the PDS. Units issued in respect of such reinvestment must be issued at an Issue Price equal to the Current Unit Value.

**4. BINDING ON ALL PARTIES**

s601GB

- 4.1 This Constitution is binding on the RE and on all Members of the Scheme as they are constituted from time to time.
- 4.2 By executing the Application Form attached to the PDS the Members as are constituted from time to time agree to be bound by the terms and conditions of this Constitution.

**5. ISSUE OF UNITS**

s601GA(a)

**5.1 Offer and minimum investment**

- (a) The RE may at any time offer Units for subscription or sale.

- (b) The Minimum Investment must be lodged with an Application for Units.
- (c) The RE may invite persons to make offers to subscribe for or buy Units.

**5.2 Minimum subscription**

- (a) The RE may set a Minimum Subscription for the pool of funds of any one currency for the Scheme at its discretion.
- (b) The RE will hold Application Money in a Subscription Account until the Minimum Subscription for the pool of funds is received, subject to clause 5.3.

**5.3 Insufficient Application Money received**

The RE will return or cause to be returned all Application Money to the persons who paid such Application Money, less any taxes and bank charges payable if:

- (a) insufficient Application Money to meet the Minimum Subscription stipulated in Clause 5.2 is received within a period reasonably determined by the RE, or
- (b) the RE withdraws a PDS (which the RE is entitled to do) before sufficient Application Money is received, or
- (c) the RE does not believe there will be sufficient funds available to achieve the aims of the Scheme contemplated in this Constitution or the PDS.

**5.4 Form of Application**

- (a) Subject to clause 5.10, each Application for Units must be:
  - (i) made by Application Form attached to a PDS (or as otherwise permitted by the Law); and
  - (ii) be accompanied by Application Moneys as required by any relevant PDS.
- (b) If the Application Form is signed pursuant to a power of attorney, then if requested by the RE, a certified copy of the relevant power of attorney and a declaration that the power of attorney has not been revoked as at the date the Application Form is signed must be provided.

**5.5 Acceptance or rejection**

The RE may, without giving any reason:

- (a) accept an Application;
- (b) reject an Application; or

(c) reject part of the Application.

**5.6 Uncleared funds**

Units issued against Application Money in the form of a cheque or other payment order (other than in cleared funds) are void if the cheque or payment order is not subsequently cleared.

**5.7 Issue of Units**

Units are taken to be issued when:

- (a) the Application Money for the Issue Price is received by the RE; and
- (b) the RE accepts the Application and the Units are entered in the Register, or at such other time as the RE determines.

**5.8 Number of Units issued**

Subject to Minimum Investment, the number of Units issued at any time in respect of an Application for Units will be calculated as follows:

- (a) by dividing the Application Moneys paid by the applicable Issue Price at that time;
- (b) by rounding down to two decimal places.

**5.9 Unit Holding Statement**

The evidence of a Member's holding in the Scheme will be the latest extract from the Register as provided from time to time to a Member by the RE in a Unit Holding Statement.

**5.10 Additional Applications**

Additional Applications for investment in the Scheme by existing Members, not made on an Application Form may be accepted in an Australian dollar investment:

- (a) from a Member;
- (b) as a result of an Application;
- (c) in accordance with an Arrangement for as long as and on condition that it complies with the requirements of the RE and the law or ASIC's policy including any relief granted to the RE from time to time; and
- (d) are in multiples of \$500 each unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment or agrees to accept an amount that is not a multiple of \$500.

**5.11 Holding Application Money**

All Application Money must be held by the RE (or its agent, the Custodian) on trust for the relevant Applicant in the Subscription Account.

**5.12 Interest on Application Money**

The RE is not required to account to any Member for any interest earned on Application Money held in the Subscription Account.

**5.13 Responsible Entity to return Application Money**

Where the RE has rejected (in full or in part) an Application, the relevant Application Money (without interest) must be returned to the Applicant within 14 days.

**5.14 Incomplete Application Form**

The RE will, on receipt of any Application Money which is not accompanied by a completed Application Form, as soon as practicable return the Application Money to the relevant Applicant, or:

- (a) attempt to obtain the Application Form from the Applicant; and
- (b) bank the Application Money.

**5.15 No Application Form received**

- (a) If the RE gives any Application Money to the Custodian pursuant to clause 5.11, then the Custodian will hold such Application Money in an account, as custodian for the Applicant in accordance with the Law until the Application Form is received.
- (b) If the RE has not received the Application Form by the time the offer is closed, then the RE must use its best endeavours to return the Application Money, less any taxes and bank charges payable, to the Applicant as soon as practicable.

**6. ISSUE PRICE**

The issue price of a Unit shall be calculated as follows:

( Net Fund Value )  
(number of Units on issue )

calculated on the last Valuation Date prior to the date of issue.

**7. WITHDRAWAL OF UNITS - WHILE THE SCHEME IS LIQUID**

**7.1 Withdrawal request - while the Scheme is liquid**

- (a) While the Scheme is liquid as defined in S601KA (4) of the Law, any Member may request that some or all of their Units be redeemed by giving the RE a Withdrawal Notice by the start of or within the relevant Withdrawal Notice Period (as required by the relevant definition of Withdrawal Notice).

**7.2 Withdrawal**

- (a) (i) Within 365 days after the end of the Member's Investment Term (where the Member's investment is held for an Investment Term and the Member has given a valid Withdrawal Notice in respect of the Units) or within 365 days after receiving a valid Withdrawal



Notice from the Member (if the Member's investment is not held for an Investment Term or is a Savings Plan investment), the RE must redeem the relevant Units out of the Scheme Property for the Withdrawal Price.

- (ii) However, the RE must redeem the Units within 180 days after the relevant date (instead of 365 days) where it determines that none of the circumstances referred to in Clause 7.2(b)(i) to (iv) below exist at the time of withdrawal. This Clause 7.2(a) does not limit the independent operation of Clause 7.2(b).
  - (iii) To the extent that the Law does not allow more than one period to be specified in this Constitution for satisfying withdrawal requests while the Scheme is liquid, that one period will be 365 days after the RE receives a valid Withdrawal Notice. Paragraph (ii) above will also apply to the extent permitted by the Law.
  - (iv) The RE may allow redemption of Units within a shorter period than the 365 (or 180) days referred to above, in its absolute discretion, subject to its obligations under the Law.
- (b) The RE may suspend the withdrawal offer as detailed in clause 7.2(a) above for such periods as it determines where:
- (i) the Scheme's cash reserves fall and remain below 5% for ten (10) consecutive Business Days; or
  - (ii) if in any period of (90) days, the RE receives valid net Withdrawal Notices equal to 10% or more of the Scheme's issued Units and, during the period of (10) consecutive days falling within the 90 day period, the Scheme's cash reserves are less than 10% of the total assets; or
  - (iii) it is not satisfied that sufficient cash reserves are available to pay the Withdrawal Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or
  - (iv) any other event or circumstance arises which the RE considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme.
- (c) The RE is not required to process Withdrawal Notices where:
- (i) the person seeking to redeem the Units cannot provide satisfactory evidence of the Member's title or authority to deal with the Units; or
  - (ii) the withdrawal would cause the Member's Unit Holding to fall below the Minimum Investment.

- (d) If the RE allows a Member to withdraw an investment from the Scheme before the end of an Investment Term, the RE is also entitled to require the Member to pay an early withdrawal charge equal to the last three months interest distributions paid or payable on the amount being withdrawn (or if the investment has been for less than three months, the RE's estimate of what that amount would have been if the investment had been in place for the last three months), and where an Adviser has been paid an upfront commission in respect of the investment being withdrawn, the RE will also be entitled to require the Member to pay a further early withdrawal charge equal to the upfront commission paid, calculated on a pro-rata basis for the length of time remaining to the end of the Investment Term. The RE will also be entitled to require the Member to pay an amount equal to any other fees or charges arising from the early withdrawal (including fees and charges that may be payable to the financial institution which has organised the investment in the relevant currency). These early withdrawal charges will be deducted from the investment being withdrawn, and paid at the time of withdrawal. Such charges will become part of the Scheme Property.
- (e) If the RE allows a Member to withdraw an investment, and that investment has been held for a period in respect of which no Distributable Income has been calculated in respect of that investment, the RE may pay to the Member the amount of Distributable Income that the RE estimates is payable to the member for that period, rather than delay payment to the member until the actual Distributable Income has been calculated.

#### 7.3 Cancellation

- (a) The RE must cancel the number of Units which have been redeemed under clause 7.2 and must not reissue them. Upon cancellation, the RE must immediately:
- (i) remove the name of the Member from the Register in respect of the redeemed Units; and
  - (ii) provide the Member with a new Unit Holding Statement for any unredeemed Units.
- (b) A Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

#### 8. WITHDRAWAL PRICE

The Withdrawal Price of each Unit pursuant to clause 7 shall be calculated as follows:

( Net Fund Value )

(number of Units issued)

calculated on the last Valuation Date prior to the date of withdrawal.

**9. TRANSFER OF UNITS**

**9.1 Transferability of Units**

- (a) Subject to this Constitution, a Unit may be transferred by instrument in writing, in any form authorised by the Law or in any other form that the RE approves.
- (b) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.

**9.2 Registration of Transfers**

- (a) The following documents must be lodged for registration on the Register at the registered office of the RE or the location of this Register:
  - (i) the instrument of transfer; and
  - (ii) any other information that the RE may require to establish the transferor's right to transfer the Units.
- (b) On compliance with clause 9.2(a), the RE will, subject to the powers of the RE to refuse registration, record on the Register the transferee as a Member.

**9.3 Where registration may be refused**

Where permitted to do so by Law or this Constitution, the RE may refuse to register any transfer of Units.

**9.4 Where registration must be refused**

- (a) Registration must be refused if:
  - (i) the RE has notice that the transferor of Units has entered into any borrowing or other form of financial accommodation to provide all or part of the funds to subscribe for or acquire a Unit and has not received confirmation from the financier that the financier consents to the transfer of those Units; or
  - (ii) the transferor has given a power of attorney in favour of the RE and the Custodian in the form set out in an application form accompanying a PDS and the transferee has not executed and provided to the RE a similar form of power of attorney (with such adaptations as are necessary) in favour of the RE and the Custodian;
- (b) In the case of (i) or (ii) above, the RE must refuse to register same and must continue to treat the seller or transferor as the case may be

as the registered holder for all purposes and the purported sale, purchase, disposal or transfer shall be of no effect.

- (c) If the transferee is not a Member the RE must not consent to the registration until the RE is satisfied that the transferee has agreed to be bound by the Constitution.

#### 9.5 Notice of non-registration

If the RE declines to register any transfer of Units, the RE must within 5 Business Days after the transfer was lodged with the RE give to the person who lodged the transfer written notice of, and the reasons for, the decision to decline registration of the transfer.

#### 9.6 Suspension of transfers

The registration of transfers of Units may be suspended at any time and for any period as the RE from time to time decide. However, the aggregate of those periods must not exceed 30 days in any calendar year.

### 10. TRANSMISSION OF UNITS

#### 10.1 Entitlement to Units on death

- (a) If a Member dies:

- (i) the survivor or survivors, where the Member was a joint holder; and
- (ii) the legal personal representatives of the deceased, where the Member was a sole holder,

will be the only persons recognised by the RE as having any title to the Member's interest in the Units.

- (b) The RE may require evidence of a Member's death as it thinks fit.
- (c) This clause does not release the estate of the deceased joint Member from any liability in respect of a Unit that had been jointly held by the Member with other persons.

#### 10.2 Registration of persons entitled

- (a) Subject to the Bankruptcy Act 1986 and to the production of any information that is properly required by the RE, a person becoming entitled to a Unit in consequence of the death or bankruptcy (or other legal disability) of a Member may elect to:
  - (i) be registered personally as a Member; or
  - (ii) have another person registered as the Member.
- (b) All the limitations, restrictions and provisions of this Constitution relating to:
  - (i) the right to transfer; and
  - (ii) the registration of a transfer;

for Units apply to any relevant transfer as if the death or bankruptcy or legal disability of the Unit Member had not occurred and the notice or transfer were a transfer signed by that Member.

**10.3 Distributions and other rights**

- (a) If a Member dies or suffers a legal disability, the Member's legal personal representative or the trustee of the Member's estate (as the case may be) is, on the production of all information as is properly required by the RE, entitled to the same distributions, entitlements and other advantages and to the same rights (whether in relation to meetings of the Scheme or to voting or otherwise) as the Member would have been entitled to if the Member had not died or suffered a legal disability.
- (b) Where two or more persons are jointly entitled to any Unit as a result of the death of a Member, they will, for the purposes of this Constitution, be taken to be joint holders of the Unit.

**11. DISTRIBUTABLE INCOME**

**11.1 Income of the Scheme**

The income of the Scheme for each Financial Year will be determined in accordance with applicable Accounting Standards.

**11.2 Expenses and provisions of the Scheme**

For each Financial Year:

- (a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and
- (b) provisions or other transfers to or from reserves may be made in relation to such items as the RE considers appropriate in accordance with the applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

**11.3 Distributable income**

The Distributable Income of the Scheme for a month, a Financial Year or any other period will be such amount as the RE determines. Distributable Income is paid to Members after taking into account any Adviser fees or costs associated with individual Members' investments, to the extent those fees or costs have not otherwise been taken into account.

**12. DISTRIBUTIONS**

**12.1 Distribution Period**

- (a) The Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute

discretion.

- (b) The Distribution Period is the Investment Term of the Investment for non-Australian dollar investments or as otherwise determined by the RE in its absolute discretion.

#### 12.2 Distributions

The RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period.

#### 12.3 Present entitlement

Unless otherwise agreed by the RE and subject to the rights, restrictions and obligations attaching to any particular Unit or Class, the Members on the Register will be presently entitled to the Distributable Income of the Scheme on the last day of each Distribution Period.

#### 12.4 Capital distributions

The RE may distribute capital of the Scheme to the Members. Subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the RE divided by the number of Units on the Register on that date. A distribution may be in cash or by way of bonus Units.

#### 12.5 Grossed up Tax amounts

Subject to any rights, obligations and restrictions attaching to any particular Unit or Class, the grossed up amount under the Tax Act in relation to Tax credits or franking rebates is taken to be distributed to Unit Members in proportion to the Distributable Income for a Distribution Period as the case may be, which is referable to a dividend or other income to which they are presently entitled.

#### 12.6 Reinvestment of Distributable income

- (a) The RE may invite Members to reinvest any or all of their distributable income entitlement by way of application for additional Units in the Scheme.
- (b) The terms of any such offer of reinvestment will be determined by the RE in its discretion and may be withdrawn or varied by the RE at any time.
- (c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer.
- (d) The Units issued as a result of an offer to reinvest will be deemed to have been issued on the first day of the next Distribution Period immediately following the Distribution Period in respect of which the distributable income being reinvested was payable.

### 13. NATURE OF RE POWERS

s601GA(1)(b) 13.1 The RE has all the powers:

- (a) of a natural person to invest and borrow on security of the Scheme Property;
- (b) in respect of the Scheme and the Scheme Property that it is possible under the Law to confer on a RE and on a Trustee;
- (c) as though it were the absolute owner of the Scheme Property and acting in its personal capacity; or
- (d) necessary for fulfilling its obligations under this Constitution and under the Law.

s601GA(3) 13.2 The RE must only invest Members' funds in:

- (a) subject to clause 13.3 and 13.3A, mortgage investments provided that:
  - (i) all mortgages are secured over property and the amount which may be advanced to a Borrower does not exceed an LVR of 75% of the value of the security property on initial settlement.
  - (ii) the type of real estate offered for security is acceptable to the RE;
  - (iii) the value of the property offered as security has been established in accordance with the Mortgage Lending Valuation Policy of the RE ;
- (b) other mortgage backed schemes in accordance with this clause and the RE's compliance standards;
- (c) a range of interest bearing investments backed by Australian Banks, building societies, State or Federal governments, or foreign banks as approved by the RE.
- (d) Authorised Investments.

s601GA(3) 13.3 Notwithstanding the provisions of clause 13.2(a), after a loan has settled and where the RE considers it is in the best interests of the Members of the Scheme, the RE may approve an LVR not to exceed 85% of the value of the security property.

13.3A Notwithstanding any other provision of this Constitution, the LVR of a loan that is in default may exceed 85%

s601GA(3) 13.4 Whenever a loan of Scheme funds involves a Development Loan, the RE shall ensure it has included amongst its officers or employees persons with relevant project management experience who are competent to manage loans of this kind.

s601GA(3) 13.5 To the extent allowed by law:

- (a) any restriction or prohibition imposed upon the RE in relation to the investment from time to time of the Scheme Property or any part thereof is hereby excluded from the obligations imposed.
- (b) without derogating from the generality of the foregoing this exclusion specifically applies to any "Prudent Person Rule" or the like which may be implied by any future enactment of legislation.

s801GA(3) 13.6 To the extent allowed by law:

- (a) the RE may borrow or raise money with or without security over the Scheme Property or any part of it on any terms, including any rate of interest and any fees and expenses as the RE thinks fit;
- (b) the RE may deal with any property to exercise all the powers of a mortgagee pursuant to the mortgage terms and conditions.

s801GA(3) 13.7 The RE must direct the Custodian to deal with the Scheme Property in accordance with this Constitution.

#### 14. COMPLAINTS PROCEDURES

s801GA(1)(c) 14.1 If a Member has a complaint they should generally first contact their Adviser. If the Adviser is unavailable, unwilling, or unable to assist, or if the Member wishes to directly contact the RE, and the complaint relates to the Fund or the RE, then the Member should contact the RE at the registered office of the RE. Complaints may be made in writing or by telephone.

14.2 The RE may (if applicable) contact the Adviser for further background information and attempt to mediate a satisfactory resolution of the complaint or escalate as necessary. The RE has 30 days to respond to the complaint once it is received. The RE must attempt to resolve the complaint within a satisfactory time period as determined by the nature of the complaint and the Member's response.

14.3 The Complaints Officer of the RE will take responsibility for formal complaints and record them in the Complaints Register. In acknowledging or resolving formal complaints, the RE must make or cause to be made, a written response including:-

- (a) the name, title and contact details of the person actually handling the complaint;
- (b) a summary of the RE's understanding of the complaint;
- (c) details of the RE's offer for resolution of the complaint and relevant time frame;
- (d) where the complaint is not fully dealt with in the letter an estimate of time required for the RE to resolve the complaint.

14.4 Full details of each formal complaint and resolution thereof must be recorded in



the Complaints Register including:-

- (a) the person responsible for resolving the complaint;
- (b) the name of the Member making the complaint;
- (c) the nature of the complaint;
- (d) the product service or department in respect of which the complaint was made;
- (e) the actual time required to resolve the complaint;
- (f) the actual resolution of the complaint;
- (g) recommendations, if any, for changes to products disclosures systems or processes to ensure similar complaints do not arise in the future.

14.5 The Complaints Register should be reviewed by the Complaints Manager of the RE as part of an ongoing review process to determine whether recommendations for change arising from resolved complaints have been effectively incorporated in the compliance program.

14.6 Where the RE believes it has either resolved the complaint, or it has not resolved the complaint but believes it can do nothing more to satisfy the complainant, and the Member feels their complaint has still not been satisfactorily resolved, the complainant must be referred to the FICS for mediation. The FICS adopts a three stage approach in resolving complaints as follows:-

- (a) stage 1: initial opportunity for Member to resolve complaints;
- (b) stage 2: complaints review, investigation and conciliation;
- (c) stage 3: independent determination of complaints by adjudicator.

The full terms of reference for the FICS are held by the RE.

14.7 If a complaint cannot be resolved to the satisfaction of the Member by the RE or the FICS then the complainant Member may:-

- (a) refer the matter to arbitration or the courts; or
- (b) take whatever other action is open to the complainant Member under the general law.

14.8 The RE must disclose the details of its complaints procedure to all investors.

## 15. TERM OF TRUST

The Scheme begins on the Commencement Date and is to be wound up on the earlier to occur of:

- (a) the date which is eighty years from the Commencement Date; and
- (b) any earlier date which the RE, in its absolute discretion may appoint as the Vesting Date.

## 16. WINDING UP THE SCHEME

16.1 The Scheme shall only be wound up in accordance with the Law and this

Constitution.

- 16.2 The RE must wind up the Scheme in the following circumstances:-
- s601NE(1)(a) (a) if the term of the Scheme as detailed in this Constitution has expired;
  - s601NE(1)(b) (b) the Members pass an extraordinary resolution directing the RE to wind up the Scheme;
  - s601NE(1)(c) (c) the Court makes an order directing the RE to wind up the Scheme pursuant to the Law and in particular pursuant to section 601FQ(5) and section 601ND;
  - s601NE(1)(d) (d) the Members pass an extraordinary resolution to remove the RE but do not at the same time pass an extraordinary resolution choosing a company to be the new RE that consents to becoming the Scheme's RE;
- s601NC(1) 16.3 (a) If the RE considers that the purpose of the Scheme:
- (i) has been accomplished; or
  - (ii) cannot be accomplished,
- it may take steps to wind up the Scheme.
- (b) If the RE wishes to wind up the Scheme pursuant to clause 16.3(a), the RE must give to the Members of the Scheme and to the ASIC a notice in writing;
- (i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished; and
  - (ii) informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on a special resolution Members propose about the winding up of the Scheme; and
  - (iii) informing the Members that the RE is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the RE giving the notice to the Members;
- (c) If no meeting is called within that 28 days to consider the proposed winding up, the RE may wind up the Scheme.
- s601NE(2) 16.4 (a) The RE may wind up the Scheme in accordance with this Constitution and any orders under s601NF(2) of the Law if the RE is permitted by s601NC(3) of the Law to wind up the Scheme.
- s601NF(3) (b) An order to wind up the Scheme pursuant to s601ND (1) or s601NF (1) or (2) of the Law may be made on the application of:

- (i) the RE; or
- (ii) a director of the RE; or
- (iii) a Member of the Scheme; or
- (iv) the ASIC.

- s601NE(3) 16.5 The RE shall not accept any further Applications for Units in the Scheme or make any further loans from the Scheme Property at a time after the RE has become obliged to ensure the Scheme is wound up or after the Scheme has started to be wound up.
- 16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.
- 16.7 Subject to the provisions of this clause 16 upon winding up of the Scheme the RE must:
- (a) realise the assets of the Scheme Property;
  - (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
  - (c) subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;
  - (d) The Members must pay the costs and expenses of a distribution of assets under clause 16.7(c) in the same proportion specified in clause 12.4.
  - (e) The RE may postpone the realisation of the Scheme Property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement.
  - (f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.
  - (g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.
- s601NG 16.8 If on completion of the winding up of a registered Scheme, the RE or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the RE or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the

ASIC to be dealt with pursuant to Part 9.7 of the Law.

s601EE 16.9 If at any time the Scheme is operated while it is unregistered the following may apply to the Court to have the Scheme wound up:

- (a) The ASIC
- (b) The RE
- (c) A Member of the Scheme

16.10 The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up.

17. **VALUE OF THE SCHEME FUND**

17.1 **Valuation of the Scheme Property**

The RE may cause the Scheme Property to be valued at any time in accordance with the Scheme Valuation Policy of the RE.

17.2 **Valuation if required**

The RE must cause the Scheme Property or any asset of the Scheme Property to be valued if required by ASIC or under the Law and the valuation must be undertaken in accordance with those requirements.

17.3 **Determination of Net Fund Value**

The RE may determine the Net Fund Value at any time in its discretion, including more than once on each day.

18. **FEES, TAXES, COSTS AND EXPENSES**

s601GA(2) 18.1 **Taxes:**

The RE may use the Scheme Property to pay any Tax or other obligation, liability or expense required by any applicable law in relation to:

- (a) this Constitution;
- (b) any amount incurred or payable by the RE;
- (c) a gift or settlement effected by this Constitution;
- (d) the exercise by the RE of any Power; or
- (e) money or investments held by or on behalf of the RE under this Constitution.

s601GA(2) 18.2 **Payment of Debts:**

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

s601GA(2) 18.3 **Fees:**

The RE is entitled to receive out of the Scheme Property, a management fee of up to 5.5 % per annum (inclusive of GST) of the Net Fund Value in relation to the performance of its duties as detailed in this Constitution, the Compliance Plan and the Law. This fee is to be calculated monthly and paid at such times as the RE determines.

s601GA(2) 18.4 The RE shall be entitled to fees in relation to the following duties:

- (a) the subscription and withdrawal of units;
- (b) the transfer or transmission of Units;
- (c) the establishment/loan application fees;
- (d) the structuring or packaging of loan proposals;
- (e) loan management;
- (f) the rollover of a loan facility;
- (g) due diligence enquiries generally;
- (h) the sale of real estate or assets of the Scheme Property;
- (i) the promotion and management of the Scheme;
- (j) the appointment of the Custodian pursuant to the Custody Agreement;
- (k) the winding-up of the Scheme;
- (l) the performance of its duties and obligations pursuant to the Law and this Constitution.

s601GA(2) 18.5 Costs and Expenses

The RE shall be indemnified out of Scheme Property for liabilities or expenses incurred in relation to the performance of its duties; including:

- (a) Auditor's fees;
- (b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans
- (c) barrister/QC - legal counsel fees;
- (d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;
- (e) valuation fees;
- (f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;
- (g) property report/property consultant fees;
- (h) process servers' fees;
- (i) private investigator fees;
- (j) fees in relation to the marketing and packaging of security properties for sale;
- (k) real estate agent's-sales commissions;
- (l) costs of maintenance of mortgage securities;
- (m) outstanding accounts relating to mortgage securities such as council rates;

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- (n) locksmith for changing locks of mortgage securities as appropriate;
- (o) insurance (property and contents);
- (p) removalists for removal of borrower's property as appropriate;
- (q) security guards to attend mortgage securities as appropriate;
- (r) building and/or property inspection report fees - i.e. building, town planning experts and the like;
- (s) all ASIC charges;
- (t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;
- (u) all costs and expenses incurred in producing PDS' and Supplementary PDS' or any other disclosure document required by the Law;
- (v) reasonable costs incurred in protecting or preserving all assets offered as security;
- (w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by any agent appointed pursuant to s601FB(2) of the Law;
- (x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;
- (y) fees and expenses of any agent or delegate appointed by the RE;
- (z) bank and government duties and charges on the operation of bank accounts;
- (aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;
- (bb) insurances directly or indirectly protecting the Scheme Property;
- (cc) fees and charges of any regulatory or statutory authority;
- (dd) taxes in respect of the Scheme but not Taxes of the RE (save and except any goods and services or similar tax ("GST")) which are payable by the RE on its own account;
- (ee) costs of printing and postage of cheques, advices, reports, notices and other documents produced during the management of the Scheme;
- (ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;
- (gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;
- (hh) costs of convening and holding meetings of Members;
- (ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;

- (jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;
- (kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601JD of the Law;
- (ll) costs of advertising the availability of funds for lending;
- (mm) brokerage and underwriting fees;
- (nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;
- (oo) If there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property.

- s601GA(2) 18.6 In the event that the RE has not performed its duties, the lack of entitlement to payment of fees pursuant to 18.3 is only in respect of that part of the payment which relates to the specific lack of proper performance on any given matter. Nothing in this clause shall be interpreted to mean that the RE is not entitled to be paid fees and expenses for work properly performed.
- s601GA(2) 18.7 In the event of any dispute regarding the payment of fees and expenses, the RE shall be paid such fees and expenses until the dispute is fully determined. Any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment.
- 18.8 The RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with this Constitution.
- 18.9 The RE may waive the whole or any part of the remuneration to which it would otherwise be entitled under this clause.
- 18.10 Despite any other provision of this Constitution, the RE may pay a Member's Adviser a fee or fees as directed by the Adviser from time to time. These fees are to be paid out of Scheme Property, as an expense of the Scheme. Where income of the Scheme is not sufficient to pay in full an Adviser's fee and the relevant Member's expected income distribution, the RE may reduce the Adviser's fee and/or the expected income distribution on a pro rata basis, or on any other basis agreed with the Adviser.

**19. INDEMNITY AND LIABILITY**

s601GA(2) 19.1 The following clauses apply to the extent permitted by law:

- (a) The RE is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:
  - (i) otherwise than in accordance with this Constitution and its duties; and
  - (ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

In any case the liability of the RE in relation to the Scheme is limited to the Scheme Property, from which the RE is entitled to be, and is in fact, indemnified.

- (b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:
  - (i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;
  - (ii) it acted as required by Law; or
  - (iii) it relied in good faith upon any signature, marking or documents.
- (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.
- (d) The RE is not liable to account to any Member for any payments made by the RE in good faith to any duly authorised authority of the Commonwealth of Australia or any State or Territory of Australia for taxes or other statutory charges.

**20. POWERS OF ATTORNEY**

20.1 Each Member by execution of the Application Form or the transfer by which he/she/it acquires Units in the Scheme appoints the RE and the Custodian and any director officer attorney or substitute nominated by either the RE or the Custodian severally for this purpose as its attorney and agent with the right:

- (a) at any time to:
  - (i) sign any document in relation to any subscription and withdrawal agreement;
  - (ii) sign any document in relation to the transfer or transmission of Units;
  - (iii) sign any variation of this Constitution;



(iv) sign any document required by ASIC to be executed by a Member in respect of the Scheme.

(b) at the request in writing of either the RE or the Custodian the Member must execute separate Powers of Attorney in a form reasonably required by the RE or the Custodian appointing the RE and/or the Custodian as its attorney for the purpose of this clause.

(c) any attorney may exercise its rights notwithstanding that the exercise of the right constitutes a conflict of interest or duty;

20.2 each Member indemnifies and shall keep indemnified any attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under the Power of Attorney.

## **21. TITLE TO SCHEME FUND**

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

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

## **22. THE REGISTER**

### **22.1 Keeping registers**

The RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.

### **22.2 Information in registers**

To the extent applicable, the Register must be kept in accordance with, and contain the information required by the Law. Otherwise, the RE may decide what information is included in the Register. If the Law applies, the RE has the powers conferred under the Law in relation to the Register.

### **22.3 Changes**

Every Member must promptly notify the RE of any change of name or address and the RE must alter the Register accordingly.

## **23. NOTICES**

23.1 A notice or other communication connected with this Constitution has no legal effect unless it is in writing.

23.2 In addition to any other method of service provided by law, the notice must be:

- (a) sent by post, postage prepaid, to the address for the Member in the RE's register of interests;
- (b) sent by facsimile to the facsimile number of the Member; or
- (c) otherwise delivered including via email, at the address of the addressee of the Member as is subsequently notified.

23.3 A notice must be treated as given and received:

- (a) if sent by post, on the 2nd Business Day (at the address to which it is

posted) after posting;

- (b) if sent by facsimile or electronically before 5.00 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of delivery.

23.4 Despite clause 23.3(ii) a facsimile is not treated as given or received unless at the conclusion of the transmission the sender's facsimile machine issues a transmission report which indicates that the relevant number of pages comprised in the notice have been sent.

23.5 A notice sent or delivered in a manner provided by clause 23.2 must be treated as validly given to and received by the party to which it is addressed even if:

- (a) the addressee has been liquidated or deregistered or is absent from the place at which the notice is delivered or to which it is sent; or
- (b) the notice is returned undelivered.

23.6 Any notice by a party may be given and may be signed by the solicitor for the party.

23.7 Any notice to a party may be given to the solicitor for the party by any of the means listed in clause 23.2 to the solicitor's business address or facsimile number as the case may be.

#### 24. LIABILITY OF MEMBERS

- (a) The liability of each Member, whether actual, contingent or prospective, is limited to the unpaid Issue Price of his/her/its Units except if the RE and the relevant Member agree otherwise in writing that the liability of a Member may be further limited or waived.
- (b) A creditor or other person claiming against the RE as trustee of the Scheme has no recourse against a Member and no Member is personally liable to indemnify the RE, any creditor of the RE or any person claiming against the RE in respect of any actual, contingent, prospective or other liability of the RE in relation to the Scheme.

#### 25. RETIREMENT AND APPOINTMENT OF RE

- s601FL 25.1 The RE may retire as RE as permitted by s601FM of the Law.
- s601FM 25.2 The RE must retire when required by s601FM of the Law.
- s601FR 25.3 If the RE changes the former RE must comply with s601FR of the Law.
- s601FS 25.4 The rights, obligations and liabilities of a former RE are as detailed in s601FS of the Law.

#### 26. CHANGING THE CONSTITUTION

- s601GC(1) 26.1 This Constitution may be modified or repealed or replaced with a new Constitution:
  - (a) by special resolution of the Members of the Scheme;

or

- (b) by the RE if the RE reasonably considers the change will not adversely affect Members' rights.

26.2 In the event the RE wishes to change the Constitution the RE must:

- s601GC(2) (a) lodge with the ASIC a copy of the modification or the new Constitution;
- (b) the modification, or repeal and replacement, cannot take effect until the copy has been lodged;
- s601GC(3) (c) the RE must lodge with the ASIC a consolidated copy of the Scheme's Constitution if the ASIC directs it to do so;

s601GC(4) 26.3 The RE must send a copy of the Scheme's Constitution to a Member of the Scheme within seven (7) days if the Member:

- (a) asks the RE in writing for the copy; and
- (b) pays any fee (up to the prescribed amount) required by the RE.

## 27. STATEMENTS, ACCOUNTS AND AUDIT

### 27.1 Appointment of auditors

- (a) The RE must appoint an Auditor to regularly audit the accounts in relation to the Scheme and perform the other duties required of the Scheme's auditors under this Constitution and the Law.
- (b) The RE must appoint an Auditor of the Compliance Plan (as defined in section 601HG of the Law).

### 27.2 Retirement of auditors

The Scheme Auditor and the Compliance Plan Auditor may each retire or be removed in accordance with the Law.

### 27.3 Remuneration of Auditor

The remuneration of the Scheme Auditor and Compliance Plan Auditor will each be fixed by the RE.

### 27.4 Accounts and reports

- (a) The accounts of the Scheme must be kept and prepared by the RE in accordance with applicable Accounting Standards and the Law.
- (b) The RE must report to Members concerning the affairs of the Scheme and their holdings as required by the Law. Subject to the Law, the person preparing a report may determine the form, content and timing of it.

### 27.5 Audit

The RE will cause:

- (a) the Scheme Auditor to audit and report on the Scheme's accounts;
- (b) the Compliance Plan Auditor to audit and report on the Compliance Plan,

each in the manner required by the Law.

**28. MEETINGS OF MEMBERS**

**28.1 Convening Meetings**

The RE may at any time call and convene a meeting of Members and must call and convene a meeting of Members when required to do so by the Law.

**28.2 Calling and holding meetings**

- s252Q(4) (a) A notice of meeting sent by post is taken to be given the day after it is delivered.
- s252R(2) (b) If, at any time, there is only 1 Member of the Scheme, the quorum for a meeting is 1 in all other cases the quorum for a meeting is 2.
- s252R(3) (c) If an individual is attending a meeting as a Member and as a body corporate representative, the RE may in determining whether a quorum is present, count the individual more than once.
- s252W(2) (d) A proxy is not entitled to vote on a show of hands.
- s252W(3) (e) A proxy is entitled to speak and vote for a Member (to the extent allowed by the appointment) even if the Member is present (but only so long as the Member does not speak or vote, as the case may be).
- s252Y(2) (f) An appointment of proxy:
  - (i) is valid even if it does not specify the Member's address; and
  - (ii) may be a standing one.
- s252Z(5) (g) The RE may determine, in relation to a particular meeting or generally, that proxy documents may be received up to any shorter period before the meeting.
- s253K(2) (h) A poll cannot be demanded on any resolution concerning:
  - (i) the election of the chair of a meeting; or
  - (ii) the adjournment of a meeting.

**29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE**

**29.1** Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:

- (a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);
- (b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or
- (c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.

30. **GOVERNING LAW**

This Deed is governed by the laws of the State of Queensland. The RE and the Members submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

31. **ASIC INSTRUMENT**

If relief from the provisions of the Law granted by an ASIC Instrument requires that this Constitution contain certain provisions, then those provisions are taken to be incorporated into this Constitution at all times at which they are required to be included and prevail over any other provisions of this Constitution to the extent of any inconsistency. However, if the relief is granted by Class Order (rather than specifically in relation to the Scheme) then the ASIC Instrument (and the provisions it requires) will only be taken to be incorporated if the RE declares in writing that this is the case.

32. **UNCONTROLLED EVENTS**

To the extent permitted by law, if the RE is prevented from performing its duties under this Constitution or the law due to the occurrence of an Uncontrolled Event then the RE is not liable to the Members and nor is the RE liable for any loss or decrease in value of the Scheme Property.

EXECUTED AS A DEED at the Gold Coast, Queensland:

GIVEN under the Common Seal of LM )

INVESTMENT MANAGEMENT LIMITED ACN 077 )

208 461 by authority of a resolution of the Board of ) Director

Directors under the hands of two Directors who )

certify that they are the proper officers to affix this )

seal and in the presence of: )

) Director

A Justice of the Peace/Solicitor

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## **Dallys Pyers**

---

**From:** Stephen Russell  
**Sent:** Wednesday, 10 February 2016 7:29 PM  
**To:** 'Scott.Couper@gadens.com'  
**Cc:** 'Jacqueline.Ogden@gadens.com'; 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](mailto: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](http://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](mailto: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	<b>\$241,453.54</b>

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*

**From:** O'Kearney, Glenn  
**Sent:** Monday, 15 February 2016 5:18 PM  
**To:** [David.Whyte@bdo.com.au](mailto:David.Whyte@bdo.com.au)  
**Cc:** Park, John  
**Subject:** LM Investment Management Limited (In Liquidation) (Receivers Appointed)

Dear David

Please find attached a copy of correspondence being delivered to your office this afternoon.

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](mailto:glenn.okearney@fticonsulting.com)

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15 February 2016

Our Ref: GOK\_8974I170.doc

**BY HAND DELIVERY**

**BDO**

**Level 10, 12 Creek Street  
BRISBANE QLD 4000**

**Attention: Mr David Whyte**

Dear Mr Whyte

**RE: LM Investment Management Limited (In Liquidation) (Receivers Appointed) (LMIM)  
Administration and Recoupment Indemnity Claim**

We refer to the order made by Jackson J in Supreme Court of Queensland proceeding number 3508 of 2015 ("the Order").

Pursuant to paragraph 5 of the Order, this letter, and the enclosed material, is our notification to you of the Administration Indemnity Claims and Recoupment Indemnity Claims ("Claims") identified as at the date of the Order.

\*Enclosed with this correspondence is:

1. a spreadsheet which:-
  - (a) summarises the invoices in chronological order;
  - (b) identifies the GST payable on each invoice;
  - (c) identifies whether the invoice is one in respect of which an Administration Indemnity Claim or a Recoupment Indemnity Claim exists (that is, whether the particular invoice has been paid or not);
2. each of the invoices the subject of a Claim identified in that spreadsheet; and

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3. other information which you may find of assistance in assessing the Claims (for example, in respect of those matters which we have had assessed pursuant to the relevant retainer agreements, the costs assessment certificates).

While the summary spreadsheet is organised chronologically, the enclosed material is organised in a more detailed fashion; that is, by creditor, by the creditor's matter or reference number and then chronologically.

Though the connection with the LM First Mortgage Income Fund ("FMIF") ought to be apparent from the face of the enclosed material, we offer the following additional comments to assist you in assessing the applicability of a right of indemnity from the assets of the FMIF.

#### **Russells**

Expenses incurred by LMIM by way of legal fees payable to its solicitors, Russells, comprise the bulk of the Claims. We have taken great care in ensuring that work which relates to discrete aspects of the administration and of the liquidation of LMIM is separately identified.

Russells name their matters in insolvency matters by referring to the firm from which the instructions emanate as the client. Hence, all of the matters on which Russells undertook this work show FTI Consulting (Australia) as the client. However, they record within each such matter the name of the entity by whom the professional fees are payable.

In each case, that entity is LMIM. There are separate matter codes for each matter. There is also a shorthand description of the subject matter (commonly referred to as the "Re").

The matters and matter codes which relate to the Claims are as follows:

1. 20131259, FTI re MIF Indemnity, being work for LMIM which relates to advice in relation to our claim against the assets of the FMIF pursuant to the right of indemnity. It is well established that the costs associated with a liquidator claiming a right of indemnity form part of that right of indemnity: *Alphena Pty Ltd (in liq) v PS Securities Pty Ltd* (2013) 94 ACSR 160; *Re Sutherland* (2004) 50 ACSR 297. Indeed, as His Honour Justice Jackson has observed in passing, pursuant to section 601 FH of the *Corporations Act 2001* ("the Act"), it is only the liquidators who can exercise LMIM's right of indemnity;
2. 20131545, FTI re LMIM - Books and Records, being work for LMIM which relates to protecting the privilege and other matters incidental to the management of the issues surrounding the co-mingling of LMIM's books and records. We consider this work to have been done for the benefit of all of the funds of which LMIM is the responsible entity. In particular, we refer to the orders of Justice Jackson dated

14 May 2015 in Supreme Court of Queensland proceeding 4526 of 2015. On that basis, we have limited LMIM's Claim in respect of the costs incurred in that application to 59% of the costs incurred. You will note from the enclosures the allocation basis for this matter has varied over time. The method of allocating costs is one that is periodically reviewed to ensure the most appropriate allocation basis is being adopted at any given point in time.

Prior to the order of 14 May 2015 the costs incurred on this matter were allocated as a percentage of funds under management (FUM). The costs of the application in Supreme Court of Queensland proceeding 4526 of 2015 were allocated to the FMIF in the amount of 59% in accordance with the order as stated above. The costs incurred since that proceeding have been allocated utilising the allocation basis ordered on 14 May 2015 but rationalised after removing the LM Managed Performance Fund (MPF) from the allocations given that LMIM did not incur these ongoing costs on behalf of the MPF. We confirm that in accordance with the Order made 14 May 2015, 23% of the costs of the application were allocated to MPF;

3. 20140653, FTI re LMIM – Remuneration Claim, being work for LMIM relating to your application for approval of your remuneration. In respect of this matter, we refer to the order of Justice P McMurdo dated 28 August 2014, which clearly entitles LMIM to be paid from the corpus of the FMIF; and
4. 20141556, FTI re LMIM – Remuneration of the Receiver David Whyte, being work for LMIM relating to your subsequent applications for approval of your remuneration, in respect of which no orders were made because we did not ultimately seek to appear at those hearings. Nevertheless, we consider that the comments of Justice McMurdo are persuasive if not binding; that is, that LMIM is clearly a proper respondent to the application. It follows that it is therefore entitled to its solicitors' costs charged for considering the material produced by you.
5. 20150954, FTI re LMIM – Cost Assessment, being Russells' matter providing us with advice as to the costs assessment conducted by Mr Hartwell, this claim is for \$20,578.33. We refer to Russells' letter dated 25 November 2015 which set out the total costs incurred on your application filed on 16 September 2015 as being \$24,457.09. As you know the liability for the costs order of Jackson J dated 20 October 2015 was settled at \$18,000.00 (inclusive of GST). The total actual costs incurred on that matter are \$38,578.33. We believe that the shortfall is captured within the right of indemnity (which is a separate obligation to the costs order) and this part of the Claim is made on that basis.



### **Costs Certificates**

Enclosed are certificates of assessment pursuant to the *Legal Profession Act 2007* which were filed in Supreme Court of Queensland proceedings number 7211 of 2015.

Consistent with our approach in response to your application in respect of Mr Hartwell's appointment, we do not contend that those certificates are strictly binding on you. Rather, the certificates serve to fix our and LMIM's liability to Russells, which is a matter which ought to weigh heavily in your assessment of LMIM's claim for indemnity.

We also note the comments from Justice Jackson (made in response to submissions from your counsel, Mr de Jersey, during the course of your application to intervene in Mr Hartwell's costs assessments) to the effect that your role is not to undertake a line by line review of each cost incurred but rather to consider whether the costs claimed fall within the right of indemnity.

You will note Mr Hartwell's costs in relation to the assessments have been claimed against the FMIF to the extent that they relate to matters for which a claim against the FMIF is made. If a particular matter has been allocated across various funds (i.e. Russells matter 20131545), the costs of the assessment have been allocated using a consistent allocation methodology.

It is clear from the face of the documents provided in support of the Claim, and from our descriptions of the matters set out above, that all of the Claims are properly made against the FMIF.

Finally, we hereby notify you that we have incurred costs in respect of the application for the approval of our remuneration, to be heard before Jackson J on 22 February 2016. In those circumstances, it is appropriate that we await the outcome of that hearing before making a Claim in respect of those costs.

### **Clayton Utz**

Clayton Utz has been retained in order to provide us with advice in relation to the potential for entering into a scheme with LMIM's professional indemnity insurer. We confirm we received advice from Clayton Utz confirming costs could be allocated between the FMIF and the MPF. This is on the basis, that from the information available, claims are most likely to be made against the Company on behalf of the beneficiaries of the FMIF and MPF and accordingly, it is imperative and in the interests of all stakeholders to ensure that action was and is taken to preserve the insurance fund as an asset. We confirm we received agreement from the Trustees of the MPF that they will contribute 50% of the 'Insurance Claims Analysis' category within the Clayton Utz matter. The balance of the invoices are claimed by LMIM as responsible entity for the FMIF.

Finally, a portion of the premium for the maintenance of the current professional indemnity policy required by LMIM in its role as Responsible Entity policy forms part of the Claim.

Please note that we have not included those claims that have already been provided by Russells directly, or our remuneration and out of pocket expenses to 30 September 2015 which are to be dealt with at the hearing to be heard on 22 February 2016. It is also noted that our remuneration claims have not yet been invoiced for the period post 1 October 2015.

We look forward to you accepting the Claims within 30 days and providing your cheque in the sum of \$375,499.78, as set out in the Order.

Should you have any further queries please contact Glenn O'Kearney of this office on (07) 5630 5205 or [Glenn.OKearney@fticonsulting.com](mailto:Glenn.OKearney@fticonsulting.com).

Yours faithfully  
FTI Consulting



John Park  
Liquidator

Consultant	Invoice Date	Invoice Number	Total amount	GST Exc	GST	Amount Paid to date by LMIF - "Recoupment/Indemnity Claim"	Amount Outstanding - "Administration Indemnity Claim"	Matter Number	Notes
Russells	10-Mar-14	B17294	\$ 25,476.94	\$ 23,160.85	\$ 2,316.09	\$ 23,160.85	\$ 2,316.09	20131268	Appeal from decision of Dalton J. Reduced for double claim of disbursement Invoice 973 John C Sheahan
Russells	28-Mar-14	B17488	\$ 1,585.85	\$ 1,441.68	\$ 144.17	\$ 1,441.68	\$ 144.17	20131259	FMIF indemnity
Russells	29-May-14	B18011	\$ 774.48	\$ 704.07	\$ 70.41	\$ 704.07	\$ 70.41	20131545	Books and Records
Russells	05-Jun-14	B18111	\$ 12,848.43	\$ 11,680.43	\$ 1,168.04	\$ 11,680.43	\$ 1,168.04	20140653	Remuneration claim
Russells	25-Jun-14	B18258	\$ 3,300.00	\$ 3,000.00	\$ 300.00	\$ 3,000.00	\$ 300.00	20140653	Remuneration claim
Russells	18-Jul-14	B18535	\$ 3,134.11	\$ 2,849.22	\$ 284.89	\$ 2,849.22	\$ 284.89	20140653	Remuneration claim
Russells	28-Jul-14	B18603	\$ 4,810.64	\$ 4,373.31	\$ 437.33	\$ 4,373.31	\$ 437.33	20131545	Books and Records
Russells	20-Aug-14	B18824	\$ 26,685.63	\$ 24,259.66	\$ 2,425.97	\$ 24,259.66	\$ 2,425.97	20140653	Remuneration claim
Russells	26-Aug-14	B18884	\$ 566.48	\$ 514.98	\$ 51.50	\$ 514.98	\$ 51.50	20131259	FMIF indemnity
Russells	11-Sep-14	1042	\$ 4,950.00	\$ 4,500.00	\$ 450.00	\$ 4,500.00	\$ 450.00	20131268	Appeal from decision of Dalton J.
Russells	29-Sep-14	B19396	\$ 3,327.09	\$ 3,024.63	\$ 302.46	\$ 3,024.63	\$ 302.46	20131259	FMIF indemnity
Russells	22-Dec-14	B20191	\$ 23,563.49	\$ 21,421.35	\$ 2,142.14	\$ 21,421.35	\$ 2,142.14	20140653	Remuneration claim
Russells	22-Dec-14	B20178	\$ 6,863.52	\$ 6,285.02	\$ 628.50	\$ 6,285.02	\$ 628.50	20141556	Remuneration of Receiver. Reduction from costs assessment applied to this Invoice. \$50 deducted.
Russells	30-Apr-15	B21563	\$ 7,200.64	\$ 6,546.04	\$ 654.60	\$ 6,546.04	\$ 654.60	20131545	Books and Records. Reduction from costs assessment applied to this Invoice. \$118 deducted (of total \$200 reduction) from FMIF allocation.
Russells	29-May-15	B21751	\$ 4,786.74	\$ 4,351.58	\$ 435.16	\$ 4,351.58	\$ 435.16	20131545	Books and Records
Clayton Utz	29-May-15	3863377	\$ 10,650.20	\$ 9,682.00	\$ 968.20	\$ 9,682.00	\$ 968.20	80143342	Insurance scheme costs
Russells	29-Jun-15	B22048	\$ 3,367.86	\$ 3,061.69	\$ 306.17	\$ 3,061.69	\$ 306.17	20141556	Remuneration of Receiver
Russells	30-Jun-15	Cost of application	\$ 997.48	\$ 997.48	\$ -	\$ 997.48	\$ -	20131545	Books and Records
Russells	30-Jun-15	B22024	\$ 8,579.32	\$ 7,799.38	\$ 779.94	\$ 7,799.38	\$ 779.94	20131545	Books and Records
Russells	15-Jul-15	B22299	\$ 315.33	\$ 285.66	\$ 28.67	\$ 285.66	\$ 28.67	20131268	Appeal from decision of Dalton J.
Russells	31-Jul-15	B22433	\$ 9,967.32	\$ 9,061.20	\$ 906.12	\$ 9,061.20	\$ 906.12	20131545	Books and Records
Clayton Utz	31-Jul-15	3873098	\$ 15,285.05	\$ 13,895.50	\$ 1,389.55	\$ 13,895.50	\$ 1,389.55	80143342	Insurance scheme costs
Russells	31-Aug-15	B22832	\$ 3,525.82	\$ 3,205.29	\$ 320.53	\$ 3,205.29	\$ 320.53	20131545	Books and Records
Russells	Various	Various	\$ 20,578.33	\$ 18,707.57	\$ 1,870.76	\$ 18,707.57	\$ 1,870.76	20150954	Costs Assessment - Total Invoices less settled Cost Order
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 9,068.68	\$ 8,244.25	\$ 824.43	\$ 8,244.25	\$ 824.43	Disbursement	Cost of costs assessment - russells matter 20131268 (Appeal from decision of Dalton J.)
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 212.76	\$ 193.42	\$ 19.34	\$ 193.42	\$ 19.34	Disbursement	Cost of costs assessment - russells matter 20131259
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,361.45	\$ 2,146.77	\$ 214.68	\$ 2,146.77	\$ 214.68	Disbursement	Cost of costs assessment - russells matter 20131545. 59% to FMIF.
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,699.84	\$ 2,454.40	\$ 245.44	\$ 2,454.40	\$ 245.44	Disbursement	Cost of costs assessment - russells matter 20140653
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 606.60	\$ 551.45	\$ 55.15	\$ 551.45	\$ 55.15	Disbursement	Cost of costs assessment - russells matter 20140947 (Controllership resignation)
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 399.21	\$ 362.92	\$ 36.29	\$ 362.92	\$ 36.29	Disbursement	Cost of costs assessment - russells matter 20141556
Clayton Utz	31-Aug-15	3876572	\$ 30,805.23	\$ 28,004.75	\$ 2,800.48	\$ 28,004.75	\$ 2,800.48	80143342	Insurance scheme costs
Clayton Utz	30-Sep-15	3880734	\$ 11,254.65	\$ 10,231.50	\$ 1,023.15	\$ 10,231.50	\$ 1,023.15	80143342	Insurance scheme costs
Russells	30-Sep-15	B23055	\$ 1,390.62	\$ 1,264.20	\$ 126.42	\$ 1,264.20	\$ 126.42	20131545	Books and Records
Russells	30-Oct-15	B23460	\$ 4,646.14	\$ 4,223.76	\$ 422.38	\$ 4,223.76	\$ 422.38	20131545	Books and records
Clayton Utz	30-Oct-15	3884463	\$ 13,609.75	\$ 12,372.50	\$ 1,237.25	\$ 12,372.50	\$ 1,237.25	80143342	Insurance scheme costs
Arthur J Gallagher	02-Nov-15	289543/289547	\$ 61,391.78	\$ 61,315.16	\$ 76.62	\$ 61,315.16	\$ 76.62	PI insurance	
Clayton Utz	27-Nov-15	3887238	\$ 17,397.05	\$ 15,815.50	\$ 1,581.55	\$ 15,815.50	\$ 1,581.55	80143342	Insurance scheme costs
Russells	30-Nov-15	B23746	\$ 5,857.84	\$ 5,325.08	\$ 532.51	\$ 5,325.08	\$ 532.51	20131545	Books and records
Russells	21-Dec-15	B23946	\$ 2,371.86	\$ 2,156.24	\$ 215.62	\$ 2,156.24	\$ 215.62	20141556	Remuneration of Receiver
Clayton Utz	24-Dec-15	3891981	\$ 6,365.15	\$ 5,786.50	\$ 578.65	\$ 5,786.50	\$ 578.65	80143342	Insurance scheme costs
Russells	29-Jan-16	B24316	\$ 1,920.42	\$ 1,745.84	\$ 174.58	\$ 1,745.84	\$ 174.58	20131259	FMIF indemnity
<b>Total</b>			<b>\$ 375,499.78</b>	<b>\$ 347,003.88</b>	<b>\$ 28,545.72</b>	<b>\$ 347,003.88</b>	<b>\$ 28,545.72</b>		

**Dallys Pyers**

---

**From:** Jacqueline Ogden [Jacqueline.Ogden@gadens.com]  
**Sent:** Wednesday, 24 February 2016 6:47 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]  
**Attachments:** Letter to Russells (24\_02\_16).PDF  
**Saved:** -1

Dear Colleagues,

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

Yours faithfully,

**Jacqueline Ogden** | Senior Associate | gadens  
[jacqueline.ogden@gadens.com](mailto:jacqueline.ogden@gadens.com) | T +61 7 3231 1688 | F +61 7 3229 5850  
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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**

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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

## Dallys Pyers

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**From:** Park, John [John.Park@fticonsulting.com]  
**Sent:** Monday, 29 February 2016 8:20 PM  
**To:** Trenfield, Kelly; O'Kearney, Glenn  
**Cc:** Stephen Russell; Ashley Tiplady  
**Subject:** FW: LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)  
**Attachments:** Ltr to FTI 29 February 2016.pdf  
**Saved:** -1

**John Park**  
Leader Australia, Corporate Finance & Restructuring

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**From:** John Somerville [mailto:John.Somerville@bdo.com.au]  
**Sent:** Monday, 29 February 2016 7:30 PM  
**To:** Park, John  
**Cc:** David Whyte  
**Subject:** LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)

Dear John

Please refer to the attached correspondence. The original will follow by post.

Regards

John

**JOHN SOMERVILLE**  
Senior Manager  
Direct: +61 7 3237 5872  
[John.Somerville@bdo.com.au](mailto:John.Somerville@bdo.com.au)

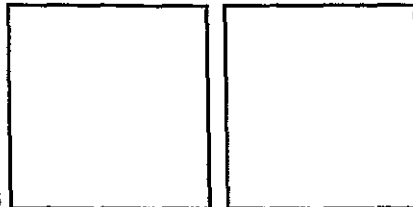
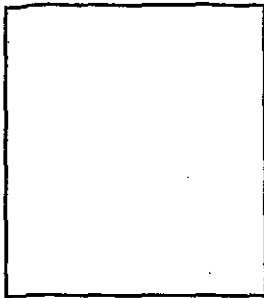
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Via email: john.park@fticonsulting.com

John Park  
FTI Consulting  
22 Market Street  
BRISBANE QLD 4000

29 February 2016

Dear Mr Park

**LM FIRST MORTGAGE INCOME FUND  
(RECEIVERS AND MANAGERS APPOINTED)(RECEIVER APPOINTED) (FMIF)**

Thank you for your letter of 15 February 2016 and the enclosures to it.

Pursuant to paragraph 8(a) of the order of Jackson J of 17 December, 2015 in Supreme Court proceedings no. 3508/2015, I request that the liquidators provide me with the following material and information in order that I may assess the various "Eligible Claims" presented in your letter.

In relation to each of the matters for which there is a claim for fees and expenses incurred by Russells and Clayton Utz, I request the liquidators provide me with a copy of the retainer agreement relating to the matters.

**Claim for Russells' fees - file 20131268 - appeal from decision of Dalton J**

You have provided me with copies of the following invoices for disbursements, which I have read:

- (a) no. B17294 of 10 March, 2014 - \$25,476.94;
- (b) no. B22299 of 15 July, 2015 - \$315.33;
- (c) no. 1042 of 11 September, 2014 - \$4,950.

In order to consider your claim for the above invoices, would you please:

- i. provide me with a copy of any invoices for the disbursements included in the invoices;
- ii. clarify whether these invoices formed part of the assessment of costs by Mr Hartwell. If they did not, explain why they were not included; and
- iii. provide me with your explanation as to why you say the appeal costs claimed are:
  - properly and reasonably incurred by the liquidators on behalf of LMIF;
  - for the benefit of FMIF;

G:\Current\Administrations\Client Folders\LM First Mortgage\09. Unsecured Creditors\9.9 FTI indemnity claim\Ltr to FTI in response to indemnity claim 290216.docx

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- incurred in the administration of the trust and/or in the performance of LMIM's duties as trustee.

In particular, I request the liquidators to provide me with a copy of the advice referred to in an e-mail from FTI of 22 July, 2015, mentioned below.

That e-mail is from Mr O'Kearney. It relates to management accounts for the year ended 30 June, 2015. There is reference in the e-mail and in the accounts to the costs of legal advisors being \$375,249. That amount includes sums mentioned in the invoices attached to your letter.

The e-mail says, in respect of these costs, that "this includes fees and disbursements for the Appeal to the court of Appeal from the judgment of Dalton J where we have received advice that these fees are properly payable from the funds of the LM FMIF."

Please provide me with a copy of this advice.

**Claim for Russells' fees - file 20131259 - MIF Indemnity**

I have read copies of the following tax invoices submitted in support of this claim:-

- (d) no. B17488 of 28 March 2014 - \$1,585.85;
- (e) no. B18884 of 26 August 2014 - \$566.48;
- (f) no. B19396 of 29 September 2014 - \$3,893.57; and
- (g) no. B24316 of 29 January 2016 - \$1,920.42.

I request the liquidators provide me with the following material and information to assist me in my consideration of this claim:-

1. In respect of the description of work in invoice B17488, an explanation why the recorded dealings with Mr Clout, Ms Banton, ASIC and Trilogy are work the cost of which is properly recoverable from the FMIF.
2. It is not evident to me, from the description of work in invoice B18884, that any of that work relates to the preparation or provision of advice to the liquidators concerning claims by them against the FMIF assets pursuant to LMIM's indemnity.

I request the liquidators provide me with information which establishes a sound connection between the work described and the indemnity issue.

3. The copy of invoice B19396 which has been provided to me, does not show Mr Tiplady's charge-out rates in August and September 2014 or the amount of time allocated to each of the tasks in the description of work done.

I request the liquidators provide me with this information.

4. It appears to me that roughly the first half of the work in this invoice is in relation to the liquidators' remuneration and I question whether the charges for that work should await the outcome of the application currently before Jackson J. If you wish to continue with this part

of the claim, please provide details of the charge out rates and the amounts of time allocated to each task.

5. In respect of the work described in invoice B24316, it is not evident to me why the FMIF ought to bear the cost of Russells' internal preparation of spreadsheets summarising their costs and expenses, or of their internal discussions about a strategy for the recovery of expenses.

I request the liquidators provide me with:

- (i) copies of the spreadsheets mentioned in the invoice; and
- (ii) any information or material which shows that the cost of the work just mentioned is properly to be recovered from the FMIF.

**Claim for Russells' fees - file 20131545 - Books and Records**

I have read copies of the following tax invoices provided in support of this claim:

- (a) no. B18011 of 29 May 2014 - \$1,113.76 - 69.54% = \$774.48;
- (b) no. B18603 of 28 July 2014 - \$8,563.96 - 56.17% = \$4,810.64;
- (c) no. B21563 of 30 April 2015 - \$12,404.47 - reduced to \$7,200.64;
- (d) no. B21751 of 29 May 2015 - \$8,113.12 - 59% = \$4,786.74;
- (e) no. B22024 of 26 June 2015 - \$14,541.22 - 59% = \$8,579.32;
- (f) no. B22433 of 31 July 2015 - \$13,008.77 - 76.62% = \$9,967.32;
- (g) no. B22832 of 31 August 2015 - \$4,601.70 - 76.62% = \$3,525.98
- (h) no. B23055 of 30 September 2015 - \$1,814.96 - 76.62% = \$1,390.68
- (i) no. B23460 of 30 October 2015 - \$6,063.61 - 76.62% = \$4,646.14; and
- (j) no. B23746 of 30 November 2015 - \$7,644.98 - 76.62% = \$5,857.84.

I request the liquidators provide me with the following material and information to assist me in my consideration of this claim:

1. The copy of invoice B18011 which has been provided to me does not show the charge-out rates of Mr Tiplady and Mr Russell in the March-May 2014 period; or the amounts of time allocated to the tasks in the description of work done.

I request the liquidators to provide me with this information.

2. It is not evident to me, from the description of work in invoice B18011, how the recorded dealings with Piper Alderman and consideration of correspondence from that firm are so closely connected to the issue of maintaining the privilege and confidentiality of FMIF records as to be properly chargeable to the FMIF.

I request the liquidators provide me with information which makes that connection clear.

3. It is not evident to me, from the description of work in invoice B18603, that the recorded dealings with Piper Alderman and in relation to ASIC's sec. 33 notice, are so closely connected to the maintenance of the privilege or confidentiality attaching to FMIF records as to be properly chargeable to the FMIF.

I request the liquidators provide me with information which makes that connection clear.

4. The copy of invoice B21563 which has been provided to me does not show the charge-out rates of the lawyers engaged on the matter or the amount of time allocated to their tasks in the description of work done.

I request the liquidators provide me with this information.

5. The copy of invoice no. B21751 which has been provided to me does not show the charge-out rates of the lawyers engaged on the matter or the amounts of time allocated to each of the recorded tasks. I request the liquidators provide me with this information.
6. The copy of invoice B22024 which has been provided to me does not show the charge-out rates of the lawyers engaged on the matter or the amount of time allocated to the tasks in the description of work done.

I request the liquidators provide me with this information.

I request the liquidators provide me with a copy of Mr Peden's invoice(s) for the sum of \$10,100 referred to as a disbursement in invoice B22024.

7. From the description of work forming part of invoice B22433, the bulk of the work done appears to relate to dealings with ASIC to express opposition to ASIC's proposed disclosure or use in court proceedings of LMIM documents which had come into its possession. It is not evident to me that the work involved in these dealings was so closely connected to questions of the privilege or confidentiality attaching to FMIF records as to make the cost of that work properly payable by the FMIF.

In addition I note that 59% of the amount of invoice B22433 is sought from the FMIF. I assume this percentage is drawn from the order of Jackson J of 14 May, 2015. If that be the case, it is not clear to me why that figure should govern the apportionment of work done principally in June and July, 2015.

I request the liquidators provide me with information which demonstrates a clear connection between the work reflected in invoice B22433 and the issue of FMIF's privilege and confidentiality, and to explain why a 59% apportionment represents at least a reasonably accurate attribution of that work to the FMIF.

8. The reason for lifting the apportionment of the amount claimed from the FMIF from 59% to 76.62% - from invoice 22433 onwards - is not apparent.

I request the liquidators provide me with all available information and material which explains why the liquidators decided that this uplift was appropriate at all, and what circumstances existed which made it (and continue to make it reasonable and proper for the FMIF to pay this increased portion of the invoices).

9. The copy of invoice B22832 which has been provided to me does not show the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to the tasks in the description of the work done.

I request the liquidators provide me with this information.

10. The work described in invoice B22832 appears to relate entirely to ASIC's use of LMIM documents in its proceedings against former LMIM directors. It is not evident to me that this work is so closely connected to the question of the privilege or confidentiality attaching to FMIF records as to make the cost of that work properly payable by the FMIF. Further, as with invoice B22433, I question the appropriateness of applying a 59% apportionment to the amount of this invoice.

I request the liquidators provide me with information which demonstrates a clear connection between the work reflected in invoice B22433 and the issue of FMIF's privilege and confidentiality, and to explain why a 59% apportionment represents at least a reasonably accurate attribution of that work to the FMIF.

11. The copy of invoice B23055 which has been provided to me does not show the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to the tasks in the description of the work done.

I request the liquidators provide me with this information.

12. The work described in invoice B23055 appears to relate entirely to ASIC's use of LMIM documents in its proceedings against the former LMIM directors. I note the reference, in an item of work of 1 September, 2015, to "correspondence to protect position of liquidators". In these circumstances, the extent to which any of the work reflected in the invoice pertained to FMIF's privilege or entitlement to confidentiality is not apparent.

I request the liquidators provide me with information which demonstrates a clear connection between the work reflected in invoice B23055 and the issue of FMIF's privilege and confidentiality, and to explain why a 59% apportionment (which has again been adopted) represents a reasonably accurate attribution of that work to the FMIF.

13. The copy of invoice B23460 which has been provided to me does not show the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to the tasks in the description of the work done.

I request the liquidators provide me with this information.

14. The work described in invoice B23460 appears to have been of two types. First, there is the continuing issue of ASIC's use of LMIM documents in its proceedings against former LMIM directors. Second, there is consideration of the effect of evidence given by a Mr Monaghan at a public examination.

None of this work appears to be directly related to the question of FMIF's privilege or confidentiality. In addition, a 59% apportionment has been adopted once again.

I request the liquidators provide me with information which demonstrates a clear connection between the work reflected in invoice B23460 and the issue of FMIF's privilege and confidentiality, and to explain why a 59% apportionment represents a reasonably accurate attribution of that work to the FMIF.

15. The copy of invoice B23476 which has been provided to me does not show the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to the tasks in the description of the work done.

I request the liquidators provide me with this information.

16. The work described in invoice B23476 appears very largely to concern the ongoing issue of ASIC's use of LMIM documents in its proceedings. There is also mention of the Monaghan issue.

None of this work appears to relate to the question of FMIF's privilege or confidentiality; and a 59% apportionment of the costs has been adopted, long after Jackson J's order of 14 May, 2015.

I request the liquidators provide me with information which demonstrates a clear connection between the work reflected in invoice B23476 and the issue of FMIF's privilege and confidentiality, and to explain why a 59% apportionment represents a reasonably accurate attribution of that work to the FMIF.

**Claim for Russells' fees - file 20140653 - My remuneration application**

I have read copies of the following tax invoices provided in support of this claim:

- (a) no. B18111 of 5 June, 2014 - \$12,848.43;
- (b) no. B18258 of 25 June, 2014 - \$3,300.00;
- (c) no. B18535 of 18 July, 2014 - \$3,134.11;
- (d) no. B18824 of 20 August, 2014 - \$26,685.63; and
- (e) no. B20191 of 22 December, 2014 - \$23,563.49.

I request the liquidators provide me with the following material and information to assist me in my consideration of this claim:

1. Excluding invoice B18258, which reflects counsel's fees, none of these invoices shows the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to the tasks in the description of work done.

I request the liquidators provide me with this information.

2. I note references to: a possible expert's report by a Ms Knight or Deloitte in invoice B18111; a report from an expert in invoice B18535; and to contact with Messrs Bettles, Worrell and Khatri, as well as research concerning the appointment of experts, in invoice B18824. As the liquidators did not file an independent expert's report in the proceedings which came before P McMurdo J, I question why any cost should be sought from the FMIF for discussions with potential expert witnesses.

I request the liquidators provide me with information which explains why these costs should be charged to the FMIF.

3. There are references to the preparation and amendment of an action plan - invoices B18111 (22 and 28 May, 2014), B18535 (3 June, 2014) and B20191 (25 August, 2014). This work would not appear to be of benefit to the FMIF. It is not evident why the cost of this work should be met by the FMIF.

I request the liquidators provide me with information which explains why these costs should be charged to the FMIF.

4. In respect of invoice B20191, I request the liquidators to provide me with copies of the tax invoices of Mr Peden and Mr Jennings which are referred to in it.

**Claim for Russells' fees - file 20141156 - My further remuneration applications**

I have read copies of the following tax invoices provided in support of this claim:

- (a) no. B20178 of 22 December, 2014 - \$6,913.52;
- (b) no. B22048 of 29 June, 2015 - \$3,367.86; and
- (c) no. B23946 of 21 December, 2015 - \$2,371.86.

None of these invoices shows the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to tasks in the description of work done.

I request the liquidators provide me with this information.

Concerning the work reflected in invoice B20178: given that the liquidators decided not to appear upon the hearing of my application, and given that it is not apparent that Mr Sheahan provided any advice to the liquidators, it is not evident to me why the FMIF should meet Mr Sheahan's fees or the costs of the work involved in contacting him and briefing him.

I request the liquidators provide me with information which explains why these costs should be charged to the FMIF. I also request that I be provided with a copy of Mr Sheahan's tax invoice.

Concerning invoice B22048: given that the liquidators did not oppose my application, it is not evident to me why the FMIF should bear the costs of the preparation and presentation of the advice to oppose my application. Nor is it evident to me why the FMIF should bear the cost of two solicitors reading my application and supporting affidavit.

I request the liquidators provide me with information which explains why these costs should be charged to the FMIF.

Further concerning invoice B22048, I note that the liquidators were advised by Russells on 4 May, 2015 by e-mail to oppose my then current remuneration application. As the cost of this advice is sought to be recovered from the FMIF, I request the liquidators provide me with a copy of the written advice.

Concerning invoice B23946: even leaving aside the fact that the liquidators decided not to oppose my application, it is not evident to me why it was necessary for two of the liquidators' solicitors to read my application and supporting affidavit in order for a decision to be made by the liquidators; and it is not evident why the FMIF should bear all of these costs.





I request the liquidators provide me with information which explains why these costs should be charged to the FMIF.

**Claim for Russells' fees - file 20150954 - Costs assessment, involving Mr Hartwell**

I have read copies of the following tax invoices provided in support of this claim:

- (a) no. B22835 of 31 August, 2015 - \$7,826.96;
- (b) no. B23062 of 30 September, 2015 - \$3,506.23;
- (c) no. B23465 of 30 October, 2015 - \$10,000.83;
- (d) no. B23749 of 30 November, 2015 - \$16,176.44; and
- (e) no. B23944 of 21 December, 2015 - \$1,067.91.

None of these invoices shows the charge-out rates of the lawyers engaged in the matter or the amount of time allocated to tasks in the description of work done. Invoice B23944 contains no description of work done at all.

I request the liquidators provide me with this information.

It is not evident to me that the liquidators' engagement and use of Mr Hartwell was for the benefit of anyone but the liquidators and their solicitors or that, at least, Mr Hartwell's engagement and services have conferred a benefit upon the FMIF.

I request the liquidators provide me with information which explains why any of the costs in the five invoices just mentioned should be met by the FMIF.

I note your comments about an indemnity for the difference between the agreed amount of costs awarded by Jackson J on 20 October, 2015 (\$18,000) and the actual costs said to have been incurred in that matter (\$38,578.33). I note, however, that Jackson J very quickly rejected the suggestion of Mr Peden, counsel for the liquidators, that he award the liquidators indemnity costs of that application.

His Honour having rejected a claim for indemnity costs, it is not evident to me that it is appropriate or possible for the liquidators to seek an indemnity from the FMIF by some other path.

I request the liquidators provide me with such information as they wish which supports their indemnity claim in the face of Jackson J's decision.

**Claim for payment of the fees of SK Hartwell**

I have read the following certificates of Mr Hartwell, each of them dated 2 January, 2016, and note his fees in respect of each of them which are claimed from the FMIF:

- (f) certificate in relation to file 20141556 - \$399.21;
- (g) certificate in relation to file 20140947 - \$606.60;
- (h) certificate in relation to file 20140653 - \$2,699.84;

- (i) certificate in relation to file 20131545 - 59% of \$4,002.45 = \$2,361.45;
- (j) certificate in relation to file 20131268 - \$9,068.68; and
- (k) certificate in relation to file 20131259 - \$212.76.

File no. 20131268, which is the subject of the fifth certificate mentioned above, concerned the liquidator's appeal against Justice Dalton's decision of August 2013.

Gadens, on my behalf, wrote to Russells on 24 February 2016 and set out my requests in relation to the claim for the costs of that appeal, including Mr Hartwell's fee.

Consequently, I do not need to repeat those requests in this letter and the requests which follow are directed to the other five certificates of Mr Hartwell.

I request the liquidators provide me with the following materials and information in order to enable me to consider this claim:

1. A copy of each set of instructions provided to Mr Hartwell, by the liquidators or by Russells on their behalf, in respect of the files mentioned in the certificates.
2. A copy of any letter of engagement between Mr Hartwell, or his firm, and the liquidators (or Russells) by reference to which Mr Hartwell's fees appearing in each of the certificates were calculated.
3. Copies of tax invoices raised by Mr Hartwell for the amounts of his fees mentioned in the certificates.

**Claim for reimbursement of expenses of \$61,391.78, described as "PI Insurance"**

I have read the following documents presented in relation to this claim:

- (a) tax invoice no. 8974inv39, dated 20 November 2015, from LM Investment Management Limited (in liquidation) to the LM FMIF;
- (b) the statement of account as at 2 November 2015 of Arthur J Gallagher (2) Pty Ltd;
- (c) tax invoice no. 289543, dated 2 November 2015, of Arthur J Gallagher (2) Pty Ltd for \$55,050 and the accompanying Schedule of Insurance; and
- (d) tax invoice no. 289547, dated 2 November 2015, of Arthur J Gallagher (2) Pty Ltd for \$25,075 and the accompanying Schedule of Insurance.

I request the liquidators provide me with the following material and information concerning this claim:

1. A copy of the costs order of 18 December, 2014 referred to in the LMIM tax invoice no. 8974inv39;
2. The liquidators' reasons for concluding that the allocation of costs contained in the order of 18 December, 2014 was appropriate to be adopted by them when calculating the portion of the sum of the two Gallagher tax invoices to be claimed from the LM FMIF.



3. The liquidators' reasons for concluding that the proportion of the premium to be claimed from the LM FMIF was approximately 76.62% (\$61,391.78 of \$80,125) and, further, for concluding that this apportionment was appropriate.
4. The liquidators' reasons for considering that it was necessary or desirable to obtain the professional indemnity cover described in the Schedules of Insurance mentioned above.
5. The liquidators' reasons for concluding, or accepting the view, that, in November 2015, they, whether alone or with others, were carrying on the business of the management and loan administration of, or in respect of, the LM FMIF.
6. A copy of any external advice held or obtained by the liquidators which bears upon their reasons mentioned in paragraphs 2, 3 and 5 above.
7. A copy of any claim, of which the liquidators are aware, which has been made or threatened to be made in connection with the management and loan administration of the LM FMIF.

**Claim for payment of a portion of seven invoices from Clayton Utz**

I have read copies of the following tax invoices from Clayton Utz and the accompanying Details of Professional Services which accompanied your letter:

1. no. 3863377, dated 29 May 2015, for \$13,195.05 (amount claimed from LM FMIF, \$10,650.20).
2. no. 3873098, dated 31 July 2015, for \$17,074.15 (amount claimed from LM FMIF, \$15,285.05).
3. no. 3876572, dated 31 August 2015, for \$32,288.85 (amount claimed from LM FMIF, \$30,805.23).
4. no. 3880734, dated 30 September 2015, for \$14,304.95 (amount claimed from LM FMIF, \$11,254.65).
5. no. 3884463, dated 30 October 2015, for \$14,369.30 (amount claimed from LM FMIF, \$13,609.75).
6. no. 3887238, dated 27 November 2015, for \$18,629.60 (amount claimed from LM FMIF, \$17,397.05).
7. no 3891981, dated 23 December 2015, for \$7,122.50 (amount claimed from LM FMIF, \$6,365.15).

I request the liquidators provide me with the following material and information concerning this claim:

1. Please send me copies of:
  - (a) the document(s) containing or evidencing the agreement with the MPF trustees which is referred to on page 4 of your letter; and
  - (b) the advice from Clayton Utz which is referred to on page 4 of your letter.
2. I request the liquidators provide with me all available information and material which sets out their reasons for coming to the conclusion that (i) entering into such an agreement with

the trustees of the MPF was appropriate and (ii) it was not appropriate that the agreement extend to any other of the funds for which LMIM was the responsible entity.

3. I enclose for the information of the liquidators a copy of an email sent to me on 5 November 2015 by Ms Trenfield of FTI Consulting. I refer to the closing passage in that email:

***"7. Insurance scheme of arrangement***

***I confirm we will not be seeking to include these costs as part of an indemnity claim".***

In light of that statement, I request the liquidators provide me with their reasons for seeking to recover any of the amounts mentioned above from the LM FMIF.

4. I request the liquidators provide me with information about the amounts paid by the trustees of the MPF pursuant to the agreement referred to, and the dates on which those payments were made.

5. The work descriptions in the invoices are in two parts. One is headed "Insurance Claims Analysis".

I request the liquidators provide me with copies of the document(s) containing or evidencing the agreement or understanding pursuant to which this segregation occurred.

6. There are several references in the invoices to work being done in relation to the Peregrine Beach proceedings and Belgian proceedings, and a reference to ACI proceedings. I am not aware that these proceedings involve the FMIF.

I request the liquidators provide me with such information and material as they have which makes it reasonable and proper for the FMIF to meet the cost of this work.

7. Concerning invoice 3880734, there is a block of 5.6 hours recorded on 23 September, 2015 for developing an insurance claims strategy and the workings of the proposed scheme. This appears to represent a disproportionate charge, given that Clayton Utz had been working since May, 2015 on matters for the greater part of which the FMIF is said to be liable.

I request the liquidators provide me with information which indicates more precisely what work was done in that block of time and what was achieved by it. I also request the liquidators provide further details of "the scheme" which is referred to and the status of same.

8. In invoice 3887238, there is reference to "update on funding application" and advice about a members' claim (24 November, 2015). This description does not immediately suggest that this work is connected to the affairs of the FMIF.

I request the liquidators provide me with all available information and material which indicates that work in relation to a funding application or a claim by members is so closely connected to the affairs of the FMIF as to make it reasonable and proper for the FMIF to meet the cost of that work.

9. Invoice 3891981 records a meeting with FTI on 17 December, 2015, attended by a partner and a senior associate of Clayton Utz. The need for both lawyers to attend that meeting is not



evident to me, particularly as an updating memo had been sent to the liquidators on 11 December, 2015.

I request the liquidators provide me with such information and material as may be available which indicates that it is reasonable and proper for the FMIF to be liable to meet the cost of both lawyers.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'David Whyte', written over a horizontal line.

David Whyte  
Receiver

## John Somerville

---

**From:** Trenfield, Kelly <Kelly.Trenfield@fticonsulting.com>  
**Sent:** 5 November 2015 3:13 PM  
**To:** David Whyte  
**Cc:** Park, John; John Somerville  
**Subject:** FW: LM First Mortgage Income Fund (receivers and Managers Appointed) (Receiver Appointed)  
**Attachments:** 8974I158.pdf; 8974I158B.pdf

Hi David

Apologies for the delay in getting back to you. In relation to the residual issues I note as follows:

**1. FTI remuneration claim**

We are currently finalising our remuneration claim in conjunction with Russels and anticipate this will be completed by 16 November at the latest. We will be happy to meet once completed.

**6. Representation issue for defence of MPF claims**

Please find attached correspondence in relation to this matter for your consideration.

**7. Insurance scheme of arrangement**

I confirm we will not be seeking to include these costs as part of an indemnity claim.

Regards  
Kelly

**Kelly Trenfield**  
Senior Managing Director, Corporate Finance/Restructuring

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**From:** David Whyte [<mailto:David.Whyte@bdo.com.au>]  
**Sent:** Monday, 26 October 2015 9:45 AM  
**To:** Trenfield, Kelly  
**Cc:** Park, John; John Somerville  
**Subject:** RE: LM First Mortgage Income Fund (receivers and Managers Appointed) (Receiver Appointed)

Thanks Kelly

I have noted my response to each of your points in blue below.

I look forward to hearing from you further.

Regards

David

**DAVID WHYTE**

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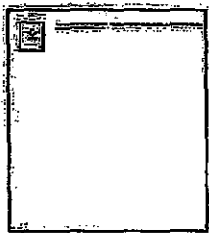
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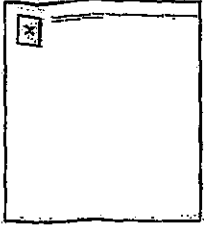
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**From:** Trenfield, Kelly [<mailto:Kelly.Trenfield@fticonsulting.com>]  
**Sent:** 21 October 2015 8:23 AM  
**To:** David Whyte  
**Cc:** Park, John; John Somerville  
**Subject:** RE: LM First Mortgage Income Fund (receivers and Managers Appointed) (Receiver Appointed)

David

In response to your email below of 13 October, I make the following comments, adopting your numbering:

**1. FTI remuneration claim**

Given the judgement handed down on 15 October 2015 we will now look to finalise our remuneration claim as at 30 September 2015 and provide you with details of the same and the intended nature of our application.

This is probably the most substantive issue that needs to be resolved following Justice Jackson's judgement and which should be dealt with by submissions at the hearing on 17 and 18 December 2014. I believe it would be worthwhile having a meeting to discuss our proposed approaches further when the draft orders have been exchanged within the 21 days from the date of judgement and before the call over on 12 November 2015.

**2. Russells fees cost assessment/claims to be made against the fund**

I note your directions application was heard today. Given the decision of Jackson, I was reserved, it seems prudent to await His Honour's decision on this matter.

Noted.

**3. Any further claims pursuant to the terms of the indemnity under the constitution**

I confirm details in relation to any possible claim against the FMIF will be provided to you by close of business on 23 October 2015 under separate cover.

Noted.

**4. Advisors commissions**

We agree the best way forward is a combined approach and will come back to you when we have a more considered position in this regard.

We have asked the advisor to provide any supporting documentation they may have so that the position can be considered further and will forward to you once they have responded.

**5. Request to ASIC for relief in not preparing audited accounts for the fund**



This matter was considered in Jackson J's judgement handed down last week. As such it would seem appropriate to hold this matter in abeyance until Orders are agreed.

We will outline our proposal to progress matters with ASIC when we forward the draft orders to you for consideration.

#### **6. Representation issue for defence of MPF claims**

I note the amended statements of claim from the MPF have now been received. I advise we are unable to provide a copy of correspondence between ourselves and the legal representatives for the insurer. Suffice to say in any instance whether the initial response from the insurer has been to deny indemnity or the advancement of defence costs we have made further submissions.

It is common ground that I need to be involved and indeed the amended claim seeks further relief from the fund that strengthens the argument I should run the majority (if not all) of the defence. The fund is an insured party and I would like my defence costs to be covered by the insurance company if at all possible. There needs to be a joint approach to obtaining the relevant indemnity cover. I do not understand why you refuse to provide a copy of the relevant correspondence and on what legal basis it could be withheld given the terms of my court order. Clearly I want to avoid the incurrence of unnecessary costs however if you continue to refuse to provide copies of books and records that concern the fund, I will be left with no option other than to seek directions about the matter. -

#### **7. Insurance scheme of arrangement**

Your comments in relation to the insurance scheme are noted.

Please confirm no costs will be sought from the fund in relation to this matter.

#### **8. Insolvency of LMIM**

As discussed a co-operative approach in relation to all matters is by far the preferred way forward. As such any matters we consider relevant to your appointment with respect to FMIF will most certainly be brought to your attention.

In respect of a future meeting we note the intention was to meet earlier than 11 November should Jackson J's decision be handed down before that time. However, given the consultation required prior to the issuance of final Orders a meeting prior to this date may be premature. I suggest we reschedule after Orders are agreed between us.

Agreed.

We will write to you separately in respect to the issues raised in Jackson J's judgement in due course.

Regards

Kelly

**Kelly Trenfield**  
Senior Managing Director, Corporate Finance/Restructuring

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22 Market Street

**From:** David Whyte [<mailto:David.Whyte@bdo.com.au>]  
**Sent:** Tuesday, 13 October 2015 9:16 AM  
**To:** Park, John; Trenfield, Kelly  
**Cc:** John Somerville  
**Subject:** LM First Mortgage Income Fund (receivers and Managers Appointed) (Receiver Appointed)

John/Kelly

Further to our meeting on Thursday, 8 October, I confirm the key points discussed and agreed way forward, as follows:

**1. FTI remuneration claim**

Whilst we do not consider that Justice Jackson's awaited decision on the liquidators residual powers application has any bearing on your remuneration claim to date (because it is for the future not the past and due to McGrathNicol's ongoing appointment), it was agreed this would be progressed upon the decision being handed down. If the decision is not handed down within 30 days then it was agreed we would meet again to progress the matter in any event.

**2. Russells fees cost assessment/claims to be made against the fund**

My application for directions on how this should be dealt with in so far as any costs to be claimed from the fund is concerned is to be heard on 20 October 2015. The costs assessor has been put on notice of the application and been requested to advise us whether from a review of the material he considers I have a role in the assessment. The cost assessor has not yet responded in that respect. John seemed to indicate that the assessor was continuing with the assessment. Can you please clarify the position in this respect and provide us with full details of what is being assessed in so far as it could be subject to a claim of indemnity from the fund. As discussed, we need openness and transparency to ensure it is done in a cost effective and efficient manner to avoid any duplication of costs.

**3. Any further claims pursuant to the terms of the indemnity under the constitution**

Our next report to investors will be finalised by 30 October 2015. Could you please advise me, by the end of next week, of the amount to be claimed for FTI's remuneration and any other costs, including legal fees, from the fund as at 30 September 2015 so that it can be accrued in the accounts and advised to investors.

**4. Advisors commissions**

From a review of the documentation we have received to date, it appears that the liability for advisors commissions lies with LMIM in its own right. We are currently reviewing one claim in this respect and will forward a copy of the documentation to you for review. We understand you are also looking at this issue from an AIF perspective although do not yet have a concluded view as to whether or not the liability may be subject to a claim for indemnity from the AIF. We would be interested to hear your views on that when you have concluded your position in that regard.

**5. Request to ASIC for relief in not preparing audited accounts for the fund**

An application to ASIC for relief in not producing audited accounts is presently on hold pending Justice Jackson's decision of the liquidators residual powers. ASIC has agreed to keep the application open until 30 November 2015. If Justice Jackson hasn't handed down his decision by early November 2016 we should jointly agree to provide ASIC with further information with a view to obtaining the relief and avoid unnecessary costs being incurred to investors detriment and bearing in mind the greater level of reporting and disclosure to investors that is currently occurring compared to that prior to my appointment.

## 6. Representation issue for defence of MPF claims

An application is to be made after receipt of the amended statement of claim from the MPF that is due this week with a hearing date of 7 December to determine the issue. In the meantime, can you please forward a copy of the letter from the insurers rejecting the claim to cover defence costs so that we can determine if this decision should be appealed.

## 7. Insurance scheme of arrangement

As discussed, this is not something we would like to support and bearing in mind the current claim on foot against LMIM, the MPF and others. We have previously advised we did not wish to share in any costs of exploring such an option and given that position it would not be appropriate for any costs to be incurred by the RE that would be the subject of an indemnity claim against the fund in that respect. Can you please confirm no costs will be claimed from the fund in considering the issue.

## 8. Insolvency of LMIM

From our investigations to date, we have not identified any transactions that only you as liquidators of the RE could bring for the benefit of members. If we do identify any we will discuss them with you accordingly. I understand from your review of the timing of the insolvency of LMIM that it is fairly complex however likely to have been at around the time of your appointment and not substantially before that. If you identify any insolvent transactions that could benefit members, could you please let us know.

Finally, I suggest we meet again on 11 November at 10:00am to progress some of the above issues further. This meeting can be brought forward if Justice Jackson hands down his decision on the residual powers application in the meantime.

Regards

David

DAVID WHYTE

Partner

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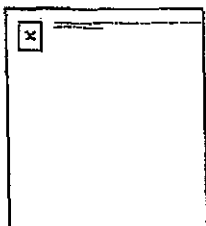
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## **Dallys Pyers**

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**From:** Stephen Russell  
**Sent:** Friday, 11 March 2016 3:23 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(5).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

Please disregard earlier email; corrected edition attached.

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*

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**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  
[jacqueline.ogden@gadens.com](mailto:jacqueline.ogden@gadens.com) | T +61 7 3231 1688 | F +61 7 3229 5850  
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**Think before you print.**

# RUSSELLS

11 March, 2016

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

Gadens  
Lawyers  
**BRISBANE**

email: [Scott.Couper@gadens.com](mailto:Scott.Couper@gadens.com)  
[Jacqueline.Ogden@gadens.com](mailto: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 made 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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SCR\_20131268\_110.docx

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 7431.
- 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

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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 zealousness, 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



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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 .

As we understand it, you have regrettably characterised Mr Whyte's attitude perfectly well; but this reflects no credit on Mr Whyte.

There should be no misunderstanding about this.

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 from whom Mr Tucker secured instructions to enable him to participate in the proceedings below.

One may have wondered why Mr Shotton would have felt it necessary to participate in the appeal. Equally, we observe that the day after Dalton J appointed Mr Whyte to the FMIF, he retained Mr Tucker as his solicitor and Mr Tucker's firm has acted for Mr Whyte in almost every aspect of the winding up of the FMIF - in fact every aspect until their conflict in relation to their claim against Mr Whyte for Mr Shotton's legal costs caused Mr Whyte to retain your firm.

The public record also shows that Mr Tucker secured Mr Whyte's appointment as a receiver of two funds in the Equitrust Group. There is, obviously a very close professional relationship between Mr Whyte and BDO on the one hand and Mr Tucker and Tucker and Cowen on the other.

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 liability for its own legal costs in the appeal and its liability for costs to a respondent in the appeal. Mr Whyte may have asserted to the contrary when he paid Tucker and Cowen, but, with respect, it is inappropriate for a person in Mr Whyte's fiduciary position to seek to treat professional friends differently from those with whom he is not so friendly, when he is acting as a quasi trustee.

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*

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**Dallys Pyers**

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**From:** Jessie Edge-Williams on behalf of Ashley Tiplady  
**Sent:** Thursday, 24 March 2016 11:03 AM  
**To:** david.whyte@bdo.com.au  
**Cc:** Ashley Tiplady; Sean Russell; dschwarz@tuckercowen.com.au; mziebell@tuckercowen.com.au; Geoff Hancock (ghancock@tuckercowen.com.au)  
**Subject:** LM First Mortgage Income Fund ~20131259~  
**Attachments:** P20131259\_029.pdf; Tax Invoice of John Peden dated 29 May 2015.pdf; B18011.pdf; B18111.pdf; B18535.pdf; B18603.pdf; B18824.pdf; B18884.pdf; B19396.pdf; B20178.pdf; B20191.pdf; B21563.pdf; B21751.pdf; B22024.pdf; B22048.pdf; B22832.pdf; B23055.pdf; B23460.pdf; B23746.pdf; B23946.pdf; Draft Amended Discovery Plan (TCS01043247-003).docx; Queensland Supreme Court receipt for copy fees dated 9 October, 2013.pdf; Queensland Supreme Court receipt for filing fee dated 23 September, 2013.pdf; Schedule of Rates as at 1 July, 2012.pdf; Schedule of Rates as at 1 July, 2013.pdf; Schedule of Rates as at 1 July, 2014.pdf; Schedule of Rates as at 1 July, 2015.pdf; Sealed Order of Justice Jackson dated 17 December 2015.pdf; Tax Invoice from Law In Order - Photocopying of Court Documents 01.10.13.pdf; Tax Invoice of Christain Jennings dated 29 August 2014.pdf; Tax Invoice of Greg Sheahan dated 27 November, 2014.pdf; Tax invoice of John Peden dated 28 August 2014.pdf

Dear Colleagues

Please refer to our attached correspondence dated 24 March, 2016 and enclosures.

Yours faithfully

**RUSSELLS**

**Ashley Tiplady**  
*Partner*

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# RUSSELLS

24 March, 2016

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

Mr David Whyte  
BDO  
BRISBANE

email: David.Whyte@BDO.com.au

---

Dear Colleagues

## **LM First Mortgage Income Fund ("FMIF")**

We refer to Mr Whyte's letter to Mr Park dated 29 February, 2016 concerning his claim for indemnity pursuant to the orders of Jackson J of 17 December, 2015 ("**the Order**").

As you know, we act for Mr Park and Ms Muller, the liquidators (and former administrators) of LM Investment Management Ltd (in liquidation).

Because the issues raised in your letter relate primarily to our firm's conduct of particular matters, Mr Park has instructed us to respond to your request for information on his behalf.

Our client does not wish for this process to become unnecessarily legalistic. If, having considered the further information provided herein, your client considers that his queries have been satisfactorily answered (or at least, those which have not been satisfactorily answered do not involve the resolution of legal issues), our client would be pleased to resume direct correspondence with your client.

For convenience, we respond to your client's correspondence using the headings which appear in your client's letter.

## **Claim for Russells' fees -20131268 - appeal from decision of Dalton J**

Enclosed is a copy of the disbursement invoices referred to in B17294.

Our Mr Stephen Russell has already written to your client's other solicitors, Gadens, on 11 March, 2016 concerning the issues which your client has raised. It would seem to us, unless your client otherwise wishes, that those parties are best to continue to deal with that issue.

That being said, the advice which your client has requested is the subject of legal professional privilege. Our clients decline to provide your client with a copy. We are unsure how or why your client's review of that advice would in any

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meaningful way assist in the role to be played by Mr Whyte as envisaged by Jackson J when considering our clients' indemnity claims. Perhaps you might clarify why your client says the provision of this advice would assist him; our clients are more than willing to reconsider their position should, upon clarification, receipt of this advice be seen to be of reasonable assistance to your client.

#### **Claim for Russells' fees – 20131259 – MIF Indemnity**

1. We have reviewed the entries referred to in your client's correspondence.

The time entries for Mr Stephen Russell (denoted by author code SCR) on 14 November, 2013 relate to the application brought by Korda Mentha, the trustee of the MPF, in proceeding 3691 in the Supreme Court of Queensland filed on 12 November, 2013.

That application included an application seeking access to the books and records of the FMIF. It also concerned other issues, including, for example an order seeking the winding up of the MPF.

Accordingly, a portion of those costs are to be borne by the FMIF (as relating to the books and records). However, given the sum involved (Mr Russell's entries total \$291.66 (excl. GST)), our clients will not press the claim in that respect. More time and money will be spent arguing over that sum than it is worth. The adjusted amount sought in respect of invoice number B17488 is \$1,150.01 (excl. GST).

The time entries relating to Trilogy concern work done for the purpose of ascertaining the proper quantum of the costs order in the appeal proceedings and therefore, the quantum of LMIM's claim against the FMIF. It should be uncontroversial that the costs of enforcing the indemnity form part of the indemnity.

2. Subject to one matter, the time on invoice B18884 is for a similar purpose (that is, it relates to the costs order for which an indemnity is claimed) and is claimed on the same basis.

Also enclosed is a copy of invoice B18884 showing itemised time entries.

3. We enclose a copy of our firm's charge out rates across the relevant periods.

Also enclosed is a copy of invoice B19396 showing itemised time entries.

4. The time entries for Mr Sean Russell (denoted by author code SCPR) relate to remuneration issues which, at that time (June, 2014), were thought to form part of a single, indivisible right of indemnity. It has not worked out that way. Our client considers those time entries are properly chargeable against the FMIF. Nevertheless, given that the quantum is \$125.00 (excl. GST) and that fact that our clients' remuneration is yet to be resolved, our client will not press the claim. The adjusted amount sought in respect of invoice number B19396 is \$2,899.59 (excl. GST).

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Our clients are otherwise content to have their claim in this respect await the outcome of Justice Jackson's decision on the basis that your client does not subsequently argue that they have not raised the claim within the time period required by paragraph 5 of the Orders.

5. The costs of calculating, claiming and enforcing our clients' right of indemnity form part of that indemnity. That should be uncontroversial. That our clients have had to take advice about how to do so does not detract from that position.

The documents your client has requested are the subject of legal professional privilege. Our clients decline to provide them to your client.

We are unsure how or why your client's review of that advice would in any meaningful way assist in the role to be played by My Whyte as envisaged by Jackson J when considering our clients' indemnity claims. Perhaps you might clarify why your client says the provision of this advice would assist him; our clients are more than willing to consider their position should, upon clarification, receipt of this advice can be seen to be of reasonable assistance to your client.

#### **Claim for Russells' fees – 20131545 – Books and Records**

1. Enclosed is a copy of invoice B18011 showing itemised time entries.
2. We do not understand what your client means by information which shows that dealings with Piper Alderman are so closely connected to the issue of maintaining the privilege and confidentiality of FMIF records as to be properly chargeable to the FMIF. LMIM as RE of the FMIF owes certain duties to maintain the confidentiality of and privilege in FMIF documents.

The situation, with which we expect you will be familiar, is as follows:-

- (a) Korda Mentha, the trustee of the MPF, sought access to the books and records of LMIM principally for the purpose of investigating claims against LMIM, including in its capacity as RE of the FMIF (and for that purpose engaged the services of Piper Alderman);
- (b) Our clients were concerned to maintain confidentiality and privilege on behalf of the funds of which LMIM was the responsible entity, including the FMIF;
- (c) Our clients proposed, and the Court approved, a regime for protecting that confidence and privilege;
- (d) Part of that regime involved our clients incurring expenses by having its solicitors liaise with the solicitors for the MPF trustees.

Our clients otherwise do not understand what information your client is requesting.

- 
3. Our clients have reviewed their records relating to this invoice. While our clients maintain that the books and records file maintained by Russells is usually for the (proportionate) benefit of the FMIF, in respect of the section 33 ASIC notice, our clients are prepared to withdraw their claim. That particular notice contained a provision limiting the documents sought to those mentioning 'Maddison Estate', a property solely relating to the MPF.
- Enclosed is a copy of invoice B18603 with the relevant entries highlighted. Our clients do not claim in respect of those highlighted entries, totalling \$6,286.24 (excl. GST). Accordingly, the adjusted amount sought in respect of invoice number B18603 is \$926.35 (excl. GST).
4. Enclosed is a copy of invoice B21563 showing itemised time entries.
5. Enclosed is a copy of invoice B21751 showing itemised time entries.
6. Enclosed is a copy of invoice B22024 showing itemised time entries as well as a copy of Mr Peden's invoice referred to therein.
7. As you are aware, the books and records of LMIM and LMA were intermingled such that the books and records for one fund could not practically be separated from another. There have been several applications to Court (in which your client has been involved) dealing with similar issues.
- We also refer to the letter from your client's solicitors, Gadens, dated 23 July, 2015. While the transactions the subject of the proceedings relate to a loan made by the MPF, the scope of documents sought was much wider. A copy of the most recent amended disclosure plan produced by the ASIC is enclosed. You will see from annexure A thereto that the keyword searches by which the documents to be produced were identified are broad and, in several respects, specifically refer to the FMIF.
- The apportionment of 59% is, as your client notes, taken from the order of Jackson J dated 14 May, 2015. That figure was chosen as representing a sensible commercial compromise which was previously agreeable to the parties. If your client will no longer agree to that proportion, please let us know what proportion your client thinks would be appropriate for the FMIF to bear and outline why he holds that view. We note that the figure is lower than is suggested either by proportionate Net Fund Value, proportionate funds under management or the "time in motion" study conducted by McGrath Nichol.
8. It is not correct to characterise the larger proportion sought in relation to these invoices as an uplift. It is a consequence of eliminating the MPF from the calculation of proportions as was explained in the second paragraph of page 3 of Mr Park's correspondence dated 15 February 2016.
9. Enclosed is a copy of invoice B22832 showing itemised time entries.
10. We repeat our comments in respect of item number 7 above.
11. Enclosed is a copy of invoice B23055 showing itemised time entries.
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12. We repeat our comments in respect of item number 7 above. We note your client's earlier comments that you were not going to conduct a 'line by line' review. The specific line item to which he refers is a misnomer. The liquidators' position in the proceedings is to protect the privilege and confidentiality of LMIM's documents; the line item should not be taken as a reference to the liquidators' personal interests.
  13. Enclosed is a copy of invoice B23460 showing itemised time entries.
  14. We repeat our comments in respect of item number 7 above. Insofar as Mr Monaghan is concerned, that work also relates to the question of privilege. As your client knows, Mr Monaghan was, at various times, the in-house lawyer for LMIM and then also LMIM's solicitor. Reviewing his evidence is as connected to the privilege of all funds, including FMIF, as reviewing documents.
  15. Enclosed is a copy of invoice B23746 showing itemised time entries.
  16. We repeat our comments in respect of items number 7 and 14 above.

**Claim for Russells' Fees – 20140653 – Your remuneration application**

1. Enclosed are copies of invoices B18111, B18535, B18824 and B20191 showing itemised time entries.
2. There can be no doubt that our clients were the proper respondents to your client's applications for remuneration, so much was said by McMurdo J at the hearing of your client's original fee approval application. In the course of so acting, our clients took legal advice about their options, considered that advice in deciding how to respond to your client's applications and thereby incurred costs. There is nothing unusual about considering different means of resolving or dealing with matters in Court.

We note your client's and counsel's comments that your client did not intend to undertake a line by line review of our clients' costs. The specific line items to which your client refers were properly incurred in the course of responding to matters unquestionably connected to the FMIF.

We otherwise do not understand your client to be making a request for further information about the invoice, as opposed to requesting further correspondence in the nature of submissions or argument. Our clients believe that their position has been sufficiently stated.

3. We note your client's and counsel's comments that your client did not intend to undertake a line by line review of our clients' costs. The specific line items to which your client refers are a normal part of how matters are run by our firm and are a method of planning for matters and updating clients. They were properly incurred in the course of responding to matters unquestionably connected to the FMIF.
4. Copies of Mr Peden's and Mr Jennings's invoices referred to in invoice B20191 are enclosed.

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**Claim for Russells' fees – 20141556 – Your further remuneration application**

1. Enclosed are copies of invoices B20178, B22048, B23946 showing itemised time entries.
2. Our clients incurred costs relating to reviewing the material your client sent to them and taking legal advice, including counsel's costs, upon the course of action they should take in response to the application. That they decided to save members' funds by not appearing on the application is not to the point. The costs were undoubtedly properly incurred in a matter unquestionably connected with the FMIF; so much follows from the comments of McMurdo J at the hearing of your client's original fee approval application.

We otherwise do not understand your client to be making a request for further information about the invoice, as opposed to requesting further correspondence in the nature of submissions or argument. Our clients believe that their position has been sufficiently stated.

3. A copy of Mr Sheahan's invoice is enclosed.
4. The documents your client has requested are the subject of legal professional privilege. Our clients decline to provide them to your client.

We are unsure how or why your client's review of that advice would in any meaningful way assist in the role to be played by Mr Whyte as envisaged by Jackson J when considering our clients' indemnity claims. Perhaps you might clarify why your client says the provision of this advice would assist him; our clients are more than willing to consider their position should, upon clarification, receipt of this advice can be seen to be of reasonable assistance to your client.

5. As to your client's comments regarding the costs of two solicitors (one partner and one employed solicitor) reading the material, that is a perfectly orthodox practice and one with which we are sure you are familiar. Indeed, we note that your client has retained two firms of solicitors (Gadens and your firm) to deal with assessing our clients' indemnity claims. We also note the presence of your Messrs Schwarz and Ziebell, Mr de Jersey and Ms Brown QC at the hearing of our clients' remuneration application. Had only one of those practitioners read the material?

**Claim for Russells' Fees – 20150954 – Costs assessment, involving Mr Hartwell**

Your client has queried the basis upon which our clients have formed the view that they are able to claim the costs associated with the assessment of costs undertaken by Mr Stephen Harwell of Hartwell Lawyers.

Our clients were conscious of the fact that some of their legal costs would ultimately be sought through their indemnity from the FMIF. Accordingly, they wished to ensure that there had been an independent review undertaken of those costs. Indeed, as became apparent during the course of the application which your client brought seeking an involvement in that costs assessment,



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Justice Jackson himself said that having a third party review the legal costs in the circumstances where such costs would ultimately be borne by members of a fund, was a prudent and proper thing to do. In this regard we refer you to page T1-7 of the transcript of argument before Justice Jackson on 20 October, 2015, where his Honour characterises our clients' actions as 'a prudent thing to do.' .

Accordingly, although the assessments made by Mr Hartwell are not binding upon your client, they should certainly assist your client in reaching a point where the fees sought to be recovered against the FMIF are reasonable, given that an independent third party has reviewed them. We note in passing that it would seem that these perhaps are the only legal costs which have been placed through such scrutiny where they are to be met by the members of the FMIF.

Accordingly, in circumstances where Justice Jackson has commented that it was a prudent step to take, our clients believe that it was in the interests of the members of the FMIF for that independent review to have taken place, and, as such, believe that the costs incurred (both in respect of Mr Hartwell's costs and also the small amount of associated legal costs) were of benefit to the members of the FMIF. Consequently, our clients press this claim.

Otherwise, we refer to the letter from our firm to your client's other solicitors' Gadens in respect of Mr Hartwell dated 11 March, 2016.

#### **Claim for payment of the Fees of SK Hartwell**

We refer to the letter from our firm to your client's other solicitors' Gadens in respect of Mr Hartwell dated 11 March, 2016.

#### **Claim for reimbursement of expenses described as 'PI Insurance'**

1. Enclosed is a copy of the Order of 17 December, 2014.
2. The basis for the apportionment, as your client notes, is taken from the order of Daubney J dated 17 December 2014. Those proportions were repeated in the order of Jackson J dated 14 May, 2015. That basis was chosen as representing a sensible commercial compromise which was previously agreeable to the parties. If your client will no longer agree to that proportion, please let us know what proportion you think would be appropriate for the FMIF to bear and outline why you hold that view.
3. We repeat our comments in respect of item number 2 above. Further, we confirm that the 76.62% allocation was calculated utilising the allocation basis ordered on 17 December 2014 and 14 May 2015 but rationalised after removing the LM Managed Performance Fund (MPF) from the allocations given that LMIM did not incur these ongoing costs on behalf of the MPF.
4. Our clients received advice from their insurance broker that the cover was necessary given the ongoing roles held by LMIM, including that as responsible entity of the FMIF. That advice is subject to confidentiality provisions and, consequently, our clients are not in a position to provide it to your client.
5. We repeat our comments at 4 above. LMIM remains the responsible entity of various Funds, including the FMIF and the insurance is a

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requirement of the responsible entity. We confirm that our client's brokers have placed the Professional Indemnity as an Investment Management business under care & maintenance mode. We also confirm that given the policy is a claims made policy, the insurance covers all actions by LMIM and LM Administration Pty Ltd (In Liquidation) in its roles since our clients' initial appointment in March 2013, including roles performed by both LMA and LMIM in relation to FMIF.

6. More generally, your client would be aware that this insurance policy is one:-
- (a) covering the period from our clients' appointment onwards;
  - (b) in respect of which there have been no claims.

**Claim for payment of a portion of seven invoices from Clayton Utz**

On the basis of the matters set out in Ms Trenfield's email of 5 November, 2015, our clients do not press their claim in this respect.  
As to your letter dated 21 March, 2016, no re-allocation from the matter relating to the proceedings in which your client was appointed has occurred.

We look forward to receiving your client's acceptance of the claim pursuant to paragraph 8(b) of the order of Justice Jackson dated 17 December, 2015.

Yours faithfully



**Ashley Tiplady**  
*Partner*

Direct (07) 3004 8833  
Mobile 0419 727 626  
*ATiplady@RussellsLaw.com.au*

**Dallys Pyers**

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**From:** Jacqueline Ogden [Jacqueline.Ogden@gadens.com]  
**Sent:** Thursday, 14 April 2016 11:47 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]  
**Attachments:** Letter to Russells Law - 14.04.16.pdf  
**Saved:** -1

Dear Colleagues,

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

Yours faithfully,

**Jacqueline Ogden** | Senior Associate | gadens  
[jacqueline.ogden@gadens.com](mailto: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**

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14 April 2016

Russells Law  
Level 18, 300 Queen Street  
BRISBANE QLD 4000

Attention:        Stephen Russell and Ashley Tiplady

By email: [SRussell@RussellsLaw.com.au](mailto:SRussell@RussellsLaw.com.au); [ATiplady@RussellsLaw.com.au](mailto: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

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

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21 April 2016

Russells Law  
Level 18, 300 Queen Street  
BRISBANE QLD 4000

Attention:        Stephen Russell and Ashley Tiplady

By email: [SRussell@RussellsLaw.com.au](mailto:SRussell@RussellsLaw.com.au); [ATiplady@RussellsLaw.com.au](mailto: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

## Dallys Pyers

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**From:** Geoff Hancock [GHancock@tuckercowen.com.au]  
**Sent:** Friday, 22 April 2016 1:01 PM  
**To:** Ashley Tiplady; Sean Russell  
**Cc:** David Schwarz  
**Subject:** LMFMIF - FTI indemnity claim  
**Attachments:** Ltr to FTI re indemnity claim 220416.pdf

**Saved:** -1

Gentlemen,

Attached is a copy of a letter our client has sent to the liquidators in response to the claims presented on 15 February, 2016.

Regards

**Geoff Hancock**  
Special Counsel

E: [ghancock@tuckercowen.com.au](mailto:ghancock@tuckercowen.com.au)

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TCS Solicitors Pty Ltd. | ACN 610 321 509

**Tucker & Cowen Solicitors.**

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Via email: john.park@fticonsulting.com

John Park  
FTI Consulting  
22 Market Street  
BRISBANE QLD 4000

22 April 2016

Dear SirMr Park

**LM FIRST MORTGAGE INCOME FUND  
(RECEIVERS AND MANAGERS APPOINTED)(RECEIVER APPOINTED) (FMIF)**

Pursuant to the order of Jackson J of 17 December, 2015, I advise you of my decisions concerning the several claims for indemnity presented to me with your letter of 15 February, 2016.

My decisions to accept (in whole or in part) or to reject the various claims are set out in the enclosed spreadsheet.

The spreadsheet is one of the documents you sent to me on 15 February, 2016, to which five final columns have been added.

The first of these columns indicates where amounts claimed have been reduced, as advised by you on 15 February, 2016 and by Russells on 24 March, 2016.

The second column sets out the GST inclusive amount of claims which I have accepted. The third column is the GST on the accepted amounts of your claims and the fourth column sets out the amounts of your claims payable.

The fifth column sets out the amounts of claims which I have rejected.

I will provide you with reasons for rejection of claims, in accordance with the order of 17 December, 2015, within seven days.

I note that Russells advised in their letter of 24 March, 2016 that all claims in respect of Clayton Utz invoices had been withdrawn. Consequently, it became unnecessary for me to deal with those claims.

I agree to the proposal in the Russells' letter of 24 March, 2016 that my consideration on their invoice B19396 be deferred until after Jackson J delivers reasons for judgment in your remuneration application.

Yours faithfully

David Whyte  
Receiver

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LM First Mortgage Income Fund  
Indemnity Claim

Consultant	Invoice Date	Invoice Number	Total amount	GST Exc	GST	Amount paid to date by LMIF - "Recompment Indemnity Claim"	Amount Outstanding - "Administration Indemnity Claim"	Matter Number	Notes	Reduced Claim	Accepted	Less GST	Amount Payable	Rejected
Russells	10-Mar-14	B17294	\$ 25,476.94	\$ 23,160.85	\$ 2,316.09	\$ 25,476.94	\$ -	20131268	Appeal from decision of Dutton J. Reduced for double claim of disbursement invoice 973 John C Shadlun.	-	Nil	-	-	25,476.94
Russells	28-Mar-14	B17488	\$ 1,585.83	\$ 1,441.68	\$ 144.17	\$ 123.75	\$ 1,462.10	20131259	FMIF indemnity	1,265.01	Nil	-	-	1,265.01
Russells	29-May-14	B18011	\$ 774.46	\$ 704.07	\$ 70.41	\$ -	\$ 774.46	20131545	Books and Records	-	Nil	-	704.07	-
Russells	05-Jun-14	B18111	\$ 12,848.43	\$ 11,680.43	\$ 1,168.04	\$ -	\$ 12,848.43	20140653	Remuneration claim	-	Nil	-	1,168.04	-
Russells	25-Jun-14	B18258	\$ 3,300.00	\$ 3,000.00	\$ 300.00	\$ -	\$ 3,300.00	20140653	Remuneration claim	-	Nil	-	3,000.00	-
Russells	18-Jul-14	B18535	\$ 3,134.11	\$ 2,849.22	\$ 284.89	\$ -	\$ 3,134.11	20140653	Remuneration claim	-	Nil	-	284.92	-
Russells	28-Jul-14	B18603	\$ 4,810.64	\$ 4,373.31	\$ 437.33	\$ -	\$ 4,810.64	20131545	Books and Records	-	Nil	-	437.33	-
Russells	20-Aug-14	B18824	\$ 26,685.63	\$ 24,259.67	\$ 2,425.97	\$ -	\$ 26,685.63	20140653	Remuneration claim	-	Nil	-	2,425.97	-
Russells	26-Aug-14	B18884	\$ 566.48	\$ 514.98	\$ 51.50	\$ -	\$ 566.48	20131259	FMIF indemnity	-	Nil	-	51.50	-
Russells	11-Sep-14	1042	\$ 4,950.00	\$ 4,500.00	\$ 450.00	\$ 4,950.00	\$ -	20131268	Appeal from decision of Dutton J.	-	Nil	-	-	4,950.00
Russells	29-Sep-14	B19396	\$ 3,327.09	\$ 3,024.63	\$ 302.46	\$ -	\$ 3,327.09	20131259	FMIF indemnity	3,109.60	DEFERRED	-	-	DEFERRED
Russells	23-Dec-14	B20191	\$ 23,563.49	\$ 21,421.35	\$ 2,142.14	\$ -	\$ 23,563.49	20140653	Remuneration claim	-	Nil	-	2,142.14	-
Russells	22-Dec-14	B20178	\$ 6,863.52	\$ 6,285.02	\$ 628.50	\$ 2,640.00	\$ 4,223.52	20141556	Remuneration of receiver. Reduction of costs assessment applied to this invoice. \$50 deducted.	-	Nil	-	6,285.02	-
Russells	30-Apr-15	B21563	\$ 7,200.64	\$ 6,546.04	\$ 654.60	\$ -	\$ 7,200.64	20131545	Books and records. Reduction from costs assessment applied to this invoice. \$118 deducted (of total \$200 reduction) from FMIF allocation.	-	Nil	-	6,546.04	-
Russells	29-May-15	B21751	\$ 4,786.74	\$ 4,351.58	\$ 435.16	\$ -	\$ 4,786.74	20131545	Books and Records	-	Nil	-	435.16	-
Clayton Utz	29-May-15	B263377	\$ 10,650.20	\$ 9,682.00	\$ 968.20	\$ -	\$ 10,650.20	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	29-Jun-15	B22048	\$ 3,367.86	\$ 3,061.69	\$ 306.17	\$ -	\$ 3,367.86	20141556	Remuneration of Receiver	-	Nil	-	3,061.69	-
Russells	30-Jun-15	Cost of application	\$ 997.48	\$ 906.60	\$ 90.60	\$ 997.48	\$ -	20131545	Books and Records	-	Nil	-	906.60	-
Russells	30-Jun-15	B22024	\$ 8,579.32	\$ 7,799.38	\$ 779.94	\$ -	\$ 8,579.32	20131545	Books and Records	-	Nil	-	779.94	-
Russells	15-Jul-15	B22299	\$ 315.33	\$ 286.65	\$ 28.67	\$ -	\$ 315.33	20131268	Appeal from decision of Dutton J.	-	Nil	-	-	315.33
Russells	31-Jul-15	B22433	\$ 9,967.32	\$ 9,067.32	\$ 900.00	\$ -	\$ 9,967.32	20131545	Books and Records	-	Nil	-	-	9,967.32
Clayton Utz	31-Jul-15	B273098	\$ 15,285.05	\$ 13,895.50	\$ 1,389.55	\$ -	\$ 15,285.05	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	31-Aug-15	B22832	\$ 3,525.82	\$ 3,205.29	\$ 320.53	\$ -	\$ 3,525.82	20131545	Books and Records	-	Nil	-	-	3,525.82
Russells	Various	Various	\$ 20,578.33	\$ 18,707.57	\$ 1,870.76	\$ -	\$ 20,578.33	20150954	Costs Assessment - total invoices less settled Costs Order	-	Nil	-	-	20,578.33
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 9,068.68	\$ 8,244.25	\$ 824.43	\$ 9,068.68	\$ -	Disbursement	Cost of costs assessment - russells matter 20131268 (Appeal of decision from Dutton J.)	-	Nil	-	-	9,068.68
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 212.76	\$ 193.42	\$ 19.34	\$ 212.76	\$ -	Disbursement	Cost of costs assessment - russells matter 20131259	-	Nil	-	-	212.76
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,361.45	\$ 2,146.77	\$ 214.68	\$ 2,361.45	\$ -	Disbursement	Cost of costs assessment - russells matter 20131545 (99% to FMIF)	-	Nil	-	-	2,361.45
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,699.84	\$ 2,454.40	\$ 245.44	\$ 2,699.84	\$ -	Disbursement	Cost of costs assessment - russells matter 20140653	-	Nil	-	-	2,699.84
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 606.60	\$ 551.45	\$ 55.15	\$ 606.60	\$ -	Disbursement	Cost of costs assessment - russells matter 20140947 (Controllingship relationship)	-	Nil	-	-	606.60
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 399.21	\$ 362.92	\$ 36.29	\$ 399.21	\$ -	Disbursement	Cost of costs assessment - russells matter 20141556	-	Nil	-	-	399.21
Clayton Utz	31-Aug-15	B276572	\$ 30,805.23	\$ 28,004.75	\$ 2,800.48	\$ -	\$ 30,805.23	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Clayton Utz	30-Sep-15	B280734	\$ 11,254.65	\$ 10,231.50	\$ 1,023.15	\$ -	\$ 11,254.65	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	30-Sep-15	B23055	\$ 1,390.62	\$ 1,264.20	\$ 126.42	\$ -	\$ 1,390.62	20131545	Books and Records	-	Nil	-	-	1,390.62
Russells	30-Oct-15	B23460	\$ 4,646.14	\$ 4,223.76	\$ 422.38	\$ -	\$ 4,646.14	20131545	Books and Records	-	Nil	-	-	4,646.14
Clayton Utz	30-Oct-15	B284463	\$ 13,609.75	\$ 12,372.50	\$ 1,237.25	\$ -	\$ 13,609.75	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Arthur J Gallagher	02-Nov-15	B28543/289347	\$ 61,391.78	\$ 56,135.16	\$ 5,256.62	\$ 61,391.78	\$ -	PI Insurance	PI Insurance	-	Nil	-	-	61,391.78
Clayton Utz	27-Nov-15	B287238	\$ 17,397.05	\$ 15,815.50	\$ 1,581.55	\$ -	\$ 17,397.05	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	30-Nov-15	B23746	\$ 5,857.84	\$ 5,325.08	\$ 532.51	\$ -	\$ 5,857.84	20131545	Books and Records	-	Nil	-	-	5,857.84
Russells	21-Dec-15	B23916	\$ 2,371.86	\$ 2,156.24	\$ 215.62	\$ -	\$ 2,371.86	20141556	Remuneration of Receiver	-	Nil	-	215.62	-
Clayton Utz	24-Dec-15	B291981	\$ 6,365.15	\$ 5,786.50	\$ 578.65	\$ -	\$ 6,365.15	20143342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	29-Jan-16	B24316	\$ 1,920.42	\$ 1,745.84	\$ 174.58	\$ -	\$ 1,920.42	20131259	FMIF indemnity	-	Nil	-	-	1,920.42
<b>Total</b>			\$ 375,499.78	\$ 347,003.83	\$ 28,495.94	\$ 110,928.49	\$ 264,571.29			\$ 5,473.59	\$ 93,449.85	\$ 8,495.44	\$ 84,954.41	\$ 169,243.26

**From:** John Somerville [mailto:John.Somerville@bdo.com.au]  
**Sent:** Wednesday, 27 April 2016 1:07 PM  
**To:** Park, John  
**Cc:** David Whyte  
**Subject:** LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)

Dear John

Please refer to the attached correspondence.

Regards

John

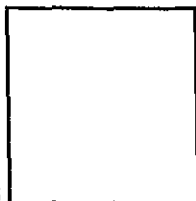
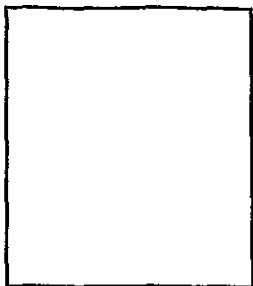
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Via email: john.park@fticonsulting.com

John Park  
FTI Consulting  
22 Market Street  
BRISBANE QLD 4000

27 April 2016

Dear Mr Park

**LM FIRST MORTGAGE INCOME FUND  
(RECEIVERS AND MANAGERS APPOINTED)(RECEIVER APPOINTED) (FMIF)**

I refer to my letter dated 22 April 2016 in relation to my determination of your claim for indemnity from the property of the FMIF. In accordance with Jackson J's Order of 17 December 2015, I provide below my reasons for rejection of your claims as summarised in the enclosed schedule.

**Costs of the appeal from Dalton J**

I have rejected the following claims:

- Russells invoice 17294 for \$25,476.94;
- Mr Sheahan's invoice 1042 for \$4,950.00;
- Russells invoice 22290 for \$315.33; and
- Mr Hartwell's assessment fees of \$9,068.68.

My reasons for rejecting these claims are the same as the reasons I provided to you by letter of 21 April, 2016 from Gadens to Russells in respect of the broader claim for appeal costs which was handled by Gadens. A copy of Gadens letter of 21 April 2016 is enclosed for your ease of reference.

**Costs of the MIF indemnity**

I have rejected the claims evident in the following Russells invoices:

- 17488 for a reduced sum of \$1,265.01;
- 18884 for \$566.48; and
- 24316 for \$1,920.42.

My reasons for rejecting these claims are I do not consider that the work recorded in these invoices falls within the indemnity provided by clause 18.5 of the FMIF Constitution. The work relating to these invoices appear to be concerned with the personal interests of the liquidators in terms of steps which may be taken to seek an indemnity for legal costs from the FMIF rather than with the performance of a duty owed by the responsible entity to the FMIF.

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**Costs of books and records**

I have rejected the claims evident in the following Russells invoices:

- 18603, for an amount of \$92.69;
- 22433, the reduced claim for which was \$9,967.32;
- 22832, the reduced claim for which was \$3,525.82;
- 23055, the reduced claim for which was \$1,390.68;
- 23460, the reduced claim for which was \$4,646.14; and
- 23746, the reduced claim for which was \$5,587.84.

My reasons concerning invoice 18603 are that there appears to be an error in the calculation of the adjusted amount sought as set out in Russells letter of 24 March 2016 of \$926.35 (exclusive of GST). The correct amount of the adjusted claim should be \$926.29 (inclusive of GST).

My reasons for rejecting the claims in the other invoices are as follows:

- (i) The work reflected is largely in relation to dealings with ASIC about the use, or the proposed use, of LMIM documents in the proceedings against the former directors. Those proceedings, however, arise from matters to do with the LM Managed Performance Fund.
- (ii) I do not consider that this work, or the work involving references to a public examination of Mr Monaghan, represents or relates to the performance by the responsible entity of the FMIF of a duty for the FMIF.
- (iii) So far as the percentage allocation is concerned, I do not consider that there is any particular reason for applying the figure of 59% appearing in Jackson J's order (and increased) in respect of the final five invoices mentioned above, which post-date that order. I note that the difficulties stemming from the intermingling of the books and records were largely removed following the provision of copies of the database administered by LMA in March, 2015.

**Whyte remuneration application**

I have rejected:

- the claim in invoice 18824, to the extent of \$9,750 (incl GST);
- the claim in invoice 20191, to the extent of \$2,200 (being Mr Jennings' fees).

My reasons for the rejection of these claims are based on the order of Atkinson J of 31 July, 2014, in which she ordered that you pay my costs of my application of 24 July, 2014.

I consider that the effect of this order was to remove any entitlement of the responsible entity to recover its costs and expenses of dealing with my application of 24 July, 2014.

Accordingly, I have rejected the claim for Mr Jennings' fees of \$2,200, because his work was to do with my application of 24 July, 2014 and the appearance before Atkinson J.

Similarly, an examination of the work recorded in invoice 18824 shows that charges of \$9,750 (incl. GST) relate to work that was to do with my application of 24 July, 2014, the appearance before Atkinson J and the subsequent finalisation of Her Honour's order.

#### **Hartwell assessments and fees**

I have rejected the claims evident in the following Russells invoices:

- no. 22835 for \$7,826.96;
- no. 23062 for \$3,506.23;
- no. 23465 for \$10,000.83;
- no. 23749 for \$16,176.44; and
- no. 23944 for \$1,067.91.

and reduced to \$20,578.37 after allowing for payment of an agreed sum of \$18,000 for awarded costs.

I have also rejected the claims for Mr Hartwell's fees of \$399.21, \$606.60, \$2,699.84, \$2,361.45 and \$212.76.

My reasons for rejecting these claims are as follows.

Your counsel informed Jackson J that the amounts assessed by Mr Hartwell would not be binding upon me. They would, at best, be persuasive evidence.

Your counsel also made clear to Jackson J, in written submissions, that the application before His Honour concerned only "the reasonableness and the quantum of costs payable by LMIM to its own lawyers". I believe that to be the context in which His Honour's remarks about the prudence of engaging Mr Hartwell's services are to be considered, which I have done.

The proceedings, in my view, were wholly to do with resolving matters as between LMIM and its own lawyers; and so not related to the performance by the responsible entity of the FMIF of a duty in that capacity.

Further, the court awarded costs on the standard basis, and a suggestion by your counsel that costs be on the indemnity basis was rejected by the judge. This is an additional factor in my decision to reject the claim.

#### **Professional Indemnity Insurance**

I have rejected the claims evident in:

- LMIM invoice 8974inv39;
- the Arthur J Gallagher (2) Pty Ltd statement of account as at 2 November, 2015;
- the Arthur J Gallagher (2) Pty Ltd invoices 2895543 (for \$55,050) and 289547 (for \$25,075).

My reasons for rejecting these claims are as follows.

I note that the schedules of insurance accompanying each of the Gallagher invoices:

- describe the cover as professional indemnity insurance,
- name the "Insured" as LMA, LMIM, Mr Park and Ms Muller,
- describe the risk insured as indemnifying the Insured against civil liability incurred in connection with the "Professional Business" arising from a claim first made during the cover period in respect of the Insured's conduct of the Professional Business, and
- define the "Professional Business" as Manager & Loan Administrator of various Funds, and Management & Loan Administration of various Funds,

I do not consider that any of LMA, LMIM, Mr Park and Ms Muller was carrying on, or could fairly and properly be regarded as carrying on, the defined "Professional Business" so far as concerns the FMIF in November, 2015 or any reasonably proximate earlier time.

It follows, in my view, that none of the amount claimed is an expenditure incurred in, or in relation to, the performance by the responsible entity of the FMIF of such a duty.

Further, I see no good reason why the figure 76.62%, which was adopted in connection with aspects of the books and records matter, should govern the apportionment of this insurance expense, should any of that expense be borne by the FMIF.

I note that the broker's advice to obtain the cover is said to be confidential and, for that reason, has not been provided. If you are able to obtain the broker's agreement to provide a copy of the advice, I would be willing to reconsider the claim, although I cannot, and do not, give any assurance that consideration of that advice will lead to a different decision.

Yours faithfully



David Whyte  
Receiver



LM First Mortgage Income Fund  
Indemnity Claim

Consolidant	Invoice Date	Invoice Number	Total amount	GST Exc	GST	Amount date by LHM - "Recognition Indemnity Claim"	Amount Outstanding - "Administration Indemnity Claim"	Matter Number	Notes	Reduced Claim	Accepted	Less GST	Amount Payable	Rejected
Russells	10-Mar-14	B17294	\$ 25,476.94	\$ 23,169.85	\$ 2,316.09	\$ 25,476.94	\$ -	20131268	Applied for recognition of indemnity - Reduced for double claim of disbursement invoice 973 John C Shedden		Nil	-	-	25,476.94
Russells	28-Mar-14	B17488	\$ 1,385.35	\$ 1,341.68	\$ 43.67	\$ 1,385.35	\$ 1,237.95	20131259	FMF indemnity	2,365.01	Nil	-	-	1,385.35
Russells	29-May-14	B18011	\$ 774.48	\$ 704.07	\$ 70.41	\$ 774.48	\$ -	20131545	Books and Records	704.07	774.48	-	-	774.48
Russells	05-Jun-14	B18111	\$ 12,848.43	\$ 11,680.43	\$ 1,168.00	\$ 12,848.43	\$ -	20140653	Remuneration claim	1,168.04	12,848.43	-	-	12,848.43
Russells	25-Jun-14	B18258	\$ 3,309.00	\$ 3,000.00	\$ 300.00	\$ 3,309.00	\$ -	20140653	Remuneration claim	300.00	3,309.00	-	-	3,309.00
Russells	18-Jul-14	B18535	\$ 1,136.11	\$ 2,899.22	\$ 288.89	\$ 1,136.11	\$ -	20140653	Remuneration claim	288.89	1,136.11	-	-	1,136.11
Russells	28-Jul-14	B18603	\$ 4,810.64	\$ 4,371.33	\$ 439.31	\$ 4,810.64	\$ -	20140653	Books and Records	439.31	4,810.64	-	-	4,810.64
Russells	20-Aug-14	B18824	\$ 26,683.63	\$ 24,259.60	\$ 2,424.03	\$ 26,683.63	\$ -	20140653	Remuneration claim	2,424.03	26,683.63	-	-	26,683.63
Russells	28-Aug-14	B18884	\$ 560.48	\$ 514.98	\$ 45.50	\$ 560.48	\$ -	20131259	FMF indemnity	45.50	560.48	-	-	560.48
Russells	11-Sep-14	B19442	\$ 4,950.00	\$ 4,500.00	\$ 450.00	\$ 4,950.00	\$ -	20131259	Appeal from decision of Dalton J.	450.00	4,950.00	-	-	4,950.00
Russells	29-Sep-14	B19396	\$ 3,327.09	\$ 3,024.63	\$ 302.46	\$ 3,327.09	\$ -	20131259	FMF indemnity	302.46	3,327.09	-	-	3,327.09
Russells	22-Dec-14	B20191	\$ 23,563.49	\$ 21,421.35	\$ 2,142.14	\$ 23,563.49	\$ -	20140653	Remuneration claim	2,142.14	23,563.49	-	-	23,563.49
Russells	22-Dec-14	B20178	\$ 6,863.52	\$ 6,285.02	\$ 578.50	\$ 6,863.52	\$ -	20141556	Remuneration of receiver, Reduction of costs assessment applied to this invoice, \$50 deducted.	578.50	6,863.52	-	-	6,863.52
Russells	30-Apr-15	B21563	\$ 2,200.64	\$ 2,046.04	\$ 154.60	\$ 2,200.64	\$ -	20131545	Books and Records	154.60	2,200.64	-	-	2,200.64
Russells	29-May-15	B21731	\$ 4,786.94	\$ 4,351.58	\$ 435.36	\$ 4,786.94	\$ -	20131545	Books and Records	435.36	4,786.94	-	-	4,786.94
Clayton Uitz	29-May-15	B22348	\$ 10,630.20	\$ 9,862.00	\$ 768.20	\$ 10,630.20	\$ -	20131545	Insurance scheme costs	768.20	10,630.20	-	-	10,630.20
Russells	30-Jun-15	B22348	\$ 997.48	\$ 917.48	\$ 80.00	\$ 997.48	\$ -	20131545	Remuneration of Receiver	80.00	997.48	-	-	997.48
Russells	30-Jun-15	B22024	\$ 8,579.32	\$ 7,799.38	\$ 779.94	\$ 8,579.32	\$ -	20131545	Books and Records	779.94	8,579.32	-	-	8,579.32
Russells	30-Jun-15	B22299	\$ 315.33	\$ 286.66	\$ 28.67	\$ 315.33	\$ -	20131545	Books and Records	28.67	315.33	-	-	315.33
Russells	15-Jul-15	B22433	\$ 9,967.32	\$ 9,061.20	\$ 906.12	\$ 9,967.32	\$ -	20131545	Appeal from decision of Dalton J.	906.12	9,967.32	-	-	9,967.32
Clayton Uitz	31-Jul-15	B23098	\$ 15,285.05	\$ 13,895.50	\$ 1,389.55	\$ 15,285.05	\$ -	20141342	Insurance scheme costs	1,389.55	15,285.05	-	-	15,285.05
Russells	31-Aug-15	B23832	\$ 3,525.82	\$ 3,205.29	\$ 320.53	\$ 3,525.82	\$ -	20131545	Books and Records	320.53	3,525.82	-	-	3,525.82
Russells	Various	Various	\$ 20,578.33	\$ 18,707.57	\$ 1,870.76	\$ 20,578.33	\$ -	20150959	Costs Assessment - Final invoices for Certified Cost Order	1,870.76	20,578.33	-	-	20,578.33
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 9,068.68	\$ 8,244.25	\$ 824.43	\$ 9,068.68	\$ -	Disbursement	Cost of costs assessment - Russell's from Dalton J. (Appel de decision from Dalton J.)	824.43	9,068.68	-	-	9,068.68
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 212.76	\$ 193.42	\$ 19.34	\$ 212.76	\$ -	Disbursement	Cost of costs assessment - Russell's from Dalton J. (Appel de decision from Dalton J.)	19.34	212.76	-	-	212.76
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,361.45	\$ 2,146.77	\$ 214.68	\$ 2,361.45	\$ -	Disbursement	Cost of costs assessment - Russell's from Dalton J. (Appel de decision from Dalton J.)	214.68	2,361.45	-	-	2,361.45
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,699.84	\$ 2,454.40	\$ 245.44	\$ 2,699.84	\$ -	Disbursement	Cost of costs assessment - Russell's from Dalton J. (Appel de decision from Dalton J.)	245.44	2,699.84	-	-	2,699.84
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 606.60	\$ 551.45	\$ 55.15	\$ 606.60	\$ -	Disbursement	Cost of costs assessment - Russell's from Dalton J. (Appel de decision from Dalton J.)	55.15	606.60	-	-	606.60
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 399.21	\$ 362.92	\$ 36.29	\$ 399.21	\$ -	Disbursement	Cost of costs assessment - Russell's from Dalton J. (Appel de decision from Dalton J.)	36.29	399.21	-	-	399.21
Clayton Uitz	31-Aug-15	B216572	\$ 30,805.23	\$ 28,006.75	\$ 2,798.48	\$ 30,805.23	\$ -	20141342	Insurance scheme costs	2,798.48	30,805.23	-	-	30,805.23
Clayton Uitz	30-Sep-15	B230734	\$ 11,254.65	\$ 10,231.50	\$ 1,023.15	\$ 11,254.65	\$ -	20131545	Insurance scheme costs	1,023.15	11,254.65	-	-	11,254.65
Russells	30-Sep-15	B23055	\$ 1,300.62	\$ 1,266.20	\$ 34.42	\$ 1,300.62	\$ -	20131545	Books and Records	34.42	1,300.62	-	-	1,300.62
Russells	30-Oct-15	B23060	\$ 4,066.14	\$ 3,732.76	\$ 333.38	\$ 4,066.14	\$ -	20131545	Books and Records	333.38	4,066.14	-	-	4,066.14
Clayton Uitz	30-Oct-15	B234403	\$ 13,609.75	\$ 12,372.80	\$ 1,236.95	\$ 13,609.75	\$ -	20131545	Insurance scheme costs	1,236.95	13,609.75	-	-	13,609.75
Arthur J. Gallagher	02-Nov-15	B23543/289547	\$ 61,391.78	\$ 55,151.16	\$ 6,240.62	\$ 61,391.78	\$ -	20131545	Insurance scheme costs	6,240.62	61,391.78	-	-	61,391.78
Clayton Uitz	30-Nov-15	B237238	\$ 17,337.09	\$ 15,815.50	\$ 1,521.59	\$ 17,337.09	\$ -	20131545	Insurance scheme costs	1,521.59	17,337.09	-	-	17,337.09
Russells	30-Nov-15	B237466	\$ 5,857.84	\$ 5,325.08	\$ 532.76	\$ 5,857.84	\$ -	20131545	Books and Records	532.76	5,857.84	-	-	5,857.84
Russells	21-Dec-15	B23946	\$ 2,371.86	\$ 2,156.24	\$ 215.62	\$ 2,371.86	\$ -	20141556	Remuneration of Receiver	215.62	2,371.86	-	-	2,371.86
Clayton Uitz	26-Dec-15	B240181	\$ 6,465.15	\$ 5,780.30	\$ 684.85	\$ 6,465.15	\$ -	20141556	Insurance scheme costs	684.85	6,465.15	-	-	6,465.15
Russells	29-Jan-16	B24318	\$ 1,920.42	\$ 1,745.84	\$ 174.58	\$ 1,920.42	\$ -	20131545	FMF indemnity	174.58	1,920.42	-	-	1,920.42
Total			\$ 575,499.78	\$ 514,003.83	\$ 61,495.95	\$ 575,499.78	\$ -							

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11 May 2016

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Dear Colleagues

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

We refer to your recent correspondence about the payment of the sum of \$84,954.41, the amount of indemnity claims accepted by our client.

There are, as our client has said in recent affidavits and in submissions made on his behalf during the March, 2016 hearing before Justice Jackson, serious questions about the propriety and reasonableness of a number of payments which LMIM caused the FMIF to make to LMA for "loan management fees" in the March-July 2013 period.

The payments in question amount to just under \$1 million and are:

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

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

We expect that His Honour's reasons for judgment, when delivered, will clarify whether the making of these payments calls for the application of the "clear accounts" rule, and, consequently, our client suggests that any payment from the FMIF in respect of the indemnity claim be deferred until after due consideration of those reasons for judgment, *vis a vis* the loan management fees.

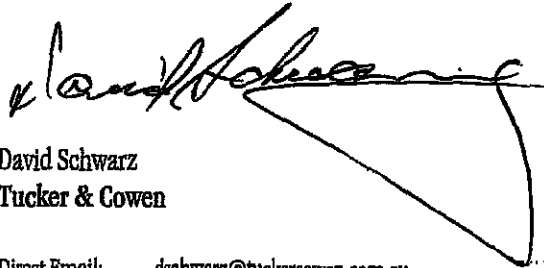
11 May 2016

There also falls for consideration an amount of \$779,266 which LMIM has owed to FMIF since 2014. The details are set out in BDO's letter to FTI of 11 May, 2016, a copy of which is enclosed.

That debt arose in connection with arrangements in place in 2014 pursuant to which Mr Clout, as liquidator of LMA, kept LMA's office open and kept some LMA staff in employment for the purpose of dealing with requests for information and copies of documents relating to the affairs of LMIM and the various funds in the LM Group.

The debt represents LMIM's unpaid share of sums paid to Mr Clout by the FMIF. It would appear to raise a reasonably clear claim available for set-off against the amount of the accepted indemnity claims, to the extent necessary to extinguish them, and it furnishes at least a further reason for the deferral suggested above.

Yours faithfully



David Schwarz  
Tucker & Cowen

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# RUSSELLS

11 May, 2016

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

**URGENT**

Tucker & Cowen  
Solicitors  
**BRISBANE**

**email: dschwarz@tuckercowen.com.au**

Dear Colleagues

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

We refer to your letter dated 11 May, 2016.

Whilst we have not yet, given the passage of time, obtained full instructions on the issues which your correspondence raises, we believe a high level response this evening to be appropriate given the course which your client has adopted (as outlined in your letter), the inevitable steps which our clients must take and what will therefore likely follow in terms of potentially wasted court time and members' funds, not to mention the impact on all concerned in the eyes of the public, the Court and the insolvency and legal professions generally.

We would hope, given the seriousness of what has been alleged and what must have been anticipated would be the steps our clients would be forced to take (not of choice but by necessity to obtain payment of monies due), that with the benefit of mature reflection and following invitation, your client might reassess the course he has chosen to adopt.

The contents of that correspondence are unfortunate and, in our view, raise serious allegations of personal misconduct against our clients. Your client has made a conscious choice, no doubt based on your advice, to promulgate the position advanced in your letter.

Such allegations ought not be made lightly or without a proper foundation.

The purpose of this letter is to set out why our clients consider the allegations to be so serious and to give your client an opportunity to reconsider the course upon which he apparently intends to embark. It is the only such opportunity which our clients intend to provide your client.

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### The Relevant Principles

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

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

The matters in respect of which your client now belatedly complains (and, we might say, following numerous invitations over many months to inform our client of any circumstances which may impact upon the payment of their remuneration and expenses) are not the same matters in respect of which our clients claim a right to be indemnified. It follows that our clients have a *prima facie* right under the trust instrument to a full indemnity and your client must therefore contend that equity's conscience prohibits our clients from exercising their right of indemnity.

Your client accepts that the claimed expenses themselves were properly incurred for the purposes of the FMIF.

By seeking to invoke the clear accounts rule, your client must be contending that because of the 'loan management fees' (the factual circumstances of which we shall shortly address), our clients have breached their duties as trustee and caused loss or damage to the FMIF. However, clause 19.1(a) of the constitution of the FMIF provides:-

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

- i. otherwise than in accordance with this Constitution and its duties; and*
- ii. without a belief held in good faith that it was acting in accordance with this Constitution or its duties..."*

It follows that your client must be alleging bad faith on our clients' part. Mr Park has deposed to the fact that he and Ms Muller took legal advice in respect of the transactions of which Mr Whyte complains and that he and Ms Muller caused the transactions to occur.

Moreover, it is well established that not every breach of trust amounts to conduct for which the trustee will have to reimburse the trust or which has the effect of delaying or defeating the trustee's right of indemnity. That is particularly so in this case, where the trust instrument contains such strong protection for the trustee. This leaves to the side for present purposes whether Mr Park and Ms Muller personally possess a right of indemnity against the trust assets of the FMIF for their remuneration and expenses.

In short, the allegations raised by your client are of a most serious kind. Our clients have no choice but to treat them as allegations of *mala fides* against them personally.

Given the nature of the allegations, they ought to be put with appropriate precision. If your client will not resile from the position, he ought to let our clients know each and every particular of the allegations raised against them (which your letter does not do nor did any submissions made in Court, nor any earlier correspondence) and why that conduct disentitles them from exercising

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their right of indemnity for expenses which your client accepts were properly incurred. We will insist on those matters, including the basis for our clients' alleged bad faith, being positively proven in Court to the requisite degree; your client's usual affidavits raising concerns and uncertainties will not suffice.

The Factual Circumstances

Your correspondence contends that your client has raised "...serious questions about the propriety ... of a number of payments..." We assume such an assertion must refer to earlier pieces of correspondence or submissions made in Court.

However, your client has never raised the propriety of the transactions in the sense which that issue is now pressed. Your client's submissions before Jackson J were to the effect that, in deciding the question of the reasonableness of our clients' remuneration, these transactions were a potentially relevant consideration. We are unaware of any correspondence either between solicitors or directly between our respective clients which addresses those matters raised in your correspondence of this afternoon. If you suggest otherwise please point us to the precise piece of correspondence or submission (by transcript reference or paragraph of an outline of submissions).

In affidavits upon which he was not cross-examined, Mr Park swore that:-

1. he took legal advice about the transactions (paragraphs 63 and 64(a) of Mr Park's affidavit sworn 8 March, 2016);
2. in the period immediately following his and Ms Muller's appointment, it was not clear to him what the actual operational costs of LMIM and LMA were (paragraph 35 of Mr Park's affidavit sworn 22 February, 2016); and
3. his intention in causing those transactions to occur (and in his belief, the effect of those transactions) was to provide an independent income stream to LMA, under pre-existing contractual arrangements, during the period of the administration (paragraph 63 of Mr Park's affidavit sworn 8 March, 2016).

In light of that unchallenged evidence, we do not see how your client (or your firm) has a proper basis for the serious allegations which you have raised in your correspondence.

The fact that:-

- (a) the issues which your client now wishes to raise were not before Justice Jackson in our clients' remuneration approval application (let alone fully argued); and
- (b) Justice Jackson's decision in that matter could not amount to a definitive determination of the underlying issues,

should be sufficient to deal with your suggestion that his Honour's reasons in the reserved judgment will impact upon the asserted basis for your client's position and hence our clients should agree to delay receipt of funds due to them to permit your client to reconsider his decision following the delivery of his Honour's reasons.

Perhaps your client's 'newly' articulated position was the reasoning behind his opposition to a payment order in favour of our clients being made in the regime

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fashioned by the orders of 17 December, 2015. It is worth casting your Mr Schwarz's mind back to discussions then held with our Mr Tiplady, that when Mr Tiplady directly questioned whether the resistance to a payment order being made was so that some disentitling conduct may be subsequently raised to defeat payment being made to our clients, Mr Tiplady was assured that was not the case. One might now view that assurance in a different light given that Mr Whyte's attitude to payment being made to our clients can hardly be something that has only just now been formulated.

Application

We have a number of serious concerns about the manner and timing by which your client has raised the issues contained in your letter, given:-

1. the fact that your client is only just now, and despite having ample opportunity over the course of several years to raise his concerns (and invitations to do so), contending that these transactions amount to a serious breach of trust;
2. that your client did not raise these concerns when considering whether LMIM ought to be indemnified from the assets of the FMIF in paying your firm's own costs in respect of Mr Shotton's appearance in the Court of Appeal proceedings.

That said, we will take instructions about the matters raised in your letter. We anticipate our instructions will be to press the application which was sent to you today and fully ventilate those issues. We intend to include this correspondence and your client's reply in the material to be put before the Court.

There should be no misunderstanding about how our clients view your client's contentions and their consequences.

The allegations are that our clients have personally engaged in conduct characterised as a serious breach of trust or involving bad faith. That conclusion is unavoidable on the basis of the matters raised in your letter.

The allegations should be immediately withdrawn and the sum which your client accepts was properly incurred in the course of our clients acting for the benefit of the FMIF should be paid immediately.

So that your client is on fair notice at the earliest possible opportunity, if he presses the claims in your letter and is unsuccessful, our clients will seek an order that he personally pay the costs of the necessary application on a full indemnity basis and potentially also that your firm be jointly liable for those costs (as it must be on your advice that these positions are being advanced).

A reply to the effect that we have misunderstood the matters raised in your correspondence and the allegations are not serious or personal will not suffice. They clearly have that character. Your client, for reasons of his own, seems determined to take every possible step to ensure that our clients are not paid a cent of what they are owed. In light of the millions of dollars he has paid as expenses to other third parties and the vigorous resistance to paying our clients any sum at all, even those he admits are proper, no alternative conclusion can be drawn.

Our clients will not offer your client another opportunity to resile from the course he now seeks to adopt and the steps which must surely follow given the position in which our clients have been placed.

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The allegations ought properly be withdrawn immediately and we invite Mr Whyte to do so by return.

Yours faithfully



**Ashley Tiplady**  
*Partner*

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Our reference: Mr Schwarz / Mr Hancock

13 May 2016

Your reference: Mr Tiplady / Mr Sean Russell

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Dear Colleagues

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

We refer to your letter of 11 May 2016, received at approximately 9pm.

There is much in your letter with which we, and our client, take issue. We intend to respond further to your correspondence, but given your request for a prompt response, and your clients' threatened application, we are instructed to provide the following response for the time being.

First, it should be noted that, by our correspondence of 11 May 2016, our client:-

1. observed that there is a substantial amount outstanding by LMIM (both in its own capacity and as trustee or responsible entity of other funds) to the FMIF<sup>1</sup> in relation to the arrangement struck with LMA during the period in which Mr Clout was liquidator of the company and in which LMA was providing resources for the benefit of the funds and various insolvency practitioners appointed to them; and
2. noted that the concerns raised by our client in connection with the LMA loan management fees that had been paid by LMIM from FMIF property to LMA during the period from March to July 2013, had been raised before Justice Jackson on the hearing of your clients' application for remuneration to be paid out of the assets of the FMIF, and that the "clear accounts" rule might operate – again, a matter that was raised before Justice Jackson.

Accordingly, our client proposed the deferral of further consideration of payment to your clients until after delivery of the decision by His Honour in respect of your clients' application, given the likelihood His Honour would give some consideration to the matters mentioned in paragraph 2 and any reasons for His Honour's decision may provide some guidance in relation to these issues.

To the extent to which your correspondence seeks to characterise our letter as doing more than that, we (and our client) reject the suggestion.

<sup>1</sup> We use this short-hand term for convenience; LMIM is liable to restore this amount to the property of the FMIF

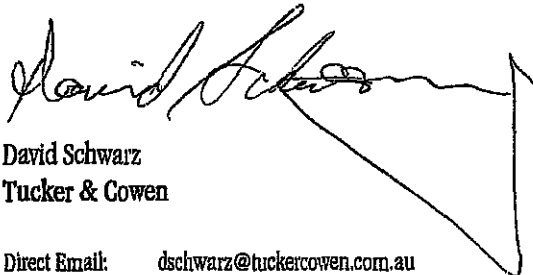
13 May 2016

Your clients have threatened an application to the Court for Orders requiring our client to pay immediately the amount of the indemnity claims that have been accepted by our client, and notified by our client's letter to Mr Park dated 22 April, 2016. The costs of such an Application (for both parties) would no doubt be significant. The amount in question is less than \$100,000. Given that the amount relates to expenses incurred in 2014 and in the period up to about June 2015 (for the most part) it is difficult to understand why your clients consider that a deferral until after delivery of the decision of Justice Jackson would constitute an excessive delay, such that the cost of such an Application would be warranted.

Nonetheless, we are instructed that our client takes the view that it would not be in the interests of the members of the FMIF to expend substantial sums in engaging in a dispute about an amount of less than \$100,000. Accordingly, without any admission or concession by our client, we are instructed that our client intends to procure payment of the amount accepted by our client and notified by his letter of 22 April, 2016 addressed to Mr Park; this amount is \$84,954.41 as was identified in your emails of 27 April and 4 May, 2016, since we understand that your clients have already claimed an input tax credit for the amount of the GST, and it is for that reason that the amount of GST was deducted in our client's schedule which was enclosed with his letter to Mr Park.

Please note that, while our client intends to cause the abovementioned amount to be paid, your clients should not take that payment as any indication whatsoever as to the view that our client may take in the future as to claims made by your clients, or as to whether it is appropriate that payments be made in respect of indemnity claims at a particular time. Our client's rights in that regard are reserved.

Yours faithfully



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# RUSSELLS

25 May, 2016

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

Tucker & Cowen  
Solicitors  
**BRISBANE**

email: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)

Dear Colleagues

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

We refer to the order of Justice Jackson dated 17 December, 2015 ("the Order").

Please find enclosed, by way of service and pursuant to paragraph 9(a) of the Order, an application regarding your client's rejection of certain claims for indemnity out of the assets of the FMIF.

Before commenting on the substance of the application with a view to your client having time to reconsider his position, we believe that the logistical arrangements for the application ought to be simple, and therefore, agreed in advance. To that end, we propose to list the matter before Justice Jackson by writing to his Honour's Associate and seeking the following directions:-

1. our clients are to file any affidavit material upon which they intend to rely by 3 June, 2016;
2. your client file any affidavit material upon which he intends to rely by 17 June, 2016;
3. our clients file any affidavit material in reply and the parties exchange written outlines of submissions by 24 June, 2016; and
4. the matter be listed for hearing before his Honour on 27 June, 2016 (or shortly thereafter as convenient to his Honour).

Would you please let us know your client's attitude to this course. Our clients' counsel has limited availability in the next few weeks and prior to August, so it is our clients' preference for the hearing to be held on 27 June, 2016 (or there about).

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We are hopeful that, with further mature reflection and the benefit of specific advice, your client will reconsider his position in respect of the rejected claims.

We set out our client's position on the broad categories of claim below.

### **Costs of the appeal from the decision of Justice Dalton**

The reasons for our clients' claim in respect of the costs of the appeal in the proceeding in which your client was appointed have been well canvassed in our previous letters to your client's other solicitors, Gadens, in correspondence dated 10 February, 2016 and 11 March, 2016. We do not propose to revisit the matters set out therein.

Your client contends that the adverse findings which were made by Dalton J (of which he says "many were upheld on appeal"), combined with the order that LMIM only have 20% of its costs of the proceedings below means that it is premature to determine whether there ought to be a full indemnity for the appeal costs. Your client says further that he made submissions to Jackson J in the remuneration application to the effect that our client's remuneration for the proceedings ought to be limited to 20%, as were their legal costs. Accordingly, so the argument goes, the expenses should follow the same logic.

We refer to paragraphs 107 and 108 of the Court of Appeal judgment, which, critically, set aside the finding that the administrators were acting in their own interests rather than in the members' interests. Similarly, at paragraph 11 the finding that Ms Muller's affidavit of evidence was unprofessionally robust and partisan was set aside. In paragraph 114 the inference drawn by the primary judge that the administrators conducted the litigation in a combative and partisan way which was reflective of the administrators acting in their own interests was found to be not open on the evidence. We also refer to paragraphs 115, 116, 121 and 129. Essentially, the Court of Appeal set aside all of the findings of Dalton J criticising the administrators' conduct of the litigation itself. That said, our clients do not intend to retread upon old ground. The relevant point to note is that the conduct within the litigation was proper and, given the deficiencies with the present regime of "dual appointments", it was obviously an attempt to benefit the FMIF.

This category of costs ought to be accepted because:-

1. your client has already accepted that LMIM's right of indemnity extends to the subject matter of the appeal because he has paid your firm's costs, in respect of Mr Shotton's involvement in the appeal. It is difficult to conceive of a situation where a party's adverse costs order would be indemnified but their own costs would not, in the absence of a specific order to that effect; and
2. the findings regarding the remuneration, while emanating from the same factual substratum, will ultimately be irrelevant because the challenge to remuneration largely relates to the conduct of the proceedings before Dalton J, whereas this claim concerns the appeal, the probity of which has never been questioned. In any event, there is a difference between remuneration and expenses. There is no reason to wait for the remuneration decision.

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### **Costs of the MIF Indemnity**

Your client has rejected the sum of \$3,751.91 claimed for the legal costs of calculating and pursuing LMIM's right of indemnity. He says those claims concern "the personal interests of the liquidators."

The costs of calculating and enforcing a trustee's right of indemnity form part of that right of indemnity: *Alphena Pty Ltd (in liq) v PS Securities Ltd* (2013) 94 ACSR 160 at 169-170 per Kunc J. The claim should be accepted.

### **Costs of books and records**

The principal challenge laid by your client in respect of the costs claimed for the "books and records" issue relate to the liquidators' role in the ASIC's civil prosecution of the directors in the Federal Court. As with the other books and records claims (which have been accepted in substantial part), LMIM's role has been to protect the privilege of all Funds, including the FMIF. On that basis, a proportionate amount was sought from the FMIF.

A claim on a similar basis was withdrawn where the search terms the subject of the disclosure exercise necessarily limited the documents likely to respond to documents related to the MPF (that is, all the search terms included 'Maddison Estate' in combination with other terms which, in all probability, could only return MPF documents).

That is not the case in the Federal Court proceedings; the search terms are much wider. In particular, while the proceeding itself relates primarily to the directors' conduct in respect of the MPF, the search terms include:-

- entries where the FMIF is specifically mentioned (e.g. Item 4 in Table A to the Discovery Plan in the Federal Court);
- entries where no fund is specifically mentioned (e.g. Item 10 in Table A to the Discovery Plan in the Federal Court) but the business of the funds generally may be included in the results; and
- entries focussed on the directors generally where no fund is specifically mentioned (e.g. Items 12 and 13 in Table A to the Discovery Plan in the Federal Court).

In those circumstances it was reasonable and necessary for the liquidators to involve themselves in those proceedings for the limited purpose of protecting the privilege of all of the LM Funds. In doing so, they have attempted to minimise costs by taking only those steps necessary to protect the interests of the funds and the confidentiality and privilege existing in the documents of the funds, including the FMIF. The claim should be accepted, at least subject to the issue of apportionment (which is an issue which our clients agree may be impacted by the reserved judgment of Jackson J in the remuneration application).

### **Your client's remuneration application**

Your client has rejected a sum of \$11,950.00 on the basis of a costs order of Atkinson J of 31 July, 2014 in which LMIM was ordered to pay Mr Whyte's costs associated with the application heard on that day. Your client contends the effect of that order was to remove any entitlement that LMIM recover its own costs and expenses from the FMIF, at least subject to the issue of apportionment (which is an issue which our clients agree may be impacted by the reserved judgment of Jackson J in the remuneration application).

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It is not immediately apparent to us that is the position at law. If your client has authority supporting the rejection would you please let us know.

Otherwise, would you please let us know whether your client paid your firm's costs of his application filed on 16 September, 2015 in proceeding 3383 of 2015 from the assets of the FMIF, in the face of Justice Jackson's costs orders of 20 October, 2015.

### **Hartwell assessment**

Your client has rejected the entirety of the claim for legal costs on Mr Hartwell's assessment (\$20,578.37, which figure includes the outstanding balance following the partial payment of our clients' costs by your client pursuant to a costs order relating to his failed application, as well as the work associated with advising our clients about the appointment of Mr Hartwell and effecting that appointment) as well as Mr Hartwell's fees for those invoices which were the subject of a claim against the FMIF (\$6,279.86).

It would seem as though your client is suggesting that a payment made pursuant to a costs order is exhaustive of all monies which your client, on behalf of the FMIF, is required to pay to our clients, including pursuant to any right of indemnity. Payment under a costs order and payment under a right of indemnity are separate heads through which relevant costs may be sought. A claim under LMIM's right of indemnity is plainly available to meet any shortfall arising despite payment pursuant to a costs order. If your client is aware of authority to the contrary please point us in that direction and our clients will more than happily reconsider their position

We have perused the receipts and payments prepared by your client. From those documents, it appears that, up to July, 2015 your firm has been paid nearly \$1.5 million and your client's other solicitors, Gadens, have been paid nearly \$500,000.00. We do not know what his legal costs in the ten months or so since July, 2015 have been, but presumably, consistent with his usual practice, he has paid those fees from the assets of the Fund without third party review.

In the circumstances, our clients' subjecting their fees to third party scrutiny prior to claiming on the indemnity out of the assets of the FMIF is entirely reasonable and consistent with acting in the best interests of the members of the FMIF. We have asked on many occasions whether your client's legal costs have been subject to the same scrutiny but have never received a response.

This claim should be accepted.

### **Professional Indemnity Insurance**

Your client has rejected the claim for our clients' premium for professional indemnity insurance in respect of LMIM for the period since their appointment on the basis that it does not relate to the performance by the responsible entity of tasks related to the FMIF. LMIM remains the responsible entity of the FMIF with certain functions which only it may undertake.

It may be that your client is not aware that the policy is a "claims made" policy. It therefore indemnifies LMIM and our clients against claims arising from the period prior to your client's appointment, at whatever time they are made. In the face of the allegations made in your letter dated 11 May, 2016, it would seem that the maintenance of the policy was a perfectly prudent step to take.

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Indeed, if your client intends to press the claim raised therein, cancellation of the policy could hardly be said to be in the interests of the members of the FMIF.

The claim ought to be accepted.

**Your letter of 11 May, 2016**


Would you please let us know if your client intends, in opposition to our clients' application (and leaving aside for the moment the reasons for rejecting the claims dealt with above) to press the matters raised in your letter of 11 May, 2016.

**Future Claims**

Our clients propose to hold off submitting any further Administration Indemnity Claims or Administration Recoupment Claims on the basis that those claims will very likely fall within existing categories. Would you please let us know if your client objects to that course. Our clients are minded to discuss with your client the timing of further such claims, perhaps every six months to minimise the costs to the FMIF members.

Would you please let us have a response to the matters raised herein at your earliest convenience with a view to refining the issues to be placed before the Court.

Yours faithfully



**Ashley Tiplady**  
*Partner*

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# RUSSELLS

9 June, 2016

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

Tucker & Cowen  
Solicitors  
**BRISBANE**

email: dschwarz@tuckercowen.com.au

Dear Colleagues

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

We refer to our letter dated 25 May, 2016 concerning our clients' application filed on 20 May, 2016 ("the Application"). We have not received a response to that correspondence other than an email from your Mr Ziebell indicating that your client's counsel would not be available for a substantive hearing during the week of 27 June, 2016.

Having discussed the matter with our clients' counsel, our clients propose to list the matter for directions on 28 June, 2016 (subject of course to the Court's availability). Since the matter will simply be listed for directions, we would hope that one of your client's counsel would be able to make themselves available. As we have said, our clients' counsel has significant unavailability during that period and our clients are concerned to ensure that the matter progresses as quickly as possible.

To assist with your client's consideration of the Application, our clients will not ask him to put on any material prior to the directions hearing. Indeed, so that your client can be properly informed of the issues, our clients will deliver their substantive material by 22 June, 2016.

We believe, in broad terms, that the following categories of expense for which our clients have sought indemnification from the FMIF will be in issue in the Application:-

1. LMIM's costs of the appeal from the decision of Dalton J;
2. LMIM's costs of dealing with the books and records in ASIC's prosecution of the directors of LMIM in the Federal Court;
3. the costs of the appearance before Atkinson J on 31 July, 2014 in your client's remuneration application;

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4. the costs of getting in, identifying and enforcing our clients' indemnity out of the assets of the FMIF;
  5. LMIM's expenses in appointing Mr Hartwell to have its legal fees assessed and the short fall arising from the costs order in dealing with your client's unsuccessful application to be declared a third party payer; and
  6. our clients' professional indemnity insurance premiums.

We have previously written to you on 24 March, 2016 and 24 May, 2016 outlining in some detail why our clients have taken the views which they have.

Would you please let us know if your client is prepared to concede any of those categories of claims or if there are any other issues which he believes ought to be raised on the Application. In particular, we invite your client to now articulate definitively whether he still wishes to press any reason (including by way of set-off or as a result of the operation of the "clear-accounts rule") why payment should not be made to our clients under LMIM's right of indemnity from the assets of the FMIF.

In the interest of transparency, our clients are quite cognisant that some of the amounts relevant to these issues are quite small. However, as we have pointed out, these claims for expenses are only up to 17 December, 2015. Subsequent expenses, for example in relation to the costs of calculating and enforcing the indemnity, have been incurred within the above categories of claim. Accordingly, our clients believe that, given your client's stated position on these matters, that court documentation is required so that issues are settled moving forward.

We look forward to receiving a response to this letter as soon as possible.

Yours faithfully



**Ashley Tiplady**  
*Partner*

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Mobile 0419 727 626  
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# 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]  
OCA 432, cited  
*West v Mead* (2003) 13 BPR 24,431; [2003] NSWSC 161, cited

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 No appearance for the first respondents  
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SOLICITORS: Russells for the appellant  
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 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."<sup>1</sup>
- [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.<sup>2</sup>
- [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".<sup>3</sup>

### **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

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

<sup>2</sup> [2013] QSC 192 at [117].

<sup>3</sup> [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".<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> The administrators' solicitor told an ASIC solicitor that he would send a re-drafted version of the undertaking to ASIC.<sup>7</sup>
- [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...

...

<sup>4</sup> [2013] QSC 192 at [57].

<sup>5</sup> [2013] QSC 192 at [58].

<sup>6</sup> [2013] QSC 192 at [59].

<sup>7</sup> [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."<sup>8</sup>

- [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.<sup>9</sup> 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.<sup>10</sup>

### **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

<sup>8</sup> AB 2308.

<sup>9</sup> [2013] QSC 192 at [60].

<sup>10</sup> [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.”<sup>11</sup>

- [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.<sup>12</sup>

- [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.”<sup>13</sup>

- [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.<sup>14</sup>

#### **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.

<sup>11</sup> [2013] QSC 192 at [53](f).

<sup>12</sup> [2013] QSC 192 at [66], [77].

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

<sup>14</sup> [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 ...".<sup>15</sup> 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".<sup>16</sup> 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".<sup>17</sup> (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".<sup>18</sup>
- [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

<sup>15</sup> [2013] QSC 192 at [70].

<sup>16</sup> [2013] QSC 192 at [70].

<sup>17</sup> [2013] QSC 192 at [72].

<sup>18</sup> [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""<sup>19</sup> 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 ...".<sup>20</sup> 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.<sup>21</sup> (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.<sup>22</sup> 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

<sup>19</sup> [2013] QSC 192 at [77].

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

<sup>21</sup> [2013] QSC 192 at [74].

<sup>22</sup> [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.<sup>23</sup>

- [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.<sup>24</sup>

- [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".<sup>25</sup> 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

<sup>23</sup> [2013] QSC 192 at [50] – [54].

<sup>24</sup> [2013] QSC 192 at [85].

<sup>25</sup> 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”].<sup>26</sup>

- [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*,<sup>27</sup> 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”.<sup>28</sup> 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”<sup>29</sup> 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”.<sup>30</sup>

**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

<sup>26</sup> AB 2187 – 2188.

<sup>27</sup> (2010) 238 FLR 246.

<sup>28</sup> [2013] QSC 192 at [86] and fn 25.

<sup>29</sup> [2013] QSC 192 at [88].

<sup>30</sup> [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.”<sup>31</sup> The primary judge went on to give some examples of that conduct.<sup>32</sup>

### ***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”.<sup>33</sup> 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*<sup>34</sup> and required that the findings and ultimate conclusion be set aside. In *MWJ v The Queen*<sup>35</sup> 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.”<sup>36</sup>
- [40] The rule is a rule of practice designed to secure fairness to witnesses.<sup>37</sup> The purposes of the rule in *Browne v Dunn* 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.<sup>38</sup>

<sup>31</sup> [2013] QSC 192 at [89].

<sup>32</sup> [2013] QSC 192 at [90] – [96].

<sup>33</sup> [2013] QSC 192 at [117].

<sup>34</sup> (1894) 6 R 67.

<sup>35</sup> (2005) 80 ALJR 329 at 339 [38].

<sup>36</sup> (2005) 80 ALJR 329 at 339 [39].

<sup>37</sup> *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.

<sup>38</sup> *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."<sup>39</sup> In *West v Mead*,<sup>40</sup> 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,<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>
- [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

<sup>39</sup> (1894) 6 R 67 at 71.

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

<sup>41</sup> Appellant's outline of argument, at [8].

<sup>42</sup> Transcript, 28 November 2013, at 1-8.

<sup>43</sup> 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...”<sup>44</sup> 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.”<sup>45</sup>

[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.<sup>46</sup> 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 ASIC<sup>47</sup> 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,<sup>48</sup> that calling the meeting was a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund],<sup>49</sup> and that the appellant pursued its continuing control of the Fund “in a manner which was at odds with the interests of the members”<sup>50</sup> were foreshadowed in the following passages of ASIC’s outline:

“[1](c)(i) the zealously [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 zealously [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]

<sup>44</sup> AB 1904.

<sup>45</sup> Affidavit of Ms Muller, at [79], AB 1077.

<sup>46</sup> Submissions on behalf of ASIC, at [52], AB 2536.

<sup>47</sup> [2013] QSC 192 at [60].

<sup>48</sup> [2013] QSC 192 at [56].

<sup>49</sup> [2013] QSC 192 at [86].

<sup>50</sup> [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 documents<sup>51</sup> 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’ thinking<sup>52</sup> was to some extent foreshadowed in the paragraphs of ASIC’s outline identified in

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

<sup>52</sup> [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 ...".<sup>53</sup> 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 ...".<sup>54</sup> 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."<sup>55</sup> He argued that the appellant's conduct in calling the meeting was "perfectly proper".<sup>56</sup> 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."<sup>57</sup> 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",<sup>58</sup> she thought that Trilogy would be defeated and that would "induce Trilogy to depart",<sup>59</sup> the statement in the appellant's

<sup>53</sup> Transcript, 15 July 2013, at 1-17.

<sup>54</sup> Transcript, 15 July 2013, at 1-21.

<sup>55</sup> Transcript, 15 July 2013, at 1-24.

<sup>56</sup> Transcript, 15 July 2013, at 1-27.

<sup>57</sup> Transcript, 15 July 2013, at 1-31.

<sup>58</sup> Transcript, 15 July 2013, at 1-41.

<sup>59</sup> 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,<sup>60</sup> and the meeting was pursued "to shore up your own position" and "to fend off Trilogy".<sup>61</sup>

- [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",<sup>62</sup> 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."<sup>63</sup> 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."<sup>64</sup> 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,<sup>65</sup> 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.<sup>66</sup> 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".<sup>67</sup>
- [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

<sup>60</sup> Transcript, 15 July 2013, at 1-48.

<sup>61</sup> Transcript, 15 July 2013, at 1-51.

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

<sup>63</sup> Transcript, 16 July 2013, at 2-57.

<sup>64</sup> Transcript, 17 July 2013, at 3-21.

<sup>65</sup> Transcript, 17 July 2013, at 3-44 to 3-45.

<sup>66</sup> Transcript, 17 July 2013, at 3-55 to 3-58.

<sup>67</sup> 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.<sup>68</sup> Those paragraphs sought orders for and relating to the appointment of receivers “[p]ursuant to section 1101B(1) of the Act”.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

<sup>68</sup> AB 2585.

<sup>69</sup> AB 2399.

<sup>70</sup> AB 2403.

<sup>71</sup> *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,<sup>72</sup> 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.<sup>73</sup> 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."<sup>74</sup> 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

<sup>72</sup> 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].

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

<sup>74</sup> (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 Trilogy<sup>75</sup> 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.

<sup>75</sup> 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.<sup>76</sup>
- (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.<sup>77</sup> 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

<sup>76</sup> Transcript, 15 July 2013, at 1-44, 1-48, 1-52.

<sup>77</sup> 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.<sup>78</sup> (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.<sup>79</sup>) 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".<sup>80</sup> 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.<sup>81</sup>

- [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.<sup>82</sup> 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.<sup>83</sup> 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".<sup>84</sup>

- [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'

<sup>78</sup> Affidavit of Ms Gubbins, at [6] – [8], AB 2248.

<sup>79</sup> Transcript, 15 July 2013, at 1-63, AB 176.

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

<sup>81</sup> Transcript, 15 July 2013, at 1-63, AB 176.

<sup>82</sup> [2013] QSC 192 at [60].

<sup>83</sup> [2013] QSC 192 at [60].

<sup>84</sup> [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.<sup>85</sup> 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.<sup>86</sup> 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

<sup>85</sup> Transcript, 18 November 2013, at 1-38.

<sup>86</sup> [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."<sup>87</sup> 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".<sup>88</sup>

- [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".<sup>89</sup> The appellant referred to *Pollard v RRR Corporation Pty Ltd*<sup>90</sup> 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

<sup>87</sup> Transcript, 28 November 2013, at 1-44.

<sup>88</sup> [2013] QSC 192 at [88].

<sup>89</sup> Affidavit of Ms Muller, at [79], AB 1077.

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

originating application”<sup>91</sup> or as “a tactic by the [appellant] which had the aim of seeing off its rival for control of [the Fund]”<sup>92</sup> 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

<sup>91</sup> [2013] QSC 192 at [51].

<sup>92</sup> [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."**<sup>93</sup>

- [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".<sup>94</sup> 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.<sup>95</sup> 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..."<sup>96</sup> 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".<sup>97</sup> When it was put to her that she was not being sincere because she knew that the overwhelming majority of proxies were against

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

<sup>94</sup> Transcript, 15 July 2013, at 1-54.

<sup>95</sup> Transcript, 15 July 2013, at 1-48, 1-49.

<sup>96</sup> Transcript, 15 July 2013, at 1-53, line 20.

<sup>97</sup> 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...”<sup>98</sup> 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”<sup>99</sup> 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,<sup>100</sup> 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”.<sup>101</sup> 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.

<sup>98</sup> Transcript, 15 July 2013, at 1-54.

<sup>99</sup> Affidavit of Ms Muller, at [69], AB 1074.

<sup>100</sup> Affidavit of Ms Muller, at [76] and [77], AB 1076.

<sup>101</sup> [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 argued<sup>102</sup> 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

<sup>102</sup> 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..."<sup>103</sup>). 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".<sup>104</sup> That should not be

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

<sup>104</sup> [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),<sup>105</sup> 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.<sup>106</sup> Ms Muller's statement was that "numerous statements" in material circulated by Trilogy and its solicitor "are either false or misleading".<sup>107</sup> 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.<sup>108</sup> ASIC pointed out, however, that those paragraphs referred to only one allegedly misleading statement made on 17 May 2013,<sup>109</sup> which was after the date (2 May 2013)<sup>110</sup> when Ms Muller swore her affidavit. There was no error in the finding challenged in grounds 4(b)(i) and (ii).

<sup>105</sup> The ground refers to "1(h)". There is no ground 1(h).

<sup>106</sup> [2013] QSC 192 at [93].

<sup>107</sup> Affidavit of Ms Muller, at [68], AB 720.

<sup>108</sup> AB 2477 – 2478.

<sup>109</sup> AB 1093.

<sup>110</sup> 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..."<sup>111</sup> 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

<sup>111</sup> 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.<sup>112</sup> 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

<sup>112</sup> Affidavit of Ms Muller, at [36], AB 1065.

continuing control of [the Fund].”<sup>113</sup> 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.”<sup>114</sup> 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,<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> 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.

<sup>113</sup> [2013] QSC 192 at [114].

<sup>114</sup> [2013] QSC 192 at [94].

<sup>115</sup> Submissions on behalf of ASIC, at [48], AB 2536.

<sup>116</sup> [2013] QSC 192 at [89] – [96].

<sup>117</sup> [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,<sup>118</sup> 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

<sup>118</sup> 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,<sup>119</sup> 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",<sup>120</sup> 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.<sup>121</sup> 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*<sup>122</sup> 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

<sup>119</sup> Notice of contention, at [3].

<sup>120</sup> Notice of contention, at [4](1)–(c).

<sup>121</sup> Notice of contention, at [4](d) and [4](e).

<sup>122</sup> [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.<sup>123</sup> 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."<sup>124</sup> The primary judge observed that the same view was taken in *Re Orchard Aginvest Ltd*,<sup>125</sup> *Re Stacks Managed Investments Ltd*,<sup>126</sup> *Re Equititrust Ltd*,<sup>127</sup> and *Re Environinvest Ltd*.<sup>128</sup>

[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."<sup>129</sup> Mr Shotton's argument raised the question whether the different classes of unit holders were treated fairly for the purposes of the constitutional provision.

<sup>123</sup> [2008] QSC 2 at 8 – 9.

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

<sup>125</sup> [2008] QSC 2 at 8 – 9.

<sup>126</sup> (2005) 219 ALR 532 at [50].

<sup>127</sup> (2011) 288 ALR 800 at [51].

<sup>128</sup> (2009) 69 ACSR 530 at [132] – [133].

<sup>129</sup> 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.<sup>130</sup> 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

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[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.<sup>131</sup>

- [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."<sup>132</sup> 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."<sup>133</sup> A very different picture emerged in cross-examination. Mr Park then accepted that it was

<sup>131</sup> [2013] QSC 192 at [105].

<sup>132</sup> Affidavit of Mr Park, at [13], AB 1516.

<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> 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 response<sup>136</sup> 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".<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> 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

<sup>134</sup> Transcript, 16 July 2013, at 2-19, AB 205.

<sup>135</sup> [2013] QSC 192 at [104].

<sup>136</sup> See Affidavit of Mr Park, at [4], AB 1514.

<sup>137</sup> Mr Shotton's outline of submissions, 14 July 2013, at [47], AB 2520.

<sup>138</sup> Mr Shotton's outline of submissions, 14 July 2013, at [31] – [33], AB 2514 – 2515.

<sup>139</sup> 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.”<sup>140</sup>

- [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.”<sup>141</sup>

- [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.”<sup>142</sup> 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

<sup>140</sup> [2013] QSC 192 at [106].

<sup>141</sup> Transcript, 16 July 2013, at 2-21, AB 207

<sup>142</sup> 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.<sup>143</sup>

[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.<sup>144</sup> 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.<sup>145</sup>

[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.<sup>146</sup> On the limited state of the

<sup>143</sup> Transcript, 16 July 2013, at 2-26.

<sup>144</sup> Transcript at 2.21.

<sup>145</sup> 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.

<sup>146</sup> [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]."<sup>147</sup>

[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.<sup>148</sup> 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 discussions<sup>149</sup> – 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

<sup>147</sup> [2013] QSC 192 at [101], [102].

<sup>148</sup> Affidavit of Ms Muller, at [46], [49], AB 1067, 1068.

<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup>

[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.

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<sup>150</sup> [2013] QSC 192 at [104].

<sup>151</sup> See [2013] QSC 192 at [115].



**Dallys Pyers**

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**From:** David Tucker [dtucker@tuckercowen.com.au]  
**Sent:** Tuesday, 17 June 2014 5:52 PM  
**To:** Stephen Russell  
**Subject:** LM Appeal  
**Attachments:** Letter to Russells re costs 17062014 (TCS00829539).pdf

David Tucker  
Partner

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Our reference: Mr Tucker  
Your reference: Mr Russell

17 June 2014

Russells  
Solicitors  
GPO Box 1402  
Brisbane QLD 4001

Dear Sirs

**LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) -v- Bruce & Ors - CA8895 of 2013**

We are writing to you in relation to the judgment of the Court of Appeal delivered on 6 June 2014 and, in particular, in relation to the Order that the Appellant pay the Respondent's costs of the appeal.

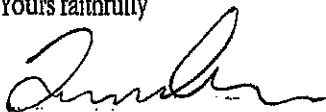
As you know, Justice Dalton delivered a judgment on 20 December 2013 which addressed the costs of the hearing below and, in that regard, it was ordered that the First Respondent be indemnified from the fund only to the extent of 20% of its costs of and incidental to the proceeding, excluding any reserved costs.

The appeal, however, was principally directed towards your client's personal position.

So that our client may consider his position further in relation to the costs order, would you kindly advise whether your client intends to seek indemnity from the FMIF for any of its costs of and incidental to the appeal. If so, does your client propose to seek a full indemnity or limit the extent of that indemnity, and if so, by how much? We would respectfully suggest that the appropriate course would be to make no claim upon the fund for your clients legal costs.

We ask these questions as a precursor to an application of the kind that was advanced before Justice Dalton to limit any claim upon the fund for costs so we do ask that you respond in a timely manner, after giving proper consideration to the matter.

Yours faithfully



David Tucker  
Tucker & Cowen  
Accredited Specialist Commercial Litigation



Direct Email: dtucker@tuckercowen.com.au  
Direct Line: (07) 3210 3507

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Richard Cowen,  
David Schwarz,  
Justin Marschke.

Special Counsel,  
Tyler Griffin,  
Geoff Hancock.

Associates,  
Dan Ryan,  
Sylvia Lopez,  
Marcelle Webster,  
Alex Nase,  
Emily Anderson,  
Daniel Davey,  
Gabriel Ash,  
Nicole Withers,  
Dugald Hamilton.

**COURT OF APPEAL**  
**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: CA8895/13

Parties: **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)**  
**AND**  
**RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE  
(FIRST RESPONDENTS)**  
**AND**  
**ROGER SHOTTON  
(SECOND RESPONDENT)**  
**AND**  
**DAVID NUNN AND ANITA JEAN BYRNES  
(THIRD RESPONDENTS)**  
**AND**  
**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION  
(FOURTH RESPONDENT)**

**COSTS ASSESSOR'S CERTIFICATE**

I, *Edward Thomas Skuse*, of Skuse and Co. Cost Assessors, 20 Robert Street,  
Mudgeeraba in the State of Queensland 4213 certify that –

1. I am an approved costs assessor appointed under the Uniform Civil  
Procedure Rules 1999.
2. On 12 August 2014 I was appointed to assess the costs awarded on 6 June 2014  
in this matter.

---


**COSTS ASSESSOR'S CERTIFICATE**

Form 62 Rule 737

Name: Skuse & Co  
Address: PO Box 331  
MUDGEERABA Q  
Phone No: 55 304622  
Fax No: 55 304602  
Email: [ted@skuse.com.au](mailto:ted@skuse.com.au)  
Ref: 5014

3. I have assessed the costs payable by the Appellant (LM Investments Management Limited (in liquidation)(receivers and managers appointed) ACN 077 208 461 as responsible entity of LM First Mortgage Income Fund), to the above named Second Respondent (Roger Shotton) in the amount of *Eighty seven thousand, eight hundred and forty one dollars and twenty cents* (\$87,841.20) comprising:

- |  |                    |
|--|--------------------|
| a) Professional Costs                            | \$26,770.96        |
| b) Disbursements                                 | \$56,087.34        |
| 4. My assessors fees totaling                    | \$ 4,982.90        |
| 5. The total amount payable by the Appellant is: | <b>\$87,841.20</b> |

  
\_\_\_\_\_  
Edward Thomas Skuse, Cost Assessor  
Dated: the 5 day of September 2014

---

COST ASSESSOR'S CERTIFICATE

Form 62 Rule 737

Name: Skuse & Co  
Address: PO Box 331  
MUDGEERABA Q  
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Fax No: 55 304602  
Email: [ted@skuse.com.au](mailto:ted@skuse.com.au)  
Ref: 5014

**Dallys Pyers**

---

**From:** Stephen Russell  
**Sent:** Friday, 19 September 2014 11:46 AM  
**To:** 'David Tucker'  
**Subject:** LMIM v Bruce and another CA 8895 of 2013 ~20131268~  
**Attachments:** TPR\_20131268\_096.pdf

Dear colleagues

Please see letter attached.

Yours faithfully

**RUSSELLS**

**Stephen Russell**  
*Managing Partner*

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# 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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TPR\_20131268\_096.docx

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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

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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 dark ink, appearing to be 'Stephen Russell', enclosed within a large, loopy oval shape.

**Stephen Russell**  
*Managing Partner*

Direct (07) 3004 8810  
Mobile 0418 392 015  
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## Dailys Pyers

---

**From:** Tori-Leigh Russell [Reception@tuckercowen.com.au] on behalf of Sasha Scherer [SScherer@tuckercowen.com.au]  
**Sent:** Wednesday, 15 October 2014 3:50 PM  
**To:** Stephen Russell; Tim Russell  
**Cc:** Sasha Scherer; David Tucker  
**Subject:** Shotton & Ors. -ats- LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - CA8895 of 2013  
**Attachments:** Letter to Russells (TCS00877692).pdf

Dear Colleagues,

Please find attached correspondence.

Kind regards,

**Tori-Leigh Russell**  
Personal Assistant

E: [reception@tuckercowen.com.au](mailto:reception@tuckercowen.com.au)  
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Our reference: Mr Tucker / Ms Scherer

15 October 2014

Your reference: Mr Russell

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By Email: [srussell@russellslaw.com.au](mailto:srussell@russellslaw.com.au)  
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Marcello Webster.  
Alex Nasc.  
Emily Anderson.  
Daniel Davey.  
Nicole Withers.  
Dugald Hamilton.  
Olivia Roberts.  
Ashley Moore.

Dear Colleague

Shotton & Ors. —ats- LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) -  
CA8895 of 2013

We refer to the above matter and to your letter dated 19 September 2014.

If your client seeks indemnity from the Fund in respect of those costs, that is a matter solely for your client to address directly with Mr David Whyte. However, your client should be mindful that we act only in respect of Mr Shotton's recovery of the costs payable by your client pursuant to the Order of the Court of Appeal dated 6 June 2014, and the source of the funds is not our client's concerns.

Our instructions are to recover the amount payable by your client pursuant to the Registrar's Order for Costs immediately. If we do not receive payment pursuant the Registrar's Order for Costs by close of business this Friday 17 October 2014, our client will enforce the Order forthwith.

Yours faithfully

*Tucker & Cowen*

David Tucker  
Tucker & Cowen  
Accredited Specialist Commercial Litigation



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**Dallys Pyers**

---

**From:** Jacqueline Ogden [Jacqueline.Ogden@gadens.com]  
**Sent:** Wednesday, 26 November 2014 4:54 PM  
**To:** Stephen Russell  
**Cc:** Scott Couper  
**Subject:** LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [IWOV-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](mailto:jacqueline.ogden@gadens.com)  
<<mailto:jacqueline.ogden@gadens.com>> | T +61 7 3231 1688 | F +61 7 3229 5850 Level 11, 111  
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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

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26 November 2014

Russells  
Level 21, 300 Queen Street  
BRISBANE QLD 4000

Attention:      Stephen Russell

By email: [srussell@russellslaw.com.au](mailto: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.

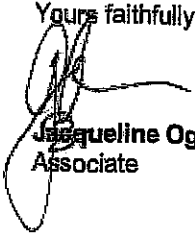
So that we may properly advise our client and so that our client may consider further the matters raised in your correspondence, and, your clients' request for an indemnity out of the Fund, would you please clarify the basis upon which your clients seek an indemnity. In particular, would you please set 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.

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

Yours faithfully



Handwritten signature of Jacqueline Ogden, consisting of a stylized 'J' and 'O' followed by a horizontal line.

**Jacqueline Ogden**  
Associate

**Dallys Pyers**

---

**From:** Stephen Russell  
**Sent:** Saturday, 31 January 2015 1:45 PM  
**To:** 'Jacqueline Ogden'  
**Cc:** Scott Couper  
**Subject:** RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [IWOV-BD.FID1006751] ~ 20131268~  
**Attachments:** TPR\_20131268\_099.pdf

Please find our letter attached.

Yours faithfully

**RUSSELLS**

Stephen Russell  
Managing Partner

Direct (07) 3004 8810

Mobile 0418 392 015

SRussell@RussellsLaw.com.au <mailto:SRussell@RussellsLaw.com.au>

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RussellsLaw.com.au <<http://www.russellslaw.com.au/>>

From: Jacqueline Ogden [mailto:Jacqueline.Ogden@gadens.com]  
Sent: Friday, 30 January 2015 2:04 PM  
To: Stephen Russell  
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](mailto:jacqueline.ogden@gadens.com)  
<<mailto:jacqueline.ogden@gadens.com>> | T +61 7 3231 1688 | F +61 7 3229 5850 Level 11, 111  
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# RUSSELLS

31 January, 2015

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

<b>EMAIL TRANSMISSION</b>
---------------------------

Gadens Lawyers  
**BRISBANE QLD 4000**

email: [Jacqueline.Ogden@gadens.com](mailto: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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[RussellsLaw.com.au](http://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](mailto: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.

## Dallys Pyers

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**From:** Ashleigh Spall [ASpall@tuckercowen.com.au]  
**Sent:** Friday, 1 May 2015 3:28 PM  
**To:** Ashley Tiplady; Sean Russell  
**Cc:** David Tucker; Sasha Scherer  
**Subject:** Shotton & Ors. -ats- LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - CA8895 of 2013.  
**Attachments:** Letter to Russells (TCS00971817).pdf  
**Saved:** -1

Dear Colleagues,

Please see attached correspondence.

Kind regards,

**Ashleigh Spall**  
Personal Assistant

E: [aspall@tuckercowen.com.au](mailto:aspall@tuckercowen.com.au)  
T: 07 300 300 00 | F: 07 300 300 33  
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001

**Tucker&CowenSolicitors.**

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Richard Cowen, David Tucker and David Schwarz have been singled out in Doyle's Guide and Justin Marschke has again been recognised as one of Australia's Best Lawyers for litigation by **Best Lawyers® International 2016**

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# Tucker & Cowen Solicitors.

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.  
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / [www.tuckerandcowen.com.au](http://www.tuckerandcowen.com.au)

Our reference: Mr Tucker / Ms Scherer

1 May 2015

Your reference: Mr Tiplady/Mr Sean Russell

Russells  
Level 18  
300 Queen Street  
Brisbane QLD 4000

By Email: [atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)  
[seanrussell@russellslaw.com.au](mailto:seanrussell@russellslaw.com.au)

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Richard Cowen.  
David Schwarz.  
Justin Marschke.

Special Counsel.  
Geoff Hancock.

Associates.  
Dan Ryan.  
Sylvia Lopez.  
Marcelle Webster.  
Alex Nasa.  
Emily Anderson.  
Daniel Davey.  
Nicole Withers.  
Dugald Hamilton.  
Olivia Roberts.  
Ashley Moore.

Dear Colleagues

**Shotton & Ors. -ats- LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) -  
CA8895 of 2013**

We refer to your letter to us of 23 April 2015.

## Relevant Facts

The relevant facts of this matter are:-

1. On 20 December 2013, the Supreme Court of Queensland (by Justice Dalton) delivered judgment in the principal proceeding;
2. On 23 September 2013, your client filed a Notice of Appeal;
3. On 28 November 2013, the appeal was heard by the Court of Appeal;
4. On 6 June 2014, the judgment of the Court of Appeal was delivered and the appeal was dismissed together with an order that the Appellant pay the Respondent's costs of the appeal;
5. On 30 June 2014, we delivered a Costs Statement to you;
6. On 21 July 2014, you delivered to us comprehensive objections to that Costs Statement;
7. Thereafter, on 22 July 2014, we filed an application for costs assessment, which included with it our Costs Statement, the Notice of Objection that we had received from you and the costs assessor's Consent;
8. On 1 August 2014, your client made an offer to settle your client's costs liability for the sum of \$75,000;
9. On 5 August 2014, your firm, on behalf of your client, consented to the appointment of the costs assessor, Mr Skuse;
10. On 5 September 2014, the costs assessor delivered his costs assessor's Certificate;

11. On 29 September 2014, the Court of Appeal made an order for the costs assessed in the sum of \$87,841.20;
12. On 8 October 2014, you wrote to us and asserted that LMIM was only to pay a certain sum to our client and you would pay the costs assessor separately. We had already paid him. There was never any mention then that these costs would not be paid;
13. Thereafter, we wrote pressing for payment of the costs on 8 October, 15 October, 29 October and then 10 March 2015. We had not heard from you in the interim. It is only after that time has elapsed that enforcement proceedings have commenced.

#### Leave to Proceed

Now, after having instituted the appeal, prosecuted it, lost and then participated in the costs assessment process, and written to us telling us our client would be paid, your client now belatedly seeks to rely upon section 500 of the *Corporations Act 2001* (Cth) and suggests that leave to proceed is necessary.

Section 556(1) does not apply. First, we do not understand that contention, because in order for the costs order to be an expense incurred by a 'relevant authority' under subsections 556(1)(a) or (dd), your client must consider Ms Muller and/or Mr Park to be personally liable for the costs order in their capacity as liquidators. Second, our client is clearly not a relevant authority for the purpose of the section. Third, we do not see how the costs order could be categorised as another type of expense which is captured by section 556(1). Please direct us to the relevant subsection your client relies upon. For those reasons, we do not consider that there is any basis for your client to continue to delay payment by virtue of this section.

Accordingly, given that your client seems to have not actively pursued the matter and we have allowed substantive time for your client to do so, we do intend to proceed with the enforcement hearing unless we receive a constructive response to this letter within 7 days. We will seek leave to do so and seek our client's costs of doing so on an indemnity basis, given there is no basis for your client not to attend to payment of the costs order.

#### Indemnity

It seems to us that these costs are plainly within the terms of the indemnity in the Constitution of the FMIF. You would be familiar with the Constitution of the LM First Mortgage Income Fund. In particular, clause 18.5(jf) expressly provides that the Responsible Entity shall be indemnified out of scheme property for all liability and expenses incurred in the performance of its duties including "Costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings".

The commencement and prosecution of the appeal and the subsequent costs order seems to plainly fall within the terms of that indemnity. Moreover, the costs order would also fall within the indemnity at general law.

The only manner in which the LM First Mortgage Fund could deny liability is if the provisions of clause 19.1(c) applied, such that your client acted negligently, fraudulently or in breach of trust. We are unaware of any circumstances to suggest that. Nor are we aware of anyone so contending.

Therefore, it seems to us that your client ought to immediately ask Mr David Whyte of BDO, on behalf of the LMFMIF for indemnity to pay the moneys due to our client, or alternatively, make payment and seek reimbursement. The updated sum is \$92,280.19, in accordance with the attached calculation.

If Mr Whyte declines to grant indemnity, he should be asked to provide reasons and then after consideration of those reasons it may be that proceedings to enforce the right of indemnity ought to be commenced.

1 May 2015

We invite you and your client to give this matter your earnest and full consideration and address these matters to see this costs order paid. It would be a most disappointing state of affairs that your client would not do so, and this matter would then be productive of further litigation and expense, when it seems as if by reason of these simple steps, that could be avoided.

Yours faithfully



David Tucker  
**Tucker & Cowen**   
Accredited Specialist Commercial Litigation

Direct Email: dtucker@tuckercowen.com.au  
Direct Line: (07) 3210 3507

Encl.

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Interest Calculations

Principal	Date From	Date To	Cash Rate	Default Rate	Days	Interest
\$87,841.20	26/9/2014	31/12/2014	2.5	6	97	\$1,984.25
\$87,841.20	1/1/2015	30/4/2015	2.5	6	120	\$2,454.74
Interest payable:						\$4,438.99
Totals						
Total days:						217
Remaining debt:						\$87,841.20
Interest payable:						\$4,438.99
Amount payable (remaining debt + interest payable):						\$92,280.19

From: Stephen Russell <[srussell@russellslaw.com.au](mailto:srussell@russellslaw.com.au)>  
Date: 20/05/2015 11:50 AM (GMT+10:00)  
To: 'Jacqueline Ogden' <[Jacqueline.Ogden@gadens.com](mailto:Jacqueline.Ogden@gadens.com)>  
Cc: Scott Couper <[Scott.Couper@gadens.com](mailto:Scott.Couper@gadens.com)>, Ashley Tiplady <[atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)>, Tim Russell <[trussell@russellslaw.com.au](mailto:trussell@russellslaw.com.au)>  
Subject: RE: LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [GQ-BD.FID1006751] ~20131268~

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](mailto:srussell@russellslaw.com.au)

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---

**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**  
[jacqueline.ogden@gadens.com](mailto:jacqueline.ogden@gadens.com) | T +61 7 3231 1688 | F +61 7 3229 5850  
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**From:** Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]  
**Sent:** 12/03/2015 8:18 AM  
**To:** [srussell@russellslaw.com.au](mailto: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](mailto:jacqueline.ogden@gadens.com) | T +61 7 3231 1688 | F +61 7 3229 5850  
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**From:** Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]  
**Sent:** 19/02/2015 1:53 PM  
**To:** [srussell@russellslaw.com.au](mailto: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 **below** and note we have not yet received your response.

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.

Yours faithfully,

**Jacqueline Ogden** | Associate | gadens  
[jacqueline.ogden@gadens.com](mailto: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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**Law Firm of the Year - 2014 Australian Banking and Finance Awards**

---

**From:** Jacqueline Ogden [<mailto:Jacqueline.Ogden@gadens.com>]

**Sent:** 10/02/2015 4:33 PM

**To:** [srussell@russellslaw.com.au](mailto: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](mailto:jacqueline.ogden@gadens.com) | T +61 7 3231 1688 | F +61 7 3229 5850

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# RUSSELLS

20 May, 2015

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

<b>EMAIL TRANSMISSION</b>
---------------------------

Gadens Lawyers  
**BRISBANE QLD 4000**

email: [Jacqueline.Ogden@gadens.com](mailto: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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SCR\_20131268\_102.docm

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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](mailto:SRussell@RussellsLaw.com.au)

**Dallys Pyers**

---

**From:** Jacqueline Ogden [Jacqueline.Ogden@gadens.com]  
**Sent:** Friday, 22 May 2015 4:35 PM  
**To:** Stephen Russell  
**Cc:** Ashley Tiplady; Tim Russell; Scott Couper  
**Subject:** LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) -v- Bruce & Ors [GQ-BD.FID1006751]  
**Attachments:** Letter to Russells Law - 22.05.15.PDF  
**Saved:** -1

Dear Colleagues,

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

Yours faithfully,

**Jacqueline Ogden** | Associate | gadens  
[jacqueline.ogden@gadens.com](mailto: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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**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

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gadens.com

22 May 2015

Russells Law  
Level 18, 300 Queen Street  
Brisbane QLD 4000

Attention: Stephen Russell

By email: [srussell@russellsllaw.com.au](mailto: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.

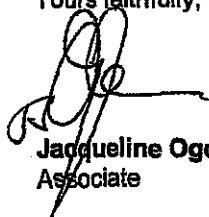
At the outset, it is not accurate to say that our client has been "sitting on the fence" in respect of this matter. That statement is not supported by the history of correspondence in this matter (referred to above). We have been awaiting your response to our letter of 10 February 2015. On that basis,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



**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

**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 20131259 the amount of \$5,752.30 (five thousand seven hundred and fifty-two dollars and thirty cents) comprising:
  - a. Professional Fees \$5,479.42
  - b. Disbursements \$272.88
4. My fees of \$212.76 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: 2/12/16

**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

---

**From:** Lobb, Renee  
**Sent:** Tuesday, 26 May 2015 3:25 PM  
**To:** Trenfield, Kelly  
**Subject:** FW: ASIC v Drake & Ors (QUD596 of 2014) - discovery of documents (Treat as In Confidence)  
[DLM=Sensitive]

**Renee Lobb**  
Director, Corporate Finance/Restructuring

**FTI Consulting**  
+61 7 3225 4976 T | +61 408 811 969 M  
[renee.lobb@fticonsulting.com](mailto:renee.lobb@fticonsulting.com)

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**From:** Irma Schoch [<mailto:Irma.Schoch@asic.gov.au>]  
**Sent:** Tuesday, May 26, 2015 1:30 PM  
**To:** Lobb, Renee  
**Cc:** Michael Wood; Ryan Rourke  
**Subject:** ASIC v Drake & Ors (QUD596 of 2014) - discovery of documents (Treat as In Confidence)  
[DLM=Sensitive]

Dear Sir/Madam

Please see attached written correspondence regarding the above proceeding.

Regards

**IRMA SCHOCH (nee Dulnuan)** | Lawyer, Enforcement - Financial Services | **ASIC** | Brisbane | ☎ +61 7 3867 4851 | 📠 +61 7 3867 4725 | 📠 +61 402 296 789 | ✉ [irma.dulnuan@asic.gov.au](mailto:irma.dulnuan@asic.gov.au)



**ASIC**  
Australian Securities & Investments Commission

Lvl 20, Commonwealth Bank Building,  
240 Queen Street, Brisbane QLD 4000  
GPO Box 9827, Brisbane QLD 4001  
DX 322 Brisbane

Telephone: +61 7 3867 4700  
Facsimile: +61 7 3867 4725  
www.asic.gov.au

Our Reference: 13-40003

Your Reference:

26 May 2015

Ms Ginette Muller  
Liquidators Appointed  
LM Investment Management Ltd (In Liquidation) (Receivers and Managers Appointed)  
C/- FTI Consulting  
'Corporate Centre One'  
Level 9, 2 Corporate Court  
BUNDALL QLD 4217

By post and email: [renee.lobb@fticonsulting.com](mailto:renee.lobb@fticonsulting.com)

Dear Ms Muller

**Australian Securities and Investments Commission v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596 of 2014) (the Proceeding) – documents produced to ASIC voluntarily or pursuant to ss19(2)(a), 30 or 33 of the *Australian Securities and Investments Commission Act 2001* (Cth)**

On 12 November 2014, the Australian Securities and Investments Commission (ASIC) commenced proceedings in the Federal Court of Australia (**the Federal Court**) against the former directors of LM Investment Management Limited ACN 077 208 461 (**LMIM**) seeking financial penalties and banning orders following the collapse of LMIM. Enclosed is a copy of ASIC's Media Release dated 20 November 2014.

On 17 February 2015 and 22 May 2015, the Federal Court made orders in relation to discovery in the Proceeding. As part of those orders, ASIC is required to make discovery of, and give access to, certain documents in its possession to the other parties to the Proceeding.

The documents in respect of which ASIC has been ordered to discover and produce may include documents produced by LM Investment Management Ltd (In Liquidation) (Receivers and Managers Appointed) (**the Company**) either voluntarily or in response to a Notice (or Notices) issued by ASIC pursuant to sections 19(2)(a), 30 or 33 of the ASIC Act (**the Documents**).

The Documents may contain material in respect of which the Company, or a third party of which the Company is aware, may wish to make a claim for legal professional privilege, or material in respect of which the Company otherwise object to being discovered or produced.

Should the Company wish to assert a claim for legal professional privilege over, or otherwise object to discovery or production of, the Documents (or part thereof), please notify ASIC in writing by no later than 5pm on Tuesday, 9 June 2015.

Any such claim or objection should:

1. identify the Documents (or part thereof) in respect of which the Company wish, or a third party might wish, to assert a claim for legal professional privilege or otherwise object to its discovery or production; and
2. set out the reasons and bases for such claim or objection.

We would be grateful if the Company would send its claim or objection to:

Ryan Rourke  
ASIC  
GPO Box 9827  
BRISBANE QLD 4001  
Telephone: 07 3867 4723  
Facsimile: 07 3867 4725  
Email: ryan.rourke@asic.gov.au

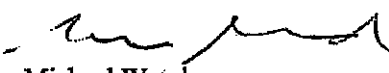
If the Company does not advise ASIC of its claim or objection within the time specified above, ASIC will assume that it does not wish to assert a claim for legal professional privilege or otherwise object to discovery or production of the Documents and will proceed to make discovery and grant access to such Documents, without further notice.

If the Company objects to discovery or production of the Documents (or part thereof) and that objection is unable to be resolved by agreement between the Company, the other parties to the Proceeding and ASIC, then the Company, the other parties to the Proceedings and ASIC may apply to have the Company's objection determined by the Court. If any such objection is unable to be resolved, ASIC will inform the Company of its intentions before proceeding to make discovery and/or grant access to the Documents to which any such objection relates.

We note that the discovery and production referred to above will be for the purposes of the Proceeding only, and any party who obtains access to the Documents will not be able to use them for any purpose other than the Proceeding.

The Company may wish to consider obtaining independent legal advice in relation to the matters set out in this letter.

Yours faithfully



Michael Wood  
Senior Lawyer  
ASIC

Encl

**Dallys Pyers**

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**From:** Stephanie Williamson  
**Sent:** Tuesday, 9 June 2015 5:01 PM  
**To:** 'ryan.rourke@asic.gov.au'  
**Subject:** LM Investment Management Limited (Receivers and Managers Appointed)(In Liquidation) ~20131545~  
**Attachments:** SCPR\_20131545\_067.pdf

Dear Colleagues

Please refer to our attached correspondence dated 9 June, 2015.

Yours faithfully

**RUSSELLS**

**Stephanie Williamson**  
*Lawyer*

Direct (07) 3004 8872  
Mobile 0438 347 638  
[SWilliamson@RussellsLaw.com.au](mailto:SWilliamson@RussellsLaw.com.au)

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# RUSSELLS

9 June, 2015

Our Ref: Mr Tiplady / Ms Williamson  
Your Ref: Mr Wood / Mr Rourke (13-40003)

ASIC  
Brisbane

email: ryan.rourke@asic.gov.au

---

Dear Colleagues

**LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation)**

We refer to your letter of 26 May, 2015 addressed to our clients, the liquidators of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ("LMIM"). We have received instructions to act on behalf of Mr Park and Ms Muller in respect of the issues raised in your correspondence.

Your letter refers to documents produced either voluntarily or in response to notices issued by ASIC and requests written notice of any claim of legal professional privilege in respect of, or otherwise objections to, the discovery or production of documents of LMIM by ASIC in Federal Court Proceeding No. QUD 596 of 2014 ("Proceeding").

Our clients do not consent to any waiver of LMIM's legal professional privilege over any documents and otherwise object to the discovery and production of LMIM's material. Quite simply, this is the only position our clients can take at this time in the absence of any detail regarding the documents which ASIC intends to discover and/or produce in the proceeding.

ASIC holds a vast number of documents (for example, the image of LMIM's server alone holds millions of documents) pursuant to various notices since commencing its investigations into the operations of LMIM. In these circumstances, our clients, as unfunded liquidators, cannot reasonably, nor practically, review each and every document of LMIM to identify every claim to privilege or objection to production or discovery of documents.

Our clients remain willing to co-operate with ASIC and propose that an appropriate course is for ASIC to give notice to us of the documents it intends to discover, together with the various notices pursuant to which these documents were produced to ASIC. LMIM will then be able to consider the circumstances of each individual document and then provide LMIM with an opportunity to state its position in respect of each of those documents.

We reserve our clients' position to raise any further or other objections in respect of the discovery, production and/or use of documents obtained through

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RussellsLaw.com.au  
SCPR\_20131545\_067.docm

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compliance with, or otherwise said to be produced voluntarily as a result of, the various notices issued by, or examinations conducted by, ASIC in respect of LMIM.

We await your response.

Yours faithfully



**Stephanie Williamson**  
*Lawyer*

Direct (07) 3004 8822  
Mobile 0438 347 638  
*SWilliamson@RussellsLaw.com.au*



**Dallys Pyers**

---

**From:** Stephanie Williamson  
**Sent:** Tuesday, 9 June 2015 5:27 PM  
**To:** 'ryan.rourke@asic.gov.au'  
**Subject:** LM Investment Management Limited (Receivers and Managers) (In Liquidation) ~20131545~  
**Attachments:** SCPR\_20131545\_068.pdf

Dear Colleagues

Please refer to our attached correspondence dated 9 June, 2015.

Yours faithfully

**RUSSELLS**

**Stephanie Williamson**  
*Lawyer*

Direct 07 3004 8872  
Mobile 0438 347 638  
[swilliamson@russellslaw.com.au](mailto:swilliamson@russellslaw.com.au)

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

9 June, 2015

Our Ref: Mr Tiplady / Ms Williamson  
Your Ref: Mr Wood / Mr Rourke (13-40003)

ASIC  
Brisbane

email: [ryan.rourke@asic.gov.au](mailto:ryan.rourke@asic.gov.au)

Dear Colleagues

**LM Investment Management Limited (Receivers and Managers  
Appointed) (In Liquidation)**

Our clients, the liquidators of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ("LMIM"), have received notice of your letter of 26 May, 2015 addressed to Mr Monaghan of Allens Linklaters. We have received instructions to act on behalf of Mr Park and Ms Muller in respect of the issues raised in your correspondence.

Our clients wish to properly consider LMIM's claim to legal professional privilege over, or other objection to the discovery and production of, the transcript of an examination of Mr Monaghan conducted by ASIC (and presumably documents referred to in that transcript) and documents produced by Mr Monaghan to ASIC under statutory compulsion and/or voluntarily. Accordingly, we request that you provide us with an indexed copy of the documents ASIC intends to discover/produce in Federal Court Proceeding No. QUD 596 of 2014 to facilitate our clients' considered response.

Once we have been provided with an indexed copy of the documents, we expect to be in a position to respond within seven days.

Yours faithfully



**Stephanie Williamson**  
Lawyer

Direct (07) 3004 8822  
Mobile 0438 347 638  
[SWilliamson@RussellsLaw.com.au](mailto:SWilliamson@RussellsLaw.com.au)

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[RussellsLaw.com.au](http://RussellsLaw.com.au)  
SCPR\_20131545\_068.docm

**Dallys Pyers**

---

**From:** Ryan Rourke [Ryan.Rourke@asic.gov.au]  
**Sent:** Monday, 6 July 2015 4:22 PM  
**To:** Stephanie Williamson  
**Cc:** Ashley Tiplady; Phillip Mines; Michael Wood; Irma Schoch  
**Subject:** Fw: ASIC v Drake & Ors (QUD596 of 2014) - discovery of documents (Treat as In Confidence) [DLM=Sensitive]  
**Attachments:** 3388\_001.pdf; Discovery - Docs obtained under notice from FTI.xlsx; Potential Privileged Documents List.xlsx  
  
**Saved:** -1

Dear Ms Williamson

Please find attached our correspondence dated 6 July 2015, with enclosures.

Yours sincerely



**ASIC**

Australian Securities & Investments Commission

**Ryan Rourke | Lawyer | Financial Services Enforcement**



GPO Box 9827 Brisbane QLD 4001



07 3867 4723



07 3867 4725



Ryan.Rourke@asic.gov.au

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**ASIC**

Australian Securities & Investments Commission

Our Ref: 13-40003  
Your Ref: Mr Tiplady / Ms Williamson

6 July 2015

Russells  
Level 18, 300 Queen Street  
BRISBANE QLD 4000

**BY EMAIL:** [swilliamson@russellslaw.com.au](mailto:swilliamson@russellslaw.com.au)

Dear Ms Williamson

**Australian Securities and Investments Commission v Peter Charles Drake & Ors  
(Federal Court Proceeding No. QUD596/2014) (the Proceedings)**

We refer to your letters of 9 June 2015, received at 5.01pm and 5.27pm, on behalf of your clients', the liquidators of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) (LMIM).

**Documents produced by David Monaghan**

Your letter received at 5.27pm relates to the transcript of an examination of Mr Monaghan conducted by ASIC (**the Transcript**), and documents produced by Mr Monaghan under statutory compulsion and/or voluntarily (**the Monaghan Documents**).

It is not clear from your letter whether you are asking for a copy of the Transcript. However, if you are, in view of ASIC's duty of confidentiality, it is not appropriate for ASIC to give a copy of a transcript to a third party in these circumstances. As you would be aware, the examinee is entitled to request a record of his own examination.

ASIC does not propose to provide your clients with an indexed copy of the documents referred to in the Transcript. Under the Discovery Plan ordered by the Court in the Proceedings, there is a general procedure for the identification of documents which might attract claims of legal professional privilege, and for insolvency practitioners to object to their discovery on those grounds. ASIC expects that any documents referred to in the Transcript which are liable to be discovered will be identified as part of this procedure, and that your clients will have an opportunity to object to their discovery. We explain this procedure below.

ASIC has reviewed the Monaghan Documents (which our present searches indicate number four in total) against the terms of the Discovery Plan. The Discovery Plan requires ASIC, among other things, to manually review each document which returned hits to certain keyword searches. The Monaghan Documents did not return hits to those searches. As such,

they are not the subject of the individual review and will not be discovered as a part of that review. If any of the four Monaghan Documents becomes subject to discovery under other parts of the Discovery Plan, we will give you reasonable written notice before taking steps to discover them.

### **Documents produced by LMIM**

Your letter received at 5.01pm sets out your clients' objection to the discovery and production of material produced by LMIM in this proceeding. ASIC also received correspondence on 9 June 2015 from your clients directly, in substantially similar terms.

As requested in your letter, we enclose a list of the documents produced by LMIM under notice that are subject to the individual review for potential discovery in the Proceedings. ASIC expects that the vast majority of these documents will not attract a claim of legal professional privilege or other objections. Furthermore, under the procedure set out below under the heading "List of Potentially Privileged Documents", any documents the subject of claims of legal professional privilege will be dealt with under that procedure.

ASIC is required under the terms of the Discovery Plan to discover and give the Respondents access to the first tranche of documents in the review by 15 July 2015, and in view of the number of documents involved, we will be finalising the documents to be handed over later this week. We expect that many of the documents within this first tranche of discovery will be documents produced by your clients. If you consider that any claim or objection exists in respect of any individual document, you should notify ASIC accordingly no later than 3 pm on Friday, 10 July, identifying each document and details of the grounds of objection.

### **List of Potentially Privileged Documents**

As alluded to above, the Discovery Plan requires ASIC to:

1. provide your clients with a list of certain potentially privileged documents from a population of documents currently under review in discovery (copy attached); and
2. give your clients the opportunity to object to ASIC giving access to relevant documents on the basis of legal professional privilege from the attached list, and the grounds, within 14 days.

ASIC generated the attached list by running keyword searches of law firm names over the documents currently under review. Many hits to the searches (and therefore documents in the attached list) will not be privileged.

Please address any objection you may have to [ryan.rourke@asic.gov.au](mailto:ryan.rourke@asic.gov.au).

Yours faithfully,



**Michael Wood**  
Senior Lawyer  
Australian Securities and Investments Commission

## Dallys Pyers

---

**From:** Stephen Russell  
**Sent:** Tuesday, 14 July 2015 3:18 PM  
**To:** 'Michael Wood'  
**Cc:** Ashley Tiplady; Hugh Copley; Phillip Mines; 'Ryan Rourke'; Stephanie Williamson  
**Subject:** RE: ASIC v Drake & Ors (QUD596 of 2014) - discovery of documents (Treat as In Confidence) [DLM=Sensitive]

**Saved:** -1

Dear Colleagues

I have called and left messages for both Mr Wood and Mr Rourke to call me.

ASIC is in breach of clauses 4.1, 4.3(a) and 4.3(b) of the agreement executed by it on 11 April 2013 and by LMIM on 12 April 2013.

Consequently, ASIC is unlawfully denying LMIM the benefit of clause 5.1 of the agreement.

It is a matter of serious concern to us that ASIC appears to take its and LMIM's responsibility in relation to privilege and disclosure of documents so lightly. There is more than a hint of resentment in your correspondence, as though the Liquidators who instruct us can and should simply turn a blind eye to legal professional privilege that subsists in documentary communications that ASIC holds, in circumstances in which they had obtained those documents through a co-operative arrangement with our clients, whereby ASIC promised to vouch safe any valid claims of privilege.

While you may be perfectly correct in your contention that few of the documents are privileged from production, the Liquidators take the view that they cannot simply wave this through.

The simple fact is that you provided us with a list of these documents for the first time on Monday, 6 July, 2015. There are over 100,000 documents at issue. It is impossible to do such a mammoth job in such a short time.

Furthermore, we cannot imagine that the 100,000 plus documents are all in fact relevant to matters in question in the proceedings. It seems fair to conclude that ASIC has simply decided to discover its entire database in relation to LMIM and let the defendants work out which documents are relevant and which are not. They may be prepared to agree to that and indeed that may be what is reflected in the Discovery Plan which is the result of such an agreement. Whatever may be the rationale for discovering over 100,000 documents, that does not alter the fact that it is oppressive to ask LMIM, in these circumstances, to decide in a few business days whether any and, if so, which of these 100,000 documents are the subject of a valid claim of legal professional privilege.

So, more time please.

Will one of you please telephone the writer to discuss a sensible way forward?

Regrettably, LMIM must reserve its rights under the agreement and otherwise at law in relation to ASIC's breach of the agreement we have mentioned, at the same time sincerely hoping that it will not be necessary to resort to the ADR process mentioned in the agreement, much less any litigation over these claims.

We are quite sure that any judge would agree that these are matters that responsible practitioners should be able to sort out between themselves in a co-operative way, each affording the other reasonable time and opportunity to let the agreement do its work.

# RUSSELLS

**Stephen Russell**  
*Managing Partner*

Direct (07) 3004 8810  
Mobile 0418 392 015  
[srussell@russellslaw.com.au](mailto: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](http://RussellsLaw.com.au)

---

**From:** Michael Wood [mailto:Michael.Wood@asic.gov.au]  
**Sent:** Tuesday, 14 July 2015 1:13 PM  
**To:** Stephanie Williamson  
**Cc:** Ashley Tiplady; Hugh Copley; 'Michael Wood'; Phillip Mines; 'Ryan Rourke'  
**Subject:** RE: ASIC v Drake & Ors (QUD596 of 2014) - discovery of documents (Treat as In Confidence)  
[DLM=Sensitive]

Dear colleagues,

I attach a letter.

**Michael Wood** | Senior Lawyer, Financial Services Enforcement | **ASIC** | Level 20, 240 Queen Street,  
Brisbane QLD 4000 | ☎ +61 7 3867 4964 | 📠 +61 7 3867 4725 | ✉ [Michael.Wood@asic.gov.au](mailto:Michael.Wood@asic.gov.au)

---

From: Stephanie Williamson <[swilliamson@russellslaw.com.au](mailto:swilliamson@russellslaw.com.au)>  
To: "Michael Wood" <[Michael.Wood@asic.gov.au](mailto:Michael.Wood@asic.gov.au)>, "Ryan Rourke" <[Ryan.Rourke@asic.gov.au](mailto:Ryan.Rourke@asic.gov.au)>,  
Cc: Ashley Tiplady <[atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)>, Phillip Mines <[Phillip.Mines@asic.gov.au](mailto:Phillip.Mines@asic.gov.au)>, Hugh Copley <[Hugh.Copley@asic.gov.au](mailto:Hugh.Copley@asic.gov.au)>  
Date: 14/07/2015 09:51 AM  
Subject: RE: ASIC v Drake & Ors (QUD596 of 2014) - discovery of documents (Treat as In Confidence) [DLM=Sensitive]

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Dear Colleagues

Please refer to our attached correspondence dated 14 July 2015.

We note your correspondence of 13 July 2015 and we are presently considering the matters raised therein. Our enclosed correspondence raises further and other objections which require ASIC's response.

Please confirm in writing by return that the ASIC will not proceed to disclose any of the LMIM Documents until these matters have been resolved.

Regards

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 1668  
F +61 7 3229 5850

23 July 2015

Russells Law  
Level 18, 300 Queen Street  
Brisbane QLD 4000

Attention:      Ashley Tiplady and Stephanie Williamson

By email:      [ATiplady@RussellsLaw.com.au](mailto:ATiplady@RussellsLaw.com.au) and [swilliamson@russellsllaw.com.au](mailto:swilliamson@russellsllaw.com.au) [at@gadens.com](mailto:at@gadens.com)

Dear Colleagues

**Australian Securities and Investments Commission v Peter Charles Drake & Ors  
Federal Court Proceeding no. QUD596/2014 ("Proceedings")**

We refer to the above Proceedings.

We enclose a copy of correspondence received from ASIC in relation to the Proceedings.

As you will see, ASIC has written to us in order to provide our client with an opportunity to object to ASIC disclosing certain documents on the basis of legal professional privilege.

In this regard, ASIC has provided us with a Schedule of Documents, the most recent of which was enclosed under cover of their letter dated 8 July 2015 as well as an Email List (see enclosed) which they have identified as being potentially privileged. The Schedule of Documents and the Email List comprise thousands of documents. It is not possible from the description of these documents alone to determine whether or not a particular document, or email, is subject to legal professional privilege. Further, the task of identifying each document from the description contained in the lists provided and then reviewing the document or email to determine whether it is subject to legal professional privilege would require considerable resources and, we expect, would take some weeks to complete. We also note that it is proposed to discover the documents and emails to the respondents of the Proceedings, being the current or former directors of LM Investment Management Limited (LMIM). As we understand it, it is not proposed to disclose the documents or emails to any third parties.

Given that LMIM remains the responsible entity of the LM First Mortgage Income Fund, ASIC may have also written to your clients on the same terms. Would you please advise us as soon as possible whether your clients intend to object to ASIC producing any of the documents and/or emails in the Proceedings?

Presently, given the time and cost which would be involved in identifying each document or email and reviewing same, our client does not intend to take any further steps or make any objection to the production of the documents and/or emails by ASIC.

We look forward to receiving your response as soon as possible, but in any event by no later than COB on Monday, 27 July 2015.

Yours faithfully

  
Jacqueline Ogden  
Associate

Enc.



**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**

Bound and marked "JRP-5" are pages 223 to 336 to the exhibits to the Affidavit of  
**JOHN RICHARD PARK** sworn 18<sup>th</sup> October, 2016:



Deponent



Solicitor/Barrister/Justice of the Peace



**CERTIFICATE OF EXHIBIT**

Filed on behalf of the Applicants

Form 47 Rule 435

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

AJT\_20131259\_062.docx

**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**

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**INDEX TO EXHIBITS TO "JRP-5"**

Filed on behalf of the Applicants

Form 47 Rule 435

**Russells**  
Level 18  
300 Queen Street  
**BRISBANE 4000**  
Phone: 07 3004 8888  
Fax: 07 3004 8899

AJT\_20131259\_060.docx

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**Dallys Pyers**

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**From:** Stephanie Williamson  
**Sent:** Monday, 27 July 2015 3:09 PM  
**To:** 'scott.couper@gadens.com'; 'jacqueline.ogden@gadens.com'  
**Subject:** ASIC v Drake & Ors (Federal Court Proceeding No. QUD596/2014)  
**Attachments:** SCPR\_20131545\_077.pdf

Dear Colleagues

Please refer to our attached correspondence dated 27 July, 2015.

Yours faithfully

**RUSSELLS**

**Stephanie Williamson**  
*Lawyer*

Direct (07) 3004 8872  
Mobile 0438 347 638  
[SWilliamson@RussellsLaw.com.au](mailto:SWilliamson@RussellsLaw.com.au)

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# RUSSELLS

27 July, 2015

Our Ref: Mr Tiplady / Ms Williamson  
Your Ref: Mr Couper / Ms Ogden

Gadens Lawyers  
**BRISBANE**

email: [scott.couper@gadens.com](mailto:scott.couper@gadens.com)  
[jacqueline.ogden@gadens.com](mailto:jacqueline.ogden@gadens.com)

Dear Colleagues

**LM Investment Management Limited (Receivers and Managers  
Appointed) (In Liquidation) ('LMIM')  
Australian Securities & Investments Commission ("ASIC") v Peter  
Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) ("the  
Proceeding")**

We refer to your letter of 23 July, 2015.

We confirm that ASIC have written to our clients regarding the disclosure of certain documents of LMIM in the Proceeding. Our clients have made an overall objection to ASIC's proposed use of any of LMIM's documents in that regard. LMIM remains as the Responsible Entity of the FMIF and, accordingly it is our clients who ought deal with this issue. Mr Whyte has no basis to be dealing with ASIC regarding LMIM's books and records.

Further, we have been instructed to liaise with ASIC to obtain a copy of those documents proposed to be discovered in the Proceeding which may contain privileged communications. Once those documents have been received, our clients will consider whether they are in a position to undertake an individual review of the documents to consider any further objections to ASIC's intended use of LMIM's records.

We will keep you informed as our clients advance with this issue. In the meantime, given that the documents in question (including those relevant to the FMIF) are those of LMIM, it should be our clients who deal with the issue and we ask that your client therefore:-

1. refer any future enquiries from ASIC to us;
2. confirm that your client will communicate with ASIC to inform ASIC that it is a matter which the liquidators of LMIM are handling; and
3. confirm that, in the above circumstances, your client will not disclose and/or consent to or deal with ASIC in any way regarding LMIM's books and records.

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[RussellsLaw.com.au](http://RussellsLaw.com.au)

SCPR\_20131545\_077.docx

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Please let us have your client's confirmation of the three points above (together with any correspondence delivered to ASIC) by 12.00pm on Tuesday, 28 July, 2015. If your client contends that he is authorised to deal with this issue on behalf of LMIM as the Responsible Entity for the FMIF, please let us know on what basis that view is held.

Yours faithfully



**Stephanie Williamson**  
*Lawyer*

Direct (07) 3004 8822  
Mobile 0438 347 638  
*SWilliamson@RussellsLaw.com.au*

**Dallys Pyers**

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**From:** Jacqueline Ogden [Jacqueline.Ogden@gadens.com]  
**Sent:** Wednesday, 29 July 2015 6:54 AM  
**To:** Ben Cohen <benc@bartleylaw.com> (benc@bartleylaw.com);  
Michaela Manning (mmanning@bartleylaw.com); Steven Muller  
<steven.muller@rbglawyers.com.au>  
(steven.muller@rbglawyers.com.au); Greg Rodgers  
<greg.rodgers@rbglawyers.com.au>  
(greg.rodgers@rbglawyers.com.au); wiebke@jcl.com.au; Martin  
Daniel (MDaniel@HWLitigation.com.au);  
mwilliams@hwlitigation.com.au; Ashley Tiplady; Stephanie  
Williamson; David.O'Brien@minterellison.com; Nadia Braad  
<Nadia.Braad@minterellison.com>  
(Nadia.Braad@minterellison.com)  
**Cc:** Scott Couper  
**Subject:** LMIM as RE of FMIF -v- Drake & Ors - Supreme Court of Queensland  
proceeding no. 12317/14 [GQ-BD.FID1006751]  
**Attachments:** Document Protocol.pdf

Dear Colleagues,

In accordance with our email of 20 July 2015, we attach for your consideration a draft document exchange protocol for describing and exchanging documents in accordance with Practice Direction 10 of 2011.

We are also presently formulating a document plan in relation to the disclosure of documents. This will canvass those issues raised by the solicitors for the seventh defendant in their email of 23 July 2015.

We will revert to you as soon as possible with the proposed document plan for your clients' consideration.

In the interim, for the purposes of conferring and reaching an agreement regarding the protocol, would you please consider the attached draft protocol and let us know as soon as possible but in any event by no later than close of business on Friday, 31 July 2015, whether:

- (a) your clients agree to the terms of the draft protocol;
- (b) if any aspect of the protocol is not agreed, the reason for the disagreement and any proposed alternative.

We look forward to hearing from you.

Yours faithfully



Jacqueline Ogden | Senior Associate | [gadens jacqueline.ogden@gadens.com](mailto:jacqueline.ogden@gadens.com)  
<<mailto: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](http://www.gadens.com) <<http://www.gadens.com>>

If you receive this email by mistake, please notify us and do not make any use of the email. We do not waive any privilege, confidentiality or copyright associated with it.

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Think before you print.

Protocol for the matter of LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 as Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288 -v- Peter Charles Drake & Ors, Supreme Court of Queensland proceeding number 12317/14

## 1 Introduction

This is the document management protocol prepared in accordance with the Supreme Court of Queensland Practice Direction No. 10 of 2011.

This protocol sets out the agreement of the parties in the matter of LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 as Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288 -v- Peter Charles Drake & Ors, Supreme Court of Queensland proceeding number 12317/14 ("Proceeding") in relation to:

- creating lists of documents by categories to be disclosed;
- giving disclosure by exchanging electronically stored information;
- inspecting disclosed documents and other material;
- delivering Court documents to, and otherwise communicating with, each party; and
- the electronic exchange of documents to be filed by the parties in the Proceeding.

This protocol does not derogate any right a party has to receive a paper copy of any Court document, or a native electronic copy of any disclosed document. However, given that a fundamental reason for agreeing this protocol is to reduce costs to each party, it is hoped that a party will not make an unnecessary request for a paper copy of a Court document or a native electronic copy of a disclosed document.

## 2 Court documents - format for exchange

All documents filed with the Court after agreement of this protocol, including but not limited to pleadings and affidavits, are to be exchanged electronically between the parties.

Where an exhibit or an annexure to a Court document has been disclosed in the Proceeding, the parties will refer to the document using its document ID.

References to documents in expert reports and witness statements shall refer to the document using its document ID. Expert reports and witness statements and their associated documents will be provided electronically on a medium format outlined in paragraph 9.

The naming convention of each file should reflect the document name and date filed in Court. For example: "Statement of Claim filed 10 June 2009" and "Affidavit of John Smith filed 20 June 2009".

### **3 Disclosed documents - document numbers**

For disclosed documents, every document should be uniquely numbered.

Electronic materials fall into two major categories: standard and non-standard. Further information about these categories is provided in clause 4.2.

Hard copy documents and standard electronic materials will be uniquely numbered at a page level, and every page will be numbered or stamped.

Non-standard electronic materials will be uniquely numbered at a document level. These documents do not need to be numbered or stamped.

The numbering convention which will be followed by the parties is **SSS.BBB.FFF.PPPP\_NN** where:

- **SSS** is the code that identifies the party or source producing the documents. For example: ABC. The party and source codes are specified below in Annexure A.
- **BBB** identifies the sequential physical box for hard copy documents and virtual box for electronic materials. Leading zeroes should be used where the number is less than 3 characters. The maximum number of boxes or categories is 999.
- **FFF** is the number that identifies the sequential folder or file. Leading zeroes should be used where the number is less than three characters. The maximum number of folders or files for any one party is 999.
- **PPPP** is the page number of the first page for hard copy documents and standard electronic materials, and the document ID for non-standard electronic materials. Leading zeroes should be used where the number is less than four digits. The maximum number of pages/documents for any folder is 9999.
- **\_NN** is a two digit sequential number for inserted pages. If a page is missed in the numbering process and needs to be inserted, a two digit sequential page number should be used. For example, ABC.001.002.0025\_01 is a page that has been inserted between pages 25 and 26 in folder 2 in box 1 for party ABC. This scheme assumes that a minimal number of insertions will be made with a maximum of 99 pages being inserted between two pages. Inserting pages between inserted pages is not accommodated in this scheme. If there is no need to insert pages, this field will not be used, so most pages numbers will only be 16 characters in length. If it is necessary to insert more than 99 missing pages, an entire replacement document will be provided unless this is impractical.

For example, the first page or document in the first folder of documents will be uniquely numbered as **ABC.001.001.0001**.

Where practical, blank pages will be removed and will not be given a page number.

## **4 Disclosed documents - format for exchange**

### **4.1 Documents and/or document images to be exchanged**

Documents and/or document images will be exchanged for relevant documents which are:

- wholly non-privileged documents; and
- partially privileged redacted documents.

Documents and/or document images will not be exchanged for wholly irrelevant or wholly privileged documents.

### **4.2 Electronic materials**

Standard electronic materials (for example, emails and word processing documents) will be converted to and exchanged in PDF format.

Non-standard electronic materials are those which are not easily converted to PDF format, or which are best viewed as native files so as to preserve context and information (for example, databases). Except where redactions are required, these documents may be exchanged in the formats described in Annexure D, or in PDF format. A placeholder PDF document will be exchanged for all electronic materials exchanged as native files. Annexure D may be varied by the parties.

Parties should be aware that some electronic materials may have information that automatically updates when the document is opened and which could change the original state of the information. Parties should ensure that where possible the original information is either preserved or the field identified as an auto-update field for disclosure. Examples of situations in which this could occur are fields and dynamic dates or macros that automatically update when electronic materials are viewed or printed.

The directory structure and filename for each file should be in the format:

`\SSS\BBB\FFF\SSS.BBB.FFF.PPPP.[extension]`

where

- SSS is the directory and code that identifies the party or source producing the documents.
- BBB is a sub-directory and the sequential virtual box for electronic materials. Leading zeroes should be used.
- FFF is a sub-directory and the number that identifies the sequential folder or file. Leading zeroes should be used.
- SSS.BBB.FFF.PPPP.[extension] is the filename, where [extension] is the file extension for the PDF or native file. Leading zeroes should be used.

### 4.3 Hard copy documents

Hard copy documents will be exchanged in PDF format.

Hard copy documents will be scanned at a minimum of 200 dpi and as black and white images, unless colour is material to achieving an understanding of the document.

The directory structure and filename for each image file should be in the format:

`\SSS\BBB\FFF\SSS.BBB.FFF.PPPP.pdf`

where

- SSS is the directory and code that identifies the party or source producing the documents.
- BBB is a sub-directory and the sequential physical box for hard copy documents. Leading zeroes should be used.
- FFF is a sub-directory and the number that identifies the sequential folder or file. Leading zeroes should be used.
- SSS.BBB.FFF.PPPP.pdf is the filename. Leading zeroes should be used.

### 4.4 PDF image format

All PDF files being exchanged will be multi-page (one PDF file per document), searchable, and compatible with Acrobat Reader v6 or above.

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## 5 Disclosure - list of documents to be exchanged

A searchable PDF list of documents is to be exchanged. The list of documents should be prepared in accordance with alternative list provided in Form 19 of the Uniform Civil Procedure Rules 1999 (QLD) where documents are electronically exchanged.

The list of documents should contain the following information and documents are to be ordered by document ID, with a separate section for wholly and partially privileged documents:

- Document ID
- Document Type
- Title
- Author
- Author Organisation
- Recipient
- Recipient Organisation

- Date (Time (if applicable) as hh:mm)

For example:

Document ID	Document Type	Title	# Author	# Author Organisation	# Recipient	# Recipient Organization	Date (hh:mm)

Where the information to be included in the list of documents is privileged, the privileged information will not be exchanged. However the list of documents will otherwise be prepared in accordance with Rule 214 of the Uniform Civil Procedure Rules 1999 (QLD).

## 6 Disclosure - additional information to be exchanged

Each party agrees to exchange additional information to that included in the list of documents in an electronic format.

This document sets out protocols using the Ringtail, multi-table format in relation to the exchange of that information and documents and/or document images.

The document descriptions and images are to be exported in a Ringtail export format. The document descriptions will be exchanged in Access 2000 mdb files named export.mdb which contain the four tables that make up the multi-table export format. They are:

- **Export** - contains the core field information for each document. All other tables are linked to the export table by the Document\_Id field;
- **Export Extras** - contains additional fields to the core field for each document;
- **Parties** - contains information about the people and organisations from and to whom documents are addressed. If there are multiple people for a single document there will be multiple entries in this table for that document; and
- **Pages** - contains filename information for images for each document. If there are multiple pages for a single document there will be multiple entries in this table for that document.

The format of the data in each of the tables is outlined below. Fields that cannot be left blank are marked with an asterisk.

## 6.1 Export table

Field name	Ringtail data type (max number of characters)	Example values
*Document_Id	Text (19)	The document ID.  For example, ABC.001.001.0001 or ABC.001.001.0001_01.
Host_Reference	Text (19)	The document ID of the document to which an attachment is attached.
*Document_Date	Text (11)	<p><b>Hard copy documents</b></p> <p>The date of the document in the format:</p> <ul style="list-style-type: none"> <li>• dd-mmm-yyyy Where dd = day, mmm = month, and yyyy = year eg 09-Jan-2003); or</li> <li>• If day is not known, enter 01-mmm-yyyy and complete the Estimated_Date field with "Yes";</li> <li>• If day and month are not known, enter 01-Jan-yyyy and complete the Estimated_Date field with "Yes";</li> <li>• If year is missing, the document is considered undated unless a date can be accurately estimated. The Estimated_Date field is to be completed with a "Yes" if the date is estimated;</li> <li>• Blank for undated where the document has no date, does not have a year or the date cannot be determined.</li> </ul> <p>Date ranges cannot be used. If there is a document which covers a period of time, parties must use the latest date in the range and complete the Estimated_Date field with a "Yes".</p> <p>If a document contains what may be an original date as well as a subsequent date (possibly as a result of alterations being made to the document), or has a number of dates, the latest date should be taken as the document date and the Estimated_Date field should be</p>

Field name	Ringtail data type (max number of characters)	Example values
		<p>completed "Yes".</p> <p>If a document has a USA date eg mmm-dd-yyyy, the date should be converted to dd-mmm-yyyy.</p> <p>Examples of special types of documents:</p> <ul style="list-style-type: none"> <li>• hard copy emails – see below;</li> <li>• Minutes - parties are to use the date of the minutes (unless the date is unknown, in which case, the date of the meeting).</li> </ul> <p><b>Hard copy emails</b></p> <p>The date is the sent date of the email and will be taken from the face of the document. Where there are multiple emails on one page, then they are to be treated as one document and the date is the date of the most recent email.</p> <p>The time to be captured in 24 hour format of hh:mm and to be populated for emails only.</p> <p>The time is the sent time of the email. It is objectively from the face of the document. The time should be extracted from the final email in a chain.</p> <p><b>Electronic emails</b></p> <p>For sent emails, the date is the date the email was sent.</p> <p>For unsent emails, the email is considered to be undated.</p> <p>The time is sent time of the email. It is extracted from the email's metadata.</p> <p><b>Other electronic materials including email attachments</b></p> <p>The date is the last modified date.</p>



Field name	Ringtail data type (max. number of characters)	Example values
Estimated_Date	Text (3)	<p>"Yes" - for partial dates and dates which can be reasonably estimated.</p> <p>If "No" - leave blank.</p>
*Document_Type	Text (255)	<p><b>Hard copy documents</b></p> <p>See <b>Annexure B</b> for a list of Document Types.</p> <p><b>Other electronic materials including email attachments</b></p> <p>The file type extracted from the file's metadata.</p>
*Title	Text (255)	<p><b>For hard copy documents:</b></p> <p>The title, re or subject line. Documents without a title will have "untitled" entered as the title.</p> <p><b>For electronic emails:</b></p> <p>The title is the subject line of the email. It is extracted from the email's metadata.</p> <p>Emails without a subject line will not have a title.</p> <p><b>Other electronic materials including email attachments:</b></p> <p>The file name is the title eg "weekly_report.xls". It is extracted from the file's metadata.</p>

## 6.2 Export\_Extras table

The export extras table contains additional fields to those contained in the export table. It is linked to the export table via the Document\_Id.

Field name	Ringtail data type (max. number of characters)	Example values

Field name	Ringtail data type (max. number of characters)	Example values
*Document_Id	Text (19)	The document ID.  For example, ABC.001.001.0001 or ABC.001.001.0001_01.
theCategory (see table below)	Text (4)	One of the following three options identifying the data type must be used:  "TEXT", "DATE", "BOOL", "NUMB" or "PICK".
theLabel (see table below)	Text (255)	The name of the field.
theValue (see table below)	Text (255)	The actual data as a text string.
memoValue	Memo	The actual data in memo form

theLabel	theCategory	theValue
*Confidential	Pick	This field identifies whether a claim of confidentiality is made over the document.  Valid values are "Yes", "No" or "Part".
*Privilege	Pick	This field identifies whether a claim of privilege is made over the document.  Valid values are "Yes", "No" or "Part"
*MD5	Text (32)	The MD5 hash value for the document

### 6.3 Parties table

The parties table contains people and organisation information for to (addressees), from (authors), cc (copied to), bcc (blind copied to), between (parties), attendees (present at meetings). It is linked to the export table via the Document\_Id field.

Note if there are multiple parties for a single document, there will be multiple entries in this table for that document.

Field name	Ringtail data type (max. number of characters)	Example Values
*Document_Id	Text (19)	The document ID.  For example, ABC.001.001.0001 or ABC.001.001.0001_01.
*Correspondence_Type	Text (9)	One of the following five character strings identifying the type of person to be used: <ul style="list-style-type: none"> <li>• From - for authors;</li> <li>• To - for addressees;</li> <li>• Between - for parties to an agreement or other legal document (not correspondence);</li> <li>• CC's - for additional people to which documents are addressed;</li> <li>• BCC's - for additional people to which documents are blind copied</li> <li>• Attendees - for attendees at meetings.</li> </ul>
People	Text (255)	<p>Person or persons who are authors, addressees, or parties to the document (where available).</p> <p><b>Hard copy documents</b></p> <p>People names will only be captured where they appear on the face of the document.</p> <p>People names will be entered in the format:</p> <ul style="list-style-type: none"> <li>• last name first initial eg "Jones P"; or</li> <li>• where a name is not available, email address; or</li> <li>• where a name and email address are not available, position eg "Marketing Manager".</li> </ul> <p><b>Emails</b></p> <p>People names will be extracted from an email's metadata, and the email address will be used.</p> <p><b>Other electronic materials</b></p>

Field name	Ringtail data type (max. number of characters)	Example Values
		Where the information exists, People names will be extracted from the document's metadata.
Organisation	Text (255)	<p>Organisations which are authors, addressees, or parties to the document (where available).</p> <p><b>Hard copy documents</b></p> <p>Organisation names are to be entered as they appear on the face of the document. The correct name of an organisation may be entered if it is known and differs from the name on the face of the document.</p> <p>Abbreviations should not be used except for common incorporation status abbreviations (eg Pty, Ltd, Plc, Inc). Other abbreviations may be used where necessary, to distinguish between similarly named entities.</p> <p><b>Emails</b></p> <p>Organisation names will only be captured where they are easily ascertainable from the email address.</p>

#### 6.4 Pages table

The pages table is used to describe the location of the documents and/or document images to be exchanged. It is linked to the export table via the Document\_Id field.

There may be multiple entries in this table for each document. For example, there will be two entries for a document exchanged as a native file, being one entry for the native file and one entry for the PDF placeholder page.

Field name	Ringtail data type (max. number of characters)	Example values
*Document_Id	Text (19)	<p>The document ID.</p> <p>For example, ABC.001.001.0001 or ABC.001.001.0001_01.</p>

Field name	Ringtail data type (max. number of characters)	Example values
*Image_File_Name	Text (7)	SSS.BBB.FFF.PPPP.[extension] is the Image_File_Name.  Leading zeroes should be used.
*Page_Label	Text (6)	For PDF files, the Page_Label is "PDF".  For native files, the Page_Label is "NATIVE"
*Page_Num	Number	This is the sequencing number.  For PDF files the Page_Num is "9999".  For Native Files, the Page_Num is "0000".
*Num_Pages	Number	This is the number of pages for each file.  For PDF files the Num_Pages is the total number of pages per file  For native files, the Num_Pages is "1"

## 7 Disclosed documents - Hard copy document delimiting and host/attachment determination

The rules set out in Annexure C will be used to delimit documents and determine whether they are coded as a host document, an attached document or unattached document.

A document may have more than one attachment, but an attachment can only have one host document.

## 8 Disclosed documents - De-duplication of Electronic Materials

Where appropriate, each party will take reasonable steps to ensure that duplicated documents are removed from the exchanged material ('De-Duplication').

However, there may be circumstances where duplicates need to be identified and retained for evidential purposes. For example, it may be relevant to retain multiple copies of an email in sender and recipient email boxes due to the fact

that it will be of evidential relevance to know who actually received the email after it was sent.

De-Duplication will be considered at a document group level. That is, all the documents within a document group (that is, a host document and attached documents) will be treated as duplicates if the *entire* document group is duplicated elsewhere. An attached document in a document group will not be treated as a duplicate if it is merely duplicated elsewhere as an individual, stand alone document that is not associated with another document group.

The rules set out in Annexure E will be used to de-duplicate documents.

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## **9 Exchange medium format**

### **9.1 Media for exchange of Court documents**

Court documents will be exchanged by email or on an alternate media as described in 9.2.

### **9.2 Media for exchange of the list of documents and discovery information**

CD-ROMs in a ISO9660 format, DVDs in a DVD+R or DVD+RW format, or portable hard drives in FAT32 and NTFS are acceptable as an exchange medium.

The exchange medium will contain:

- the list of documents referred to in section 4.4 of this protocol;
- the export.mdb referred to in section 6 of this protocol;
- together with the documents and/or document files referred to in section 4 of this protocol.

The exchange medium will be labelled with:

- name of Proceeding and party names;
- disk/hard drive number;
- date;
- description of data eg "Data and images for schedule 1 part 1"; and
- whether it is additional or replacement data.

---

## **10 Updating and adding document descriptions and images**

### **10.1 Updating document descriptions and/or images**

After the initial list of documents and images have been exchanged between the parties, if errors are found in the document descriptions or images, the issuing party should be notified and should reissue the entire record that contains the errors in the agreed format.

Any updates should be accompanied by a covering letter outlining the Document\_Id(s) and the information that has been amended.

#### **10.2 Adding document descriptions and/or images**

If additional data or images are found after the initial exchange, they should be exchanged in the format outlined in this protocol.

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### **11 Malicious software testing responsibility**

It is the responsibility of the recipient of electronic data to test for malicious software.

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### **12 Responsibility for cost**

It is the responsibility of each party to bear the cost of producing and exchanging data as outlined in this protocol subject to any costs order which may ultimately be made in the Proceeding.

DRAFT

### **Annexure A - Party or source codes (section 3)**

The following table sets out the party or source codes to be used. Each party is to circulate updates to this table to the other parties when new parties or source codes are added.

Code	Party or source
FMIF	Plaintiff's disclosure
PCD	First defendant's disclosure
LMD	Second defendant's disclosure
EVDH	Third defendant's disclosure
FMM	Fourth defendant's disclosure
SJT	Sixth defendant's disclosure
LMIM	Seventh defendant's disclosure
MPF	Eighth defendant's disclosure



## Annexure B - Document types (section 6.1)

The following table sets out the standard document types to be used. Each party is to circulate updates to this table to the other parties when new document types are added.

Type	Examples of Document Types
Accounting record	
Agenda	
Agreement	Includes all agreements, contracts or deeds whether or not set out in a formal agreement format or in letter format, and whether or not the document is executed by some or all of the parties: <ul style="list-style-type: none"> <li>• acknowledgement</li> <li>• bank guarantee</li> <li>• contract</li> <li>• draft clauses for agreements</li> <li>• formal agreement</li> <li>• memorandum of agreement</li> <li>• memorandum of understanding</li> <li>• supplemental memorandum</li> </ul>
Annual return	
Article	Includes all articles and other publications
Bank statement	
Brochure	Includes media and advertising material
Business card	
Certificate	
Chart/Graph	
Cheque	
Company records	
Computer disk/ CD-ROM	
Computer printout	
Court document	Includes pleadings
Coversheet	Includes fax cover sheets and other sheets attaching documents including with compliments slips

Type	Examples of Document Types
Diagram	Any drawing, plan or diagram that does not fall within another category: <ul style="list-style-type: none"> <li>• drawings</li> <li>• map</li> <li>• sketches</li> <li>• graph</li> </ul>
Diary/Notebook	
Email	
Extract	
Facsimile	Includes proper faxes, fax confirmations and transmission reports. It does not include a document that has been faxed forward (ie a document whose only indication it was faxed is the fax stream on the top of the page)
File cover/ divider	Includes internal document or note and may be handwritten
File note	
Financial report	
Form	Includes forms which do not fall within another category
Guidelines/ manual/ policy	
Handwritten note	
Invoice	
Legislation	
Letter	
List/ index	Includes tables and index
Log Sheet	
Memorandum	Includes internal and external memorandum
Minutes	Includes formal and informal minutes
Note	Other notes (not including meeting or file notes) including briefing notes
Photograph	
Plan/ map	

Type	Examples of Document Types
Policy	
Presentation	
Receipt	
Report	<ul style="list-style-type: none"> <li>• annual reports</li> <li>• company reports</li> <li>• proposals</li> <li>• reviews</li> <li>• presentation papers</li> <li>• search report</li> </ul>
Schedule	
Specification	
Spreadsheet	
Table	
Tender	

## **Annexure C - Delimiting and host/attachment determination (section 7)**

All documents will be delimited as host document, attached document or unattached document as determined.

### **C.1 Hard copy documents**

- (a) If there is any doubt as to whether a group of consecutive pages form one document or several individual documents, the pages will be coded as individual documents.
- (b) Annexures, attachments and schedules, which form part of an Agreement, Report, Financial report, Minutes or Agendas may not be coded as separate documents, but will be considered part of the document.
- (c) Annexures and exhibits to expert reports and witness statements will be coded as individual documents, and considered to be attachments to the expert report or witness statement.
- (d) Documents bundled with a clip will be treated as host and attachments, unless it is obvious that the documents are not related.
- (e) A hard copy document will only be delimited as a host document if it is clearly ascertainable from the face of the document that one or more of the documents immediately following it is an attachment to it. The host document must contain a sentence which mentions either the word enclosed or attached. The host document must contain the words "enclosed", "attached", "following" or derivatives thereof. For example, Please find enclosed....., Please find attached..... Enclosed herewith....etc
- (f) Any document that is not a host document or an attached document will be considered an unattached document. If there is any doubt as to whether two documents form a host document and attached document, they will be delimited as unattached documents.
- (g) If a document is interrupted by another unrelated document, the unrelated document and the second half of the original document will not be coded as an attachment to the first half of the original document. These documents will be delimited as three separate unattached documents.
- (h) Groups of similar documents will not be bundled, but captured as separate documents.

### **C.2 Standard and non-standard electronic materials**

- (i) An attachment to an email is to be delimited as an attached document.
- (j) Documents which are attachments to an attachment (eg nested emails), will be referenced back to the main host document.
- (k) Documents embedded in another document are to be delimited as an attached document.

- (1) The contents of container files such as ZIP and TAR files will be extracted. Where the container file is an attachment to an email, each extracted file will be delimited as an attached document to the host email. Where the container file is an embedded object in an electronic file, each extracted file will be delimited as an attached document to the host document. The container file will not be discovered.

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## **Annexure D - Non-standard electronic materials - exchange format (section 4.2)**

The parties have agreed to exchange the following non-standard Electronic Materials (where redactions are not required) as native files.

Native file format	Exchange format
Microsoft Access databases (.mdb)	
Microsoft Excel files (.xls or .csv)	
Log files	
Windows sound files (.wav)	
Other media files (ie .mp3, .avi, mpg etc)	
CAD or other engineering files	

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## **Annexure E - De-duplication (section 8)**

Each party will take reasonable steps to ensure that duplicated documents are removed from the exchanged material.

The parties will use MD5 hash values to identify and, where appropriate, remove duplicates from their exchanged material.

The Metadata fields to be used to generate the MD5 hash value for emails are 'Sender', 'To' and 'Date Sent', 'Body' and 'Number of Attachments' (or MD5 hash values of Attachments).

MD5 hash values will be stored in the export extras table (at item 6.2).

**Dallys Pyers**

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**From:** Stephanie Williamson  
**Sent:** Tuesday, 8 September 2015 9:29 AM  
**To:** 'scott.couper@gadens.com'; 'jacqueline.ogden@gadens.com'  
**Subject:** ASIC v Drake & Ors - Proceeding No. QUD596/2014  
**Attachments:** SJW\_20131545\_086.pdf

Dear Colleagues

Please refer to our attached correspondence dated 8 September, 2015.

Yours faithfully

**RUSSELLS**

Stephanie Williamson

Lawyer

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# RUSSELLS

08 September, 2015

Our Ref: Mr Tiplady / Ms Williamson  
Your Ref: Mr Couper / Ms Ogden

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Dear Colleagues

**LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ('LMIM')  
Australian Securities & Investments Commission ("ASIC") v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) ("the Proceeding")**

We refer to your letter of 29 July, 2015.

Our clients, as Liquidators of the Responsible Entity of the LM funds, including the FMIF, continue to deal with ASIC in respect of the Proceeding. Presently, we are awaiting a response from ASIC on the proposed amendments to the Discovery Plan; we understand the amendments are designed to limit the volume of documents to be reviewed by the Liquidators.

In our clients' view, conducting a review of identified documents for potential privilege claims to be made is in the best interests of, and for the benefit of, all of the funds. In our view, there can be little said against this.

Our clients reserve their position in respect of any claim to an indemnity from the funds, including the FMIF, for the costs incurred in undertaking a review of the information to consider any objections which may be required to be made in the best interests of the funds. If your client takes the view that the FMIF ought not contribute to those costs, please let us know on what basis.

Yours faithfully



**Stephanie Williamson**  
Lawyer

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Our Reference      Jacqueline Ogden 201401822  
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Partner Responsible   Scott Couper

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14 September 2015

Russells Law  
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Attention:      Ashley Tiplady and Stephanie Williamson

By email:        [ATiplady@RussellsLaw.com.au](mailto:ATiplady@RussellsLaw.com.au) and [swilliamson@russellslaw.com.au](mailto:swilliamson@russellslaw.com.au)

Dear Colleagues

**Australian Securities and Investments Commission v Peter Charles Drake & Ors  
Federal Court Proceeding no. QUD596/2014 ("Proceedings")**

We refer to our letter of 29 July 2015 and your letter of 8 September 2015.

We note your advice that your clients continue to deal with ASIC in respect of the Proceedings and that you are awaiting ASIC's response regarding proposed amendments designed to limit the volume of documents to be reviewed by your liquidator clients.


We would expect that the amendments to ASIC's Discovery Plan will limit the documents to be reviewed to those relevant to the matters in the Proceedings. Given the fact that (as we understand it) the Proceedings relate, principally, to a transaction involving a loan made by the LM Managed Performance Fund (MPF), we would expect any relevant material in the Proceedings would relate to that fund (and not the LM First Mortgage Income Fund (FMIF)). As a result, the costs incurred in dealing with this issue would be a cost of LMIM in its own right or as former trustee of the MPF and no costs in relation to this matter would be the subject of an indemnity from the FMIF.

We note your clients have reserved their position in respect of any claim to an indemnity from the FMIF. However, as we note above, if the amendments proposed by ASIC limit the documents to be reviewed in the manner we expect, then there's unlikely to be any costs incurred in dealing with this issue which would be incurred on behalf of the FMIF (and therefore the subject of a claim for an indemnity from the FMIF).

We note your assertion that conducting a review of identified documents for potential privilege claims to be made is in the best interests of, and for the benefit of, all of the funds. We do not see how that can be the case if the relevant documents reviewed relate to a specific fund, such as the MPF.

Notwithstanding the above, if the amendments proposed by ASIC do not limit the documents to be reviewed by the liquidators as we expect and your clients contend that there is a right to an indemnity from the FMIF in respect of any costs incurred in dealing with ASIC on this issue, we again invite you to advise the basis for such claim and (to the extent you can) provide a detailed estimate of any such costs before they are incurred.

Yours faithfully

  
Jacqueline Ogden  
Senior Associate

**Dallys Pyers**

---

**From:** Stephanie Williamson  
**Sent:** Friday, 18 September 2015 9:57 AM  
**To:** 'scott.couper@gadens.com'; 'jacqueline.ogden@gadens.com'  
**Subject:** Australian Securities & Investments Commission v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014)  
**Attachments:** SCPR\_20131545\_087(1).pdf

Dear Colleagues

Please refer to our attached correspondence dated 18 September, 2015.

Yours faithfully

RUSSELLS

Stephanie Williamson

Lawyer

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# RUSSELLS

18 September, 2015

Our Ref: Mr Tiplady / Ms Williamson  
Your Ref: Mr Couper / Ms Ogden

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Dear Colleagues

**LM Investment Management Limited (Receivers and Managers  
Appointed) (In Liquidation) ("LMIM")  
Australian Securities & Investments Commission ("ASIC") v Peter  
Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) ("the  
Proceeding")**

We refer to your letter of 14 September, 2015.

Clearly, work will need to be undertaken by our clients to ascertain the nature of the documents provided by ASIC to our clients in accordance with the Discovery Plan. This will necessarily include identifying and dealing with matters from the point of view of the LM First Mortgage Income Fund ("FMIF"), and any other of the other LM funds, whose information is proposed to be discovered in the Proceeding.

LMIM remains the responsible entity of the FMIF and our clients are taking appropriate steps to protect the position of the FMIF, as they are bound to do, and are doing so as economically and efficiently as possible.

Does your client contend that our clients' costs of dealing with this matter, in so far as the matter relates to the FMIF, are not covered by LMIM's indemnity? If so, please explain your client's position to us.

If no issues regarding the FMIF arise in the Proceeding, not just the individual documents in question, does that mean that Mr Whyte will not be charging his fees, costs or expenses in dealing with this matter from the FMIF?

Yours faithfully



**Stephanie Williamson**  
Lawyer

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25 September 2015

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By email:     **ATiplady@RussellsLaw.com.au** and **swilliamson@russellslaw.com.au**

Dear Colleagues

**Australian Securities and Investments Commission v Peter Charles Drake & Ors  
Federal Court Proceeding no. QUD596/2014 ("Proceedings")**

We refer to our letter of 29 July 2015, your letter of 8 September 2015, our letter of 14 September 2015 and your response of 18 September 2015.

To clarify, our client does not contend that the liquidators' costs (in so far as they relate to the LM First Mortgage Income Fund (FMIF)) are *not* covered by the indemnity in favour of LM Investment Management Limited as responsible entity of the FMIF. However, if the liquidators contend that there is a right to an indemnity from the FMIF in respect of any costs incurred in dealing with ASIC on the issue of disclosure in the Proceedings, our client asks that the liquidators' advise the basis for such claim and (to the extent they can) provide a detailed estimate of any such costs before they are incurred.

In respect of our client's costs, as you know, pursuant to the order of Dalton J, our client is entitled to be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out his Appointment. In respect of any claim for remuneration, this is subject to the approval of the Court.

Yours faithfully



 **Jacqueline Ogden**  
Senior Associate

**Dallys Pyers**

---

**From:** Stephanie Williamson  
**Sent:** Thursday, 8 October 2015 10:00 AM  
**To:** 'jacqueline.ogden@gadens.com'; 'scott.couper@gadens.com'  
**Subject:** LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation)  
**Attachments:** SCPR\_20131545\_o88(1).pdf  
**Saved:** -1

Dear Colleagues

Please refer to our attached correspondence dated 8 October, 2015.

Yours faithfully

**RUSSELLS**

**Stephanie Williamson**  
*Lawyer*

Direct (07) 3004 8833  
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[SWilliamson@RussellsLaw.com.au](mailto:SWilliamson@RussellsLaw.com.au)

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# RUSSELLS

8 October, 2015

Our Ref: Mr Tiplady / Ms Williamson  
Your Ref: Mr Couper / Ms Ogden

Gadens Lawyers  
**BRISBANE**

email: [scott.couper@gadens.com](mailto:scott.couper@gadens.com)  
[jacqueline.ogden@gadens.com](mailto:jacqueline.ogden@gadens.com)

---

Dear Colleagues

**LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ("LMIM")  
Australian Securities & Investments Commission ("ASIC") v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) ("the Proceeding")**

Thank you for your letter of 25 September, 2015.

We are instructed to respond as follows:

1. the basis of our clients' claim is that LMIM, as Responsible Entity of the FMIF, being the party responsible for the custody and control of the books and records of the FMIF, is discharging its obligations and functions (and acting in the interests of the FMIF members) regarding the proposed disclosure and use of FMIF documents in the Proceeding (including documents the subject of claims for legal professional privilege);
2. in dealing with these issues to date, our clients estimate that they have incurred costs in the amount of approximately \$8,560.00 (GST excl) and legal costs of approximately \$20,000.00 (GST incl);
3. in relation to future costs, it is difficult to provide a meaningful estimate without knowing the exact volume of documents to be reviewed. Given our clients' review to date has consisted of those documents easily identified as not being subject to privilege and probably represents only 20% of the documents to hand, the total costs could be as high as \$50,000.00. Providing an accurate estimate at this time is difficult and it is not yet known how amendments to the discovery plan in the Proceeding will effect our clients' review of the documents;
4. at this stage, it is not anticipated that more than \$2,500.00 to \$3,000.00 in future legal costs will be incurred, subject to having to

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SCPR\_20131545\_088.docx

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deal with any objections to any claims of privilege our clients may make in respect of the documents;

5. our clients' costs and expenses will likely be apportioned across the various LM funds under our clients' control and in whose interests our clients are acting. The percentage split or basis for the apportioning of these costs will be considered at the completion of the document review process. However, our clients wish to put your client on notice that it will be seeking an indemnity from the FMIF for a portion of their costs and expenses; and
6. presently, the privilege review has been placed in abeyance pending receipt of a response from ASIC regarding amendments to the discovery plan in the Proceeding.

We will write to you further at the conclusion of our clients' privilege review to discuss the matter of costs.

Yours faithfully



**Stephanie Williamson**  
*Lawyer*

Direct (07) 3004 8822  
Mobile 0438 347 638  
*SWilliamson@RussellsLaw.com.au*



## Dallys Pyers

---

**From:** Ryan Rourke [Ryan.Rourke@asic.gov.au]  
**Sent:** Friday, 9 October 2015 9:21 AM  
**To:** Stephanie Williamson  
**Cc:** Phillip Mines; Michael Wood; Kaan Finney; Hugh Copley  
**Subject:** RE: Australian Securities & Investments Commission v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) (Treat as In Confidence) [DLM=Sensitive]  
**Attachments:** Draft Amended Discovery Plan (TCS01043247-003).docx; Draft Orders - 12 October 2015 - 5th Respondent Proposal (TCS01060166).docx

**Saved:** -1

Ms Williamson

Please find **attached** ASIC's proposed amended Discovery Plan with changes tracked throughout the document.

Also **attached** is a copy of the draft orders proposed by the fifth respondent, to which the second, third and fourth respondents have agreed.





Yours faithfully



**ASIC**

Australian Securities & Investments Commission

**Ryan Rourke | Lawyer | Financial Services Enforcement**

 GPO Box 9827 Brisbane QLD 4001  
 07 3867 4723  
 07 3867 4725  
 Ryan.Rourke@asic.gov.au

From: Stephanie Williamson <swilliamson@russellsllaw.com.au>  
To: Ryan Rourke <Ryan.Rourke@asic.gov.au>  
Date: 08/10/2015 03:51 PM  
Subject: RE: Australian Securities & Investments Commission v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) (Treat as In Confidence) [DLM=Sensitive]

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Mr Rourke

Please provide us with a 'marked up' or 'tracked changes' version of the Discovery Plan highlighting the proposed amendments as soon as possible.

Please also indicate which of the proposed orders or terms are presently not agreed between the parties.

Regards

# RUSSELLS

**Stephanie Williamson**  
Lawyer

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**From:** Ryan Rourke [<mailto:Ryan.Rourke@asic.gov.au>]  
**Sent:** Thursday, 8 October 2015 3:38 PM  
**To:** Stephanie Williamson  
**Cc:** Michael Wood; Phillip Mines; Kaan Finney; Hugh Copley  
**Subject:** RE: Australian Securities & Investments Commission v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) (Treat as In Confidence) [DLM=Sensitive]

Dear Ms Williamson

Thank you for your email.

The parties are to appear before His Honour Justice Edelman for directions at 10.00am on 12 October 2015. Please find **attached** ASIC's proposed orders (including the two annexures to the orders, one of which is the proposed amended Discovery Plan), which we sent to His Honour's Associate this afternoon.

At the time of writing, the parties have not reached an agreement about the terms of the proposed orders. As such, you may consider attending the hearing on 12 October.

Yours faithfully



**ASIC**

Australian Securities & Investments Commission

**Ryan Rourke | Lawyer | Financial Services Enforcement**

GPO Box 9827 Brisbane QLD 4001  
 07 3867 4723  
 07 3867 4725  
 [Ryan.Rourke@asic.gov.au](mailto:Ryan.Rourke@asic.gov.au)

— Forwarded by Ryan Rourke/Brisbane/QLD/ASIC on 08/10/2015 03:27 PM —

**From:** Stephanie Williamson <[swilliamson@russellslaw.com.au](mailto:swilliamson@russellslaw.com.au)>  
**To:** Ryan Rourke <[Ryan.Rourke@asic.gov.au](mailto:Ryan.Rourke@asic.gov.au)>  
**Cc:** Michael Wood <[Michael.Wood@asic.gov.au](mailto:Michael.Wood@asic.gov.au)>, Phillip Mines <[Phillip.Mines@asic.gov.au](mailto:Phillip.Mines@asic.gov.au)>, Kaan Finney <[Kaan.Finney@asic.gov.au](mailto:Kaan.Finney@asic.gov.au)>, "Hugh Copley" <[Hugh.Copley@asic.gov.au](mailto:Hugh.Copley@asic.gov.au)>  
**Date:** 08/10/2015 12:11 PM  
**Subject:** RE: Australian Securities & Investments Commission v Peter Charles Drake & Ors (Federal Court Proceeding No. QUD596/2014) (Treat as In Confidence) [DLM=Sensitive]

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Dear Mr Rourke

We refer to your below email.

As you know, our clients have not advanced the privilege review due to the proposed amendments to the Discovery Plan being discussed between the parties to the proceeding.

Please let us know if there has been any progress in that regard.

Regards

**RUSSELLS**

**Stephanie Williamson**  
*Lawyer*

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No: QUD596/2014

Federal Court of Australia  
District Registry: Queensland  
Division: General

**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**  
Applicant

First Respondent: **PETER CHARLES DRAKE**

Second Respondent: **FRANCENE MAREE MULDER**

Third Respondent: **EGHARD VAN DER HOVEN**

Fourth Respondent: **SIMON JEREMY TICKNER**

Fifth Respondent: **LISA MAREE DARCY**

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## Discovery Plan

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## **1. Discovery Plan ("Plan")**

1. Discovery in this proceeding is non-standard.
2. In view of the large number of items and documents in ASIC's possession, ASIC has proposed that in order for discovery to occur as quickly, inexpensively and efficiently as possible, discovery of documents will take place:
  - a. by ASIC handing over documents in a text searchable, electronic format indexed in a manner compatible with Ringtail litigation software;
  - b. in part by using Keyword Searches to locate documents which respond to the Categories of Discovery annexed to the Court orders made on 17 February 2015 (**the Categories of Discovery**); and
  - c. otherwise as set out in this Discovery Plan (**Plan**) and the Document Exchange Standards & Protocol (Annexure F) (**Protocol**).

---

### **1.1 Background**

3. On 19 March 2013, John Park and Ginette Muller of FTI Consulting were appointed as administrators of LMIM (and on 1 August 2013, were appointed as liquidators).
4. On 21 March 2013, ASIC commenced an investigation in relation to suspected contraventions by LMIM and its directors in its capacity as responsible entity of the FMIF and as trustee of the MPF. The investigation was later expanded in July 2013 to include suspected contraventions of sections:
  - a. 180 to 182 and 184 of the Act (by the officers of LMIM in its capacity as trustee of the MPF);
  - b. 601FD of the Act (by the officers of LMIM in its capacity as responsible entity of FMIF); and
  - c. 601FC and 601LA of the Act (by LMIM in its capacity as responsible entity of the FMIF,

during the period 1 April 2005 to 19 March 2013 (**the ASIC Investigation**).

5. During the ASIC Investigation, ASIC issued a total of approximately 154 Notices under sections 19, 30 and 33 of Part 3 of the ASIC Act (**the Notices**).
6. Approximately 20 million items were produced in response to the Notices by LMIM, the respondents and third parties.
7. Approximately 43 examinations relevant to this proceeding were conducted by ASIC pursuant to section 19 of the ASIC Act (**s19 examinations**). ASIC also conducted four voluntary interviews. ASIC caused all s19 examinations and voluntary interviews to be transcribed.

---

## **1.2 Documents held on two databases**

8. At the time of preparing this Plan, ASIC holds items and documents on the following two databases:
  - (a) A database created using the Ringtail litigation support software (**the LM Ringtail Database**).
  - (b) A database created using software known as NUIX Enterprise Discovery (**the LM Nuix Database**).
9. ASIC will discover documents from the LM Ringtail Database and the LM Nuix Database.

### ***LM Ringtail Database***

10. The LM Ringtail Database presently contains approximately 36,604 documents (32.6 gigabytes of data) comprising:
  - (a) documents produced to ASIC in response to Notices or provided voluntarily in the course of the ASIC Investigation; and
  - (b) additional documents created by, or on behalf of, ASIC including:
    - i. Notices;
    - ii. receipts in respect of documents produced;
    - iii. company searches and personal name extracts;
    - iv. financial documents filed with ASIC;



- v. transcripts of s19 examinations and voluntary interviews; and
- vi. court documents of other proceedings.

11. Of that number of 36,604, approximately 10,000 represent documents ASIC has copied from the LM Nuix Database to the LM Ringtail Database. The remaining number of approximately 26,000 are either documents ASIC obtained under notice, or documents generated by ASIC.
12. ASIC has applied sequentially numbered stickers to the pages of the documents produced to ASIC in hard copy that contain text. ASIC has scanned these documents into PDF format and stored them in the LM Ringtail Database. These documents are text-searchable via an Optical Character Recognition tool. The accuracy of the search results generated by this process is heavily reliant upon the quality of the original document.

#### **LM NUIX Database**

13. The LM Nuix Database contains approximately 18,920,309 items (2.4 terabytes of data). The expression "items" does not equate to "documents". A "document" may consist of more than one component ("items"), for example a company logo within a word processing file or an email, or a chart within a spreadsheet, or pictures within a presentation. Nuix extracts all items and counts them individually.
14. The 18,920,309 items contained in the LM Nuix Database equates to approximately 10.2 million documents.
15. The LM Nuix Database comprises forensic images of user-generated data from the following sources:

*(a) LM's file server, consisting of approximately 7.2 million items.*

These items were produced to ASIC on four 3-terabyte hard drives contained within a NAS (Network Attached Storage) Box in response to a Notice issued to LMIM (In Administration) dated 9 April 2013 (**the LMIM Notice**). ASIC was advised that the NAS Box contained a complete snapshot of LMIM's IT virtual machine system as at 18 March 2013.

*(b) LM's email server, consisting of approximately 11.6 million items.*

These items were also produced to ASIC in response to the LMIM Notice.

*(c) The First Respondent's personal computer and blackberry, consisting of approximately 77,009 items.*

These items were produced to ASIC in response to a Notice dated 25 October 2013 and issued to Mr William Fletcher and Ms Tracy Knight of Bentleys in their capacity as joint and several Receivers to the property of the First Respondent (**the First Respondent's Receivers**). The First Respondent's Receivers told ASIC that the image of the First Respondent's personal computer and blackberry was obtained on 1 October 2013.

The documents contained in the LM Nuix Database referred to in paragraphs 1545(a)(a) and (b)(b) comprise documents created before and up to 18 March 2013. The documents contained in the LM Nuix Database referred to in paragraph 1545(c)(a) comprise documents created before and up to 1 October 2013.

---

### 1.3 Keyword searches

16. In view of the very large number of items, ASIC has not had the opportunity to review the overwhelming majority of items in the LM Nuix Database.
17. In ASIC's view, the majority of the approximately 20 million items and documents held in electronic format on the LM Nuix Database and LM Ringtail Database are unlikely to be relevant to the Categories of Discovery, since they cover the whole of the business of the LM group.
18. Some documents (in whole or in part) may be subject to claims of legal professional privilege or confidentiality by the party who produced the documents or by third parties (in the case of documents produced to ASIC voluntarily or under the Notices).
19. Annexure A sets out the Keyword Searches and the Categories of Discovery to which they relate.

20. The descriptions used in the Categories of Discovery are in some cases broad. Many categories deal with issues which are the same as or similar to issues dealt with in other categories. Thus there is some overlap among the Categories of Discovery, in that some documents fall within the descriptions of more than one category. In order to facilitate the formulation and operation of the Keyword Searches (that is, to "tag" documents more accurately to corresponding Categories of Discovery), where appropriate we have aggregated those Categories of Discovery where the descriptions overlap.<sup>1</sup> Details appear in the table appearing as Annexure A.
21. The table appearing as Annexure A also sets out the following details for both the LM Nuix Database and the LM Ringtail Database:
- a. The approximate raw number of documents which fall within each category (or aggregated Category of Discovery).
  - b. The approximate total number of unique documents which fall within the Categories of Discovery.
22. ASIC will not run Keyword Searches in respect of category 22 of the Categories of Discovery, which requires ASIC to discover "[s]ection 19 examination transcripts of each respondent to the proceedings, any other persons named in the Statement of Claim, and any other relevant persons" (the s19 transcripts). It is not necessary to conduct keyword searches for ASIC to discover the s19 transcripts and the documents referred to in the transcripts, as these documents were caused to be created by ASIC and are readily identifiable. ASIC will provide the respondents with copies of the s 19 transcripts and transcripts of voluntary interviews, as well as the documents referred to in those transcripts (subject to the objection process for Privilege, and any redaction of personal details such as personal contact details to protect confidentiality, as referred to in the Protocol), within three weeks after the date the Court makes an order adopting this Plan.

---

<sup>1</sup> The Keyword Searches appearing in annexure "A" are arranged under headings of the aggregated categories, which include references to the original Categories of Discovery which comprise the aggregated categories.

---

#### **1.4 Discovery of documents from the LM Nuix Database and the LM Ringtail Database**

23. ASIC will discover documents:

- a. exported from the LM Nuix Database to the LM Ringtail Database and allocated to binders; and
- b. currently in the LM Ringtail Database,
- c. from the balance of documents in the LM Nuix Database after the export process referred to below; and
- d. otherwise as set out below,

(subject to the objection process discussed below).

##### ***Step one – the export process***

- 24. As soon as reasonably practicable after the Court has made an order adopting this Plan, ASIC will start exporting documents from the LM Nuix Database to the LM Ringtail Database<sup>2</sup> (that is, documents which respond to the final Keyword Searches set out in Table B appearing in part 2.2 of Annexure A).
- 25. As part of the export process, ASIC will arrange for the LM Nuix Database documents to be automatically "tagged" (using the Nuix software) in a manner which identifies the aggregated Categories of Discovery to which each set of keyword search results relate.
- 26. ASIC estimates that this process will take approximately two weeks. ASIC will inform the respondents in writing once the export process has been completed.

##### ***Step two – keyword searches run over the LM Ringtail Database***

- 27. Upon completion of the export, ASIC will:
  - a. run the Keyword Searches across the content of documents in the LM Ringtail Database, and allocate those documents into the same binders in Ringtail which correspond to each of the Categories of Discovery, such that the Ringtail binders include documents from both the LM Nuix

---

<sup>2</sup> As part of the export process, documents "tagged" multiple times will be exported from the LM Nuix Database to the LM Ringtail Database only once. This may have the effect of decreasing the numbers of documents referred to in Annexure A.

Database (that is, the documents exported as described in Step one above), and the LM Ringtail Database, which meet those categories (Ringtail Files); and

- b. provide the respondents with a Ringtail-generated report listing the documents contained in the Ringtail Files.

28. ASIC estimates that this process will take approximately one week.

29. ASIC will also discover copies of the related books shown to examinees during the course of the section 19 examinations (subject to the objection process discussed below).

**Step three – Objections Individual review of Ringtail Files.**

30. ASIC will review individually each document in the Ringtail Files, and will:

- a. tag each document that meets the description of an aggregated Category of Discovery (including reviewing for direct relevance where required by a category) ("Tagged Documents"); and
- b. by 30 September 19 October 2015, identify any Tagged Documents which are in ASIC's reasonable opinion subject to a claim for legal professional privilege (Reviewed PPD List Documents).

31. A large number of Some emails in the Ringtail Files have either:

- a. no text in the body of those emails; or
- b. appear to be missing information such as the original attachment(s) to those emails which can no longer be read, and/or the text formerly contained in the body of those emails (the "Stub Emails").

32. Before discovering any Stub Emails, ASIC will:-

- a. perform a reasonable search of all documents within ASIC's possession, custody, or control (including, but not limited to the documents in the Nuix Database and the LM Ringtail Database) to seek to determine whether ASIC is in possession of the original version of that email (being the version with the missing text or attachments as the case may be);
- b. if that search indicates that ASIC is in possession of the original version of a Stub Email, discover the original version instead of the Stub Email;

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- c. if that search indicates that ASIC is not in possession of the original version of a Stub Email, inform the respondents as to which Category of Discovery ASIC contends the Stub Email relates.

33. If ASIC has already discovered any Stub Emails, ASIC will, by 30 September 26 October 2015, carry out the process described in paragraph 3232 above in relation to those documents.

**Step Four - Handover of reviewed documents in tranches**

34. ASIC will make copies of all Tagged Documents (except for Reviewed PPD List Documents) available to the respondents by leaving copies for collection at ASIC's reception monthly 15 July 2015, 14 August 2015, 15 September 2015, and monthly thereafter if required (or otherwise as agreed between ASIC and the respondents). ASIC will tell the respondents by email on those dates when the documents are ready for collection.

**Step five - Objections**

30. ~~Annexure B includes a list headed "Privilege", setting out the names of law firms of which ASIC is aware which may have been engaged by LMIM (either in its own capacity or as responsible entity/trustee of one or more of the LM Funds) or other entities in the LM group of companies. Documents on the LM Nuix Database and LM Ringtail Database which include the names of these law firms may be documents potentially subject to a claim of legal professional privilege (Potentially Privileged Documents).~~

31. ~~In respect of any Potentially Privileged Documents for which privilege has not been waived, ASIC will (subject to any order by the Court to the contrary), upon completion of Step two:~~

- ~~a. run searches of the Law Firm Names across the Ringtail Files;~~
- ~~b. remove documents which respond to Law Firm Name searches and place them in a separate folder marked "Potentially Privileged Documents"; and~~
- ~~c. provide the respondents with a Ringtail generated report listing the documents within the folder marked "Potentially Privileged Documents" (the PPD List).~~

~~ASIC estimates that it will take approximately two days to generate the report.~~

35. Before giving the respondents access to any Reviewed PPD List Documents By 2-19 October 2015, ASIC will:-

a. -provide FTI and KM with a list of the Reviewed PPD List Documents and copies of those documents. Such list must, at a minimum, contain the following fields:-

- i. Document ID;
- ii. Document Date;
- iii. Document Title;
- iv. Document Type; and
- v. If the document is an email:-
  - 1. The sender; and
  - 2. The recipient(s)

b. write to each of FTI and KM and inform them of the requirements for making any claim of privilege as set out in paragraphs 3636 below

36. If either FTI or KM wish to make any claim of legal professional privilege in relation to any of the Reviewed PPD List Documents, they must, by 23 October 10 November 2015, provide ASIC and each of the respondents, with a list of the Reviewed PPD List Documents in respect of which such a claim is made. Such list must, at a minimum, contain the following fields and information:-

- i. Document ID;
- ii. Document Date;
- iii. Document Title;
- iv. Document Type;
- v. If the document is an email:-
  - 1. The sender; and
  - 2. The recipient(s); and
- vi. In respect of every document:-

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1. Whether the category of legal professional privilege that is claimed in relation to that document is the advice branch, the litigation branch, or both; and

2. The basis upon which it is said that legal professional privilege attaches to that document.

~~and an opportunity to object to ASIC giving access to those documents to the respondents, by giving ASIC written notice of the objections and the grounds thereof within three weeks of receipt from ASIC of a list of the Reviewed PPD List Documents and copies of all those documents.~~

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37. By 30 October 17 November 2015, ASIC will provide each of the respondents with copies of any of the Reviewed PPD List Documents in relation to which a claim of legal professional privilege has not been made, or has not been made in accordance with paragraphs 3636 above.

~~ASIC will notify the respondents of any objections made by the affected parties to access being given to any Reviewed PPD List Documents and the grounds, as soon as reasonably practicable after receiving an objection.~~

~~If the parties cannot resolve objections by agreement, ASIC, the respondents and the affected parties have liberty to apply on 5 days' notice to have the objections determined by the Court. Nothing in this Plan obliges ASIC to apply to have any objections determined by the Court.~~

32.38. Annexure C includes a table headed "Transcripts" which lists transcripts of persons examined by ASIC pursuant to s19 of the ASIC Act (the examinees) and persons interviewed by ASIC voluntarily (the interviewees), (collectively, the Confidential Transcripts).

33. Annexure D is a table headed "Production of Documents" which lists the people who produced documents to ASIC under the Notices relevant to this Proceeding.

34. ~~Before giving the respondents access to documents contained in the Ringtail Files, ASIC will, as soon as practicable after completing Step two, provide the Insolvency Practitioners with the PPD List (except for any Insolvency Practitioners who might by that time have waived legal professional privilege).~~



35. ~~Before giving the respondents access to documents contained in the Ringtail Files, ASIC will, as soon as practicable after completing Step two above, provide:~~

- ~~a. the examinees and interviewees, whose Confidential Transcripts are contained in the LM Ringtail Database; and~~
- ~~b. LMIM, the respondents and third parties who produced documents contained in the LM Ringtail Database and the LM Nuix Database; and~~
- ~~c. the Insolvency Practitioners~~
- ~~(together, the affected parties),~~

~~with the opportunity to object to ASIC giving access to relevant documents to the respondents. ASIC will require that any parties objecting to access being given do so by giving ASIC written notice of any objections and the grounds within 14 days.~~

36. ~~ASIC will notify the respondents of any objections made by the affected parties to access being given to any documents in the Ringtail Files, and the grounds, as soon as reasonably practicable after receiving an objection.~~

37. ~~ASIC will give the respondents written notice of any objection by ASIC to giving access to any documents in the Ringtail Files and the grounds within 14 days of the completion of steps one and two.~~

38. ~~If the parties cannot resolve objections by agreement, ASIC, the respondents and the affected parties have liberty to apply on 5 days' notice to have the objections determined by the Court. Nothing in this Plan obliges ASIC to apply to have any objections determined by the Court.~~

***Step four six – offer to provide copies of the Ringtail Files to the parties***

39. Upon completion of steps one and two to five, ASIC will (except for any documents the subject of unresolved claims for legal professional privilege in accordance with paragraph 3636 above) or objections to production or those Reviewed PPD List Documents which upon review by ASIC do not meet the description of an aggregated Category of Discovery), offer to give the respondents:

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a. copies of the Ringtail Files (including the audio files of the Confidential Transcripts) in a manner agreed between the parties (e.g. in the form of an external hard drive or hard drives, subject to any technical restraints or limitations); and

b. a Ringtail-generated report listing the documents contained in the Ringtail Files.

b. Despite paragraph 39, in order to protect potential claims of legal professional privilege in respect of Ringtail Files which do not meet the description of an aggregated Category of Discovery, ASIC will not give the Respondents any Ringtail Files which are not Tagged Documents which are in ASIC's reasonable opinion subject to a claim for legal professional privilege, without first giving FTI or KM the opportunity to object to discovery of those documents as set out in Step Five (maintaining the time intervals set out in Step Five, with the intervals starting as soon as practicable after receipt of a request by a Respondent).

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40. Any respondent who wishes to obtain copies of the Ringtail Files or Ringtail-generated report must make a request in writing, and (except for any documents the subject of unresolved claims for legal professional privilege or objections to production), ASIC will make those documents available to the respondent who makes the request. ASIC estimates that this process will take approximately one week after receipt of a request.

~~Except as expressly otherwise provided, the times for completion set out above are estimates only. ASIC will use its best endeavours to meet these times, however for technical or other reasons it may not be possible to do so. If ASIC cannot meet the timeframes set out above, ASIC will notify the respondents as soon as practicable.~~

#### **Further aspects of ASIC's discovery duties**

##### ***Individual review of Ringtail Files, and handover of reviewed documents in tranches.***

41. ASIC will review individually each document in the Ringtail Files, and will:

a. tag each document that meets the description of an aggregated Category of Discovery (including reviewing for direct relevance where required by a category) ("Tagged Documents"); and

- b. ~~make copies of all Tagged Documents available to the respondents by leaving copies for collection at ASIC's reception monthly 15 July 2015, 14 August 2015, 15 September 2015, and monthly thereafter if required (or otherwise as agreed between ASIC and the respondents). ASIC will tell the respondents by email on those dates when the documents are ready for collection.~~

***Availability of LM Nuix Database***

~~42.41.~~ As soon as reasonably practicable after the Court has made an order adopting this Plan, ASIC will, if requested, give any respondent reasonable access to the LM Nuix Database for the purpose of reviewing and copying electronically any document which meets the description of a Category of Discovery, upon:

- a. receipt by ASIC of reasonable written notice; and
- b. ASIC taking reasonable arrangements to protect reasonable claims of confidentiality and privilege.

***Review of folder structure in the LM Nuix Database and the LM Ringtail Database***

~~43.42.~~ As soon as reasonably practicable after the Court has made an order adopting this Plan, ASIC will:

- a. generate a list of folders and sub-folders in the entire LM Nuix Database and LM Ringtail Database ("Folder List"); and
- b. send the respondents a copy of that list by email.

~~44.43.~~ As soon as reasonably practicable after the Court has made an order adopting this Plan, ASIC will undertake a reasonable review of the names of the Folder List, and if ASIC considers that a folder name indicates that it may contain documents which meets the description of an aggregated Category of Discovery, ASIC will undertake reasonable searches of folders in an attempt to locate those documents, and may use keyword searches in doing so. ASIC will provide the respondents with a further list of the names of all folders which ASIC searches following the reasonable review of the names of the Folder List, and will provide that further list at the same time as it makes copies of all Tagged Documents available to the respondents.

**45.44.** If a respondent, acting reasonably, considers that a folder may contain documents which meet the description of the aggregated Categories of Discovery, then upon receipt of a written request from a respondent explaining why it considers that to be the case, and providing details sufficient to reasonably identify those documents:

- a. ASIC will undertake reasonable searches of the folder in an attempt to locate those documents (if ASIC considers that the number of documents in a folder is so large that a manual review of all documents is impractical, ASIC will use electronic searches to search a folder, and will use any reasonable keyword searches proposed by a respondent);
- b. if a respondent wishes, it may inspect the contents of the folder adopting the procedure under the heading above "Availability of LM Nuix Database" in an attempt to locate those documents; and
- c. if ASIC's reasonable searches, or an inspection by a respondent, locates any such documents, ASIC will give the respondents electronic copies of those documents as soon as practicable.

***Search by ASIC for specific documents upon request from a respondent***

**46.45.** If any respondent becomes aware of the existence or likely existence of documents which respond to the description of a Category of Discovery and which have not otherwise been discovered:

- a. ASIC will undertake reasonable searches to locate any such documents, as soon as practicable upon receipt by ASIC of details sufficient to reasonably identify those documents; and
- b. if ASIC's reasonable searches locates any such documents, ASIC will give the respondents electronic copies of those documents as soon as practicable.

***ASIC's ongoing duty of discovery***

**47.46.** If at any time ASIC becomes aware that it possesses any document which meets the description of an aggregated Category of Discovery and which has not otherwise been disclosed, ASIC will discover that document as soon as practicable.

### ***Dealing with concerns regarding discovery***

**48.47.** If any respondent has concerns about the way discovery has taken place, they may raise them in writing, and ASIC will consider those concerns and respond. If the parties cannot resolve the concerns within seven days after the date a respondent gives ASIC notice in writing of its concerns, any party may apply to the Court to have the dispute resolved.

***ASIC will provide the respondents with copies of documents listed in Table B***

**48.48.** By the date seven days after the Court has made an order adopting this Plan, ASIC will provide the respondents with copies of the documents listed in searches numbered 4, 17, 18 and 19 in Table B.

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## **1.5 Definitions**

**"ASIC Act"** means *Australian Securities and Investments Commission Act 2001 (Cth)*

**"FMIF"** means the LM First Mortgage Income Fund ARSN 089 343 288

**"Insolvency Practitioners"** means:

**Joseph Hayes and Anthony Connelly of McGrath Nicol** in their capacity as Receivers and Managers over the FMIF

**Korda Mentha Pty Ltd and Calibre Capital Ltd** in their capacity as trustees for the MPF

**David Whyte** of BDO in his capacity as receiver of the FMIF

**Peter Dinoris** of Vincents Chartered Accountants in his capacity as liquidator of Maddison Estate Pty Ltd

**John Park and Ginette Muller** of FTI Consulting in their capacity as joint and several liquidators of LMIM

**David Clout and Lorraine Smith** of David Clout and Associates in their capacity as joint and several liquidators of LM Administration Pty Ltd

**"LMIM"** means LM Investment Management Limited ACN 077 208 461

**"MPF"** means the LM Managed Performance Fund

**"the Act"** means *Corporations Act 2001* (Cth)



## 2. Annexure A - Keyword Searches

Total number of documents ASIC will make available: approximately 99,300 that is, the total number of Ringtail documents ASIC will make available to the respondents as set out in step four above)

### 2.1 Glossary

CD means Categories of Discovery

FS means LM's File Server

ES means LM's Email Server

PD means Peter Drake's personal computer and blackberry

RT means the LM Ringtail Database

### 2.2 Tables

Table A – Initial Searches

Search number, CD	Keyword searches (and search parameters, if any)	Raw numbers of hits for each database (rounded, expressed in thousands)			
		FS	ES	PD	RT
1. CD 1 (a), 1 (f), 1 (g), 3, 4, 5, 6, 10)	["Maddison" or CRDC or Coomera or YL or "Young" or Pimpama or "One Development" or Arrow* or Element] AND ["Investment Committee" or "Credit Committee" or "CC"] AND [MPF or "Managed Performance Fund"]  Date range: 13/9/07 to 13/11/14	24.2	47.0	0.007	1.4
2. CD 1 (a), 1 (f), 1 (g), 3, 4, 5, 6, 10	["Maddison" or CRDC or Coomera or YL or "Young" or Pimpama or "One Development" or Arrow* or Element] AND [director* or board or Drake or Mulder or Hoven or Tickner or Darcy or "O'Sullivan" or Fischer or Phillips or Chalmers or Petrik or AP or Monaghan or DM or "David Young" or DY or "Bronwyn Kingston" or BK or "Kym Ford" or KF or Daking or "Katy Scott" or KS]  Date range: 13/9/07 to 13/11/14	84.0	157.3	1.5	7.8
3. CD 1 (a), 1 (f), 1 (g), 3, 4,	["Maddison" or CRDC or Coomera or YL or "Young" or Pimpama or "One Development" or Arrow* or Element] AND [Kurbatoff or MK or "Greg McDonald" or GM or Lough or Parker or Landmark or "Land	46.4	50.0	1.0	8.1

5, 6, 10	mark" or LMW or Ernst or EY or E&Y or Matusik or RPS or Moreton or GCCC or "Gold Coast City Council" or "DA" or "Development Approval" or "Development Plan" or "Kelly Slater" or "Jamie Durie" or "Sam Reilly" or "Natalie Cook" or "wave pool" or wavepool or swim or volleyball]  Date range: 13/9/07 to 13/11/14				
4. CD 1(e), 1(h), 12, 15, 16	[LMIM or "LM Investment" or *MIF or "First Mortgage Income" or "Managed Performance Fund" or MPF or LMA or "LM Administration"] AND ["management fee*" or "mgmt fee*" or revenue or "balance sheet" or "financial position" or "financial statement*" or *solven* or impair* or "cash flow*" or cashflow* or "account statement*" or "bank statement*" or "ledger*" or "LM Group position" or "general journal" or "cash at bank" or "avg balance*"]  Date range: 1/7/09 to 13/11/14	81.2	88.4	0.047	7.0
5. CD 1(b) and 1(d)	[Suncorp or "Suncorp-Metway" or Metway] AND [LM or Coomera or Maddison or CRDC or mortgage* or charge* or securit* or "Landmark White" or "Land Mark" or LMW or valu* or Pimpama or drawdown* or refinance* or variation* or Ernst or EY or E&Y or loan* or interest or Matusik or 021927243 or 126213 or 021789784 or guarantee* or indemnity* or "watch list" or watchlist* or offer*]  Date Range: 1/1/08 to 13/11/14	160.1	32.6	0.4	6.0
6. CD 1(c) and 1(d)	[Maddison or "Coomera" or Arrow* or "One Development" or Element or Pimpama] AND [loan* or variation* or varies or varied or vary or increase* or approval* or "establishment fee*"]  Date range: 1/7/07 to 13/11/14	57.8	81.0	0.9	7.6
7. CD 2 and 3(d)	["Maddison" or Coomera or Pimpama or "One Development" or Arrow* or Element or YL or "Young*"] AND [report or valu* or synops* or projection* or forecast* or model* or feas* or analys* or assess* or Landmark or "Land mark" or LMW or Ernst or EY or E&Y or Matusik or RPS or Moreton* or "core economics"]  Date range: 13/9/07 to 13/11/14	113.4	141.6	1.7	10
8. CD 2 and 3(d)	["Maddison" or Coomera or Pimpama or "One Development" or Arrow* or Element] AND ["Estate Master" or ".emdf" or "EMDF"]	2.0	1.7	0.2	0.5
9. CD 13, 20, 14	[130252727] AND [PD or PCD or Drake or PDANZLOANTRF or AOTR* or 34860071 376011389801005 or Lumley]  Date range: 1/3/08 to 13/11/14	.5	0.2	0	0.3
10. CD 13, 20, 14	[Drake] AND [LMA or "LM Administration" or "LMA Trust" or "Administration Trust"] AND ["general ledger" or "GL"] AND [loan or drawing* or "financial statement*"]	0.6	0.1	0	0.2



	Date range: 1/6/07 to 13/11/14				
11. CD 7	["Managed Performance Fund" or MPF] AND ["lending polic*" or "loan polic*" or "lending procedure*" or "loan procedure*" or constitution* or "credit approval*" or "credit polic*" or "conflict record*"]	8.2	9.9	0.002	1.5
	Date range: 1/4/10 to 13/11/14				
12. CD 8	[Drake or Mulder or Hoven or Tickner or Darcy] AND ["personal leave" or "annual leave" or "sick leave" or holiday*" or "travel expense*"]	7.4	15.6	0.007	0.5
	Date range: 1/4/10 to 13/11/14				
13. CD 9	[Drake or Mulder or Hoven or Tickner or Darcy or Barnett or Fischer or King or Chalmers] AND ["employment agreement" or "consultancy agreement*" or "letter of offer*" or "contract of employment*" or "offer of employment*" or "employment contract*"]	1.7	1.5	0.006	0.4
	Date range: 13/11/07 to 13/11/14				
	Document type: PDF only				
	Does not include email source and irrelevant attachments				
14. CD 11	[MPF or "Managed Performance Fund"] AND ["Investment Committee*" or "Credit Committee*" or CC] AND ["membership register*" or member* or "register of members" or "membership list*"]	11.4	18.0	0.005	1.2
	Date range: 13/9/07 to 13/11/14				
15. CD 14	["Century Star" or "Coomera Ridge" or "LM Administration" or "LM Coomera Holdings" or "LM Investment Management" or "LMIM Asset Management" or "Maddison Estate" or "Oceanboard" or "Drake Management" or "Ekard Property"] AND ["company extract" or shareholding or "share register" or "summary of holding*" or "membership register" or "member register" or "annual return"]	3.2	3.8	0.013	0.3
	Date range: 13/9/07 to 13/11/14				
16. CD 17	[Maddison or Coomera or Arrow* or "One Development" or Element] AND ["loan statement*" or "financial statement*" or "balance sheet*" or ledger*]	5.4	0.5	0.2	1.0
	Date range: 1/7/07 to 13/11/14				
	Does not include email source				
17. CD 18	[LMIM or "LM Investment"] AND ["annual report" or "financial report*" or "financial statement*" or "balance sheet*"]	8.7	4.8	0.018	1.9
	Date range: 30/06/07 to 13/11/14				

	Document type: PDF only  Does not include email source and irrelevant attachments				
18. CD 19	[MPF or "Managed Performance Fund"] AND ["annual report" or "financial report*" or "financial statement*" or "balance sheet*"]  Date range: 30 June 2007 to 13/11/14  Document type: PDF only  Does not include email source and irrelevant attachments	3.5	2.6	0	1.8
19. CD 21	["LMIM" or "LM Investment"] AND ["MPF" or "Managed Performance Fund"] AND ["information memorandum"]  Date range: 13/9/07 to 13/11/14  Document type: PDF only  Does not include email source and irrelevant attachments	10.3	4.3	0.002	2.6

**Table B – Final Searches**

Search number, CD	Keyword searches (and search parameters, if any)	Raw numbers of hits for each database (rounded, expressed in thousands)			
		FS	ES	PD	RT
1. CD 1 (a), 1 (f), 1 (g), 3, 4, 5, 6, 10)	[Maddison or CRDC or "LM Coomera" or "Coomera Ridge" or "David Young" or "Young Land Project Management" or Pimpama or "One Development" or Arrowtown or "Arrow Town" or "Northern Element"] AND ["Investment Committee*" or "Credit Committee*" or content:(CC)] AND [MPF or "Managed Performance Fund"]  Date range: 13/9/07 to 30/09/12	2.4	3.4	0.006	0.2
2. CD 1 (a), 1 (f), 1 (g), 3, 4, 5, 6, 10	["Maddison" or CRDC or "LM Coomera" or "Coomera Ridge" or "David Young" or "Young Land Project Management" or Pimpama or "One Development" or Arrowtown or "Arrow Town" or "Northern Element"] AND [director* or board or Drake or Mulder or Hoven or Tickner or Darcy or Fischer or Phillips or Chalmers or Petrik or Monaghan or "David Young" or "Bronwyn Kingston" or "Kym Ford" or "Katy Scott"]  Date range: 13/9/07 to 30/09/12	11.1	33.0	1.1	3.2
3. CD 1 (a), 1 (f), 1 (g), 3, 4,	["Maddison" or CRDC or "LM Coomera" or "Coomera Ridge" or "David Young" or "Young Land Project Management" or Pimpama or "One Development" or Arrowtown or "Arrow Town" or "Northern Element"]	15.1	12.1	0.8	4.1

5, 6, 10	<p>AND [Kurbatoff or "Greg McDonald" or Lough or Parker or Landmark or "Land mark" or LMW or Ernst or EY or "E&amp;Y" or Matusik or RPS or Moreton or GCCC or "Gold Coast City Council" or "DA" or "Development Approval*" or "Development Plan*" or "Kelly Slater" or "Jamie Durie" or "Sam Reilly" or "Natalie Cook" or "wave pool" or wavepool or swim or volleyball]</p> <p>Date range: 13/9/07 to 30/09/12</p>				
4. CD 1(e), 1(h), 12, 15, 16	<p>ASIC will discover the following documents:</p> <p>LMA Service Agreement</p> <p>MPF Annual Reports (years ended 30 June 2010 to 30 June 2014 inclusive)</p> <p>FMIF Annual Reports (years ended 30 June 2011 to 30 June 2014 inclusive)</p> <p>CPF Annual Reports (years ended 30 June 2011 to 30 June 2014 inclusive)</p> <p>ICPAIF Annual Reports (years ended 30 June 2011 to 30 June 2014 inclusive)</p> <p>CPAIF Annual Reports (years ended 30 June 2011 to 30 June 2014 inclusive)</p> <p>ASPF Annual Reports (years ended 30 June 2011 to 30 June 2014 inclusive)</p> <p>AIF Annual Reports (years ended 30 June 2011 to 30 June 2014 inclusive)</p> <p>Report on LM Group Position dated 14 June 2012</p> <p>Minutes of Directors' Finance Meeting and Action Plan dated 20 June 2012</p> <p>ASIC will also run the following keyword searches:</p> <p>[LMIM or "LM Investment" or *MIF or "First Mortgage Income" or "Managed Performance Fund" or MPF or LMA or "LM Administration"] AND ["management fee*" or "mgmt fee*" or "financial position" or *solvem* or impair* or "LM Group position" NOT [redemption or hardship or frozen or "closed funds"]</p> <p>Date range: 1/7/11 to 13/11/12</p>	9.0	18.0	0	1.1
5. CD 1(b) and 1(d)	<p>LM File Server and Drake's PC and blackberry.</p> <p>[Suncorp OR "Suncorp-Metway" OR Metway]] AND (LM OR Coomera OR Maddison OR CRDC OR mortgage* OR charge* OR securit* OR "Landmark White" OR "Land Mark" OR LMW OR valu* OR Pimpama OR drawdown* OR refinance* OR variation* OR Ernst OR EY OR "E&amp;Y" OR loan* OR interest OR Matusik OR 021927243 OR 126213 OR 021789784 OR guarantee* OR indemnit* OR "watch list*" OR watchlist* OR offer*]</p> <p>Date range: 1/1/08 to 30/9/12</p> <p>LM Email Server and Ringtail Database:</p>	2.7	1.5	0.4	0.8

	<p>[Suncorp OR "Suncorp-Metway" OR Metway] AND [LM OR Coomera OR Maddison OR CRDC OR mortgage* OR charge* OR securit* OR "Landmark White" OR "Land Mark" OR LMW OR valu* OR Pimpama OR drawdown* OR refinance* OR variation* OR Ernst OR EY OR "E&amp;Y" OR loan* OR interest OR Matusik OR 021927243 OR 126213 OR 021789784 OR guarantee* OR indemnity* OR "watch list*" OR watchlist* OR offer*] AND ["David Kop" or "Michael Kearney" or "Mark Kurbatoff" or "Amanda Helmore" or "Wayne Jones" or "Lisa Cannon"]</p> <p>Date range for Ringtail Database: 1/1/08 to 30/9/12 Date range for Ringtail Database: 13/9/07 to 13/11/14</p>				
6. CD 1(c) and 1(d)	<p>["Maddison or "LM Coomera" or Arrowtown or "Arrow Town" or "One Development" or "Northern Element" or Pimpama] AND [loan* or variation* or varies or varied or vary or increase* or approval* or "establishment fee*"]</p> <p>Date range: 1/7/07 to 30/09/12</p>	6.8	24.1	0.3	2.7
7. CD 2 and 3(d)	<p>["Maddison" or "LM Coomera" or Pimpama or "One Development" or Arrowtown or "Arrow Town" or "Northern Element" or "Young Land Project Management"] AND [content:"report" or valu* or synops* or projection* or forecast* or model* or feas* or analys* or assess* or Landmark or "Land mark" or LMW or Ernst or EY or "E&amp;Y" or Matusik or RPS or Moreton* or "core economics"] NOT [FMIF or "First Mortgage Income Fund" or AIF or "Australian Income Fund" or AIFCP or "Australian Income Fund Currency Protected"]</p> <p>Date range: 13/9/07 to 30/09/12</p>	22.5	16.0	0.4	4.2
8. CD 2 and 3(d)	<p>["Maddison" or "LM Coomera" or Pimpama or "One Development" or Arrowtown or "Arrow Town" or "Northern Element"] AND ["Estate Master" or ".emdf" or "EMDF"]</p>	1.6	1.5	0.055	0.5
9. CD 13, 20, 14	<p>[130252727] AND [PD or PCD or Drake or PDANZLOANTRF or AOTR* or 34860071 or 376011389801005 or Lumley]</p> <p>Date range: 1/3/08 to 30/09/12</p>	0.6	0.2	0	0.2
10. CD 13, 20, 14	<p>[Drake] AND [LMA or "LM Administration" or "LMA Trust" or "Administration Trust"] AND ["general ledger" or "GL"] AND [loan or drawing* or "financial statement*"]</p> <p>Date range: 1/6/07 to 30/09/12</p>	0.4	0.2	0	0.07
11. CD 7	<p>["Managed Performance Fund" or MPF] AND ["lending polic*" or "loan polic*" or "lending procedure*" or "loan procedure*" or constitution* or "credit approval*" or "credit polic*" or "conflict</p>	2.6	1.2	0.002	0.4

	record**] NOT [FMIF or "First Mortgage Income Fund" or AIF or "Australian Income Fund" or AIFCP]				
	Date range: 1/4/10 to 30/09/12				
12. CD 8	[Drake or Mulder or Hoven or Tickner or Darcy] AND ["personal leave" or "annual leave" or "sick leave" or holiday**" or "travel expense**"] NOT ["Jeremy Holiday"]  LM File Server Search only the folder: [root]/Data/LM Data/Human Resources/  LM Email Server: search only respondents as custodians  Date range: 1/4/10 to 30/09/12	1.0	7.1	0.006	0.2
13. CD 9	[Drake or Mulder or Hoven or Tickner or Darcy or Barnett or Fischer or King or Chalmers] AND ["employment agreement" or "consultancy agreement**" or "letter of offer**" or "contract of employment**" or "offer of employment**" or "employment contract**"]  LM File Server Search only the folder: [root]/Data/LM Data/Human Resources/ Date range: 13/11/07 to 30/09/12  Document type: PDF only  Does not include email source and irrelevant attachments	0.043	0.3	0.006	0.2
14. CD 11	[MPF or "Managed Performance Fund"] AND ["Investment Committee**" or "Credit Committee**"] AND [ member* ]  Date range: 13/9/07 to 30/09/12	4.4	3.8	0.003	0.7
15. CD 14	["Century Star" or "Coomera Ridge" or "LM Administration" or "LM Coomera Holdings" or "LM Investment Management" or "LMIM Asset Management" or "Maddison Estate Pty Ltd" or "Oceanboard" or "Drake Management" or "Ekard Property"] AND [shareholding or "share register" or "summary of holding**" or "membership register" or "member register" or "annual return"]  Date range: 13/9/07 to 30/09/12	2.4	2.4	0.001	0.1
16. CD 17	["Maddison or "LM Coomera" or Arrowtown* or "Arrow Town" or "One Development" or "Northern Element"] AND ["loan statement**" or "financial statement**" or "balance sheet**" or ledger*]  Date range: 1/7/07 to 30/09/12	1.3	1.2	0.1	0.4



	Does not include email source				
17. CD 18	ASIC will discover the following documents: LMIM Annual Reports (years ended 30 June 2007 to 30 June 2013 inclusive)	n/a	n/a	n/a	n/a
18. CD 19	ASIC will discover the following documents: MPF Annual Reports (years ended 30 June 2007 to 30 June 2013 inclusive)	n/a	n/a	0	n/a
19. CD 21	ASIC will discover the following documents: Supplementary Information Memorandum to the Information Memorandum issued on 17 June 2008 MPF Information Memo and Application Form issued 25 November 2009 Supplementary Information Memorandum to the Information Memorandum issued on 25 November 2009 MPF Information Memo and Application Form dated 22 February 2011 Supplementary Information Memorandum to Information Memorandum issued on 22 February 2011 Information Memorandum dated 1 November 2011 Supplementary Information Memorandum to Information Memorandum issued on 1 November 2011 Information Memorandum dated 14 December 2012	n/a	n/a	n/a	n/a

## 2.3 Notes

### *Explanation of tables*

- The tables summarise the results of keyword searches run over the LM Nuix Database and the LM Ringtail Database.
- The searches use advanced Boolean search terms.
- The "Search number, CD" column numbers the 19 searches undertaken. The numbers after "CD" refer to the relevant paragraphs of the Categories of Discovery, and show which categories have been aggregated, and which categories have been searched as stand-alone categories. For example, search number 1 aggregates Categories of Discovery (a), 1 (f), 1 (g), 3, 4, 5, 6, 10. Search number 7 is a search of Category of Discovery 7 only.

- Tables A and B show the results of two successive series of keyword searches ASIC undertook of the LM Nuix Database and the LM Ringtail Database. The first searches appear in Table A as the "Initial Searches", and the total number of net unique hits of documents from these searches was approximately 434,000. The second searches appear in Table B as the "Final Searches", and the total number of net unique hits of documents from these searches was approximately 99,281. ASIC ran the Final Searches wholly within the population of documents which were hits to the search terms of the Initial Searches. The keyword searches used in the Final Searches represent a narrower (or identical in some cases) series of searches than those in the Initial Searches, in that the keyword searches and search parameters of the Final Searches fall wholly within the search terms of the Initial Searches.

***Explanation of numbers***

- During ASIC's investigation, and before ASIC filed the proceedings, ASIC copied approximately 10,000 documents from the LM Nuix Database to the LM Ringtail Database. ASIC has run the keyword searches in the LM Ringtail Database across the 10,000 documents copied to that database. Of these 10,000 documents, 3,090 documents returned "hits" to keyword searches run in both the LM Nuix Database and the LM Ringtail Database ("Nuix/Ringtail Doubleups"). ASIC will not copy these documents again from Nuix to Ringtail, since they have already been exported to Ringtail, and they already form a part of the total number of Ringtail documents ASIC will give the respondents as set out in step four above.
- The numbers appearing in the "Raw numbers" column beside each search represent the number of hits generated by running the relevant set of keyword searches across the two databases (that is, the LM Nuix Database and the LM Ringtail Database). Despite the aggregation of some Categories of Discovery (described above under the heading "Keyword Searches"), some documents nevertheless are hits in more than one category. This means that a total of all the numbers in the "Numbers" column does not represent the overall number of documents which respond to the searches (in part because some documents overlap as hits in more than one category). Indeed, a total of all the numbers in the "Numbers" column is much greater than the total number of documents which respond to the searches, in large part because of

the overlap. ASIC has calculated a net figure from the Final Searches appearing in Table B, which represents the total number of Ringtail Files, which are the documents ASIC will offer to make available to the respondents as set out in step four above. The net figure of Ringtail Files is also the number of documents ASIC will review individually, described under the heading "Individual review of Ringtail Files" above. ASIC calculated that net figure as follows:

- o disregarding the overlapping documents (described above);
- o removing files that the Nuix software calls "immaterial" files, being files of the following nature:
  - directory files;
  - embedded images and files; and
  - system files, and
- o de-duplication within databases, and across databases (that is, de-duplicating documents which appear in more than one of the LM File Server, the LM Email Server and the First Respondent's computer and blackberry).

This table shows the calculation of the total number of documents (from Table B above) ASIC will hand over:

<b>Hits, and deductions</b>	
LM File Server	25,935
Plus LM Email Server	67,775
Plus First Respondent's personal computer and blackberry	304
Plus LM Ringtail Database	8,357
Less Nuix/Ringtail Doubleups	3,090
<b>Total</b>	<b>99,281</b>

**Bank references**

- Some search numbers include references to bank account, payment or transaction numbers, or client references:



*Search number 5*

021927243: Loan payment reference

126213: Borrower reference

021789784: Client reference

*Search number 9*

34860071: Account number

376011389801005: Credit card number

***Search parameters (date range, email source, document type and irrelevant attachments)***

- ***Date range:*** ASIC conducted searches over the date ranges specified, or where no dates are specified, the searches contained no date parameters. Where date ranges are used, they derive from dates used in the Categories of Discovery, although ASIC extended them back in some cases (so as to include documents from a relevant financial year), and in Table A, forward in all cases to run up to the date the proceedings were filed (so as to include documents whose "creation" dates may have changed when the documents were opened at a later date than the actual creation date). In Table B, any applicable date ranges for the Final Searches run across the LM Nuix Database appear within the table and reflect the date ranges in the Categories of Discovery. The date ranges for the Final Searches run across the LM Ringtail Database were 13/09/07 to 13/11/14.
- ***Email source and listed documents:*** In Table A, in respect of three types of documents (search 13 covering financial statements, searches 16 and 17 covering employment agreements, and search 19 covering information memoranda), ASIC has not searched email sources. Each is a discrete set of readily identifiable documents. In view of the nature of the documents which meet the description of the categories, documents which respond to the descriptions in the relevant Categories of Documents are not "email source" documents, and for that reason we have not searched the email source documents. In Table B, for the same reasons, ASIC has not searched email sources in respect of searches 13 and 16. Additionally, in respect of searches 17, 18 and 19, ASIC will discover documents listed in Table B, for the reason that the

documents which respond to the descriptions of the categories are a discrete set of readily identifiable documents. In respect of search 4, ASIC will discover documents listed in Table B, in addition to running keyword searches set out in that search. *Document type:* In search number 13, ASIC conducted searches for PDF documents only, where it could be reasonably expected that documents which meet the description of the relevant Category of Discovery would be in PDF format (namely, executed employment agreements, consultancy agreements, letters of offer, contracts of employment, offers of employment or employment contracts).

- *Irrelevant attachments:* The keyword search table above refers in some cases to "irrelevant attachments". In some cases, keyword searches for documents falling within a given Category of Discovery returned hits for only some of the attachments to particular emails, and the software considered other attachments "irrelevant" (in that they did not represent a hit for a keyword search). ASIC will discover those attachments which returned hits to keyword searches, and not include irrelevant attachments.

#### ***Searches of LM Email database***

- The email server contains approximately 11.6 million items, and to ASIC's knowledge represents the email database of the entire LMIM enterprise. In order to search such a large database effectively to locate documents which meet the description of the Categories of Discovery, ASIC ran keyword searches over the email custodians who dealt with the matters the subject of the proceeding, being the respondents and relevant LMIM employees, namely:

1. Andrew Petrik
2. Ann McCallum
3. Bronwyn Kingston
4. Caroline Lough
5. Dan Longan
6. Eghard van der Hoven
7. Eryn Vannucci
8. Francene Mulder
9. Grant Fischer
10. John O'Sullivan
11. Katy Phillips
12. Katy Scott
13. Lisa Darcy

14. Luke Barnett
15. Maribel Bell
16. Michael Parker
17. Nick Daking
18. Peter Drake
19. Phil Klein
20. Scott King
21. Shauna Larkin
22. Shelley Chalmers
23. Simon Tickner

- The only exceptions to these custodians were in searches 12 and 13 of Table B, where the email custodians were limited to the respondents.
- Annexure "E" is a full list of email custodians appearing on the LM Email Server given to ASIC. Despite searches, ASIC has not been able to locate inboxes for additional custodians including Brett Hawkins, David Monaghan and Greg McDonald.
- The numbers appearing in the keyword searches table above represent the precise numbers which appear in the searches we undertook. However the numbers may well be approximate, in view of the very large number of items involved. It is possible that the actual numbers of documents will vary slightly from those appearing in the table.

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### **3. Annexure B - Privilege**

1. Allens Arthur Robinson (or Allens)
2. Minter Ellison
3. Monaghan Lawyers
4. Thomsons Lawyers
5. Hickey Lawyers
6. Ashurst
7. McCullough Robertson
8. Verekers Lawyers
9. Hopgood Ganim
10. Holman Webb
11. DLA Phillips Fox
12. Hickey Lawyers
13. Reaburn Solicitors
14. Pevy Lawyers
15. Quinn and Box Lawyers
16. Arcuri Lawyers
17. Norton Rose
18. Bugden Lawyers
19. Kemp Strang

#### 4. Annexure C - Transcripts

No.	Date	Description
<b>(a) Luke John BARNETT</b>		
1.	23.05.2013	S19 Transcript of Luke John Barnett
<b>(b) Andrea Lynn BLANK</b>		
2.	24.10.2013	S19 Transcript of Andrea Lynn Blank, WPIAS Pty Ltd
<b>(c) Shelley CHALMERS</b>		
3.	25.07.2013	Transcript of 1 <sup>st</sup> Voluntary Interview of Shelley Chalmers
4.	26.11.2013	Transcript of 2 <sup>nd</sup> Voluntary Interview of Shelley Chalmers
5.	08.07.2014	Transcript of 3 <sup>rd</sup> Voluntary Interview of Shelley Chalmers
<b>(d) William Grant CHATHAM</b>		
6.	04.12.2013	S19 Transcript of William Grant Chatham, PKF (Gold Coast) Pty Ltd
<b>(e) Lisa Maree DARCY</b>		
7.	01.08.2013	S19 Transcript of 1 <sup>st</sup> examination of Lisa Maree Darcy
8.	22.01.2014	S19 Transcript of 2 <sup>nd</sup> examination of Lisa Maree Darcy
9.	21.02.2014	S19 Transcript of 3 <sup>rd</sup> examination of Lisa Maree Darcy
<b>(f) Peter Charles DRAKE</b>		
10.	01.05.2013	S19 Transcript of 1 <sup>st</sup> examination of Peter Charles Drake
11.	17.12.2013	S19 Transcript of 2 <sup>nd</sup> examination of Peter Charles Drake
12.	18.12.2013	S19 Transcript of 3 <sup>rd</sup> examination of Peter Charles Drake
13.	20.01.2014	S19 Transcript of 4 <sup>th</sup> examination of Peter Charles Drake
<b>(g) Grant Peter FISCHER</b>		
14.	18.07.2013	S19 Transcript of 1 <sup>st</sup> examination of Grant Peter Fischer
15.	08.08.2013	S19 Transcript of 2 <sup>nd</sup> examination of Grant Peter Fischer
16.	11.12.2013	S19 Transcript of 3 <sup>rd</sup> examination of Grant Peter Fischer
17.	13.12.2013	S19 Transcript of 4 <sup>th</sup> examination of Grant Peter Fischer



No.	Date	Description
<b>(n) Richard GREEN</b>		
18.	04.06.2014	S19 Transcript of Richard Green of Landmark White
<b>(o) Carolyn Anne HODGE</b>		
19.	05.11.2013	S19 Transcript of Carolyn Anne Hodge
<b>(p) Michael Vincent KEARNEY</b>		
20.	13.02.2014	S19 Transcript of Michael Vincent Kearney, Suncorp
<b>(q) Scott Andrew KING</b>		
21.	10.07.2013	S19 Transcript of Scott Andrew King
<b>(r) David KOP</b>		
22.	12.02.2014	S19 Transcript of 1 <sup>st</sup> examination of David Kop, Suncorp
23.	12.09.2014	S19 Transcript of 2 <sup>nd</sup> examination of David Kop, Suncorp
<b>(s) Mark KURBATOFF</b>		
24.	30.05.2014	S19 Transcript of 1 <sup>st</sup> examination of Mark Kurbatoff, Suncorp
25.	10.09.2014	S19 Transcript of 2 <sup>nd</sup> examination of Mark Kurbatoff, Suncorp
<b>(t) Bruce Neil MACKENZIE</b>		
26.	06.11.2013	S19 Transcript of Bruce Neil Mackenzie
<b>(u) Scott James MCMURTRIE</b>		
27.	28.05.2013	S19 Transcript of Scott James McMurtrie, PKF (Gold Coast) Pty Ltd
28.	21.11.2013	Transcript of Voluntary Interview of Scott McMurtrie, PKF (Gold Coast) Pty Ltd
<b>(v) Alexander David MONAGHAN</b>		
29.	17.02.2014	S19 Transcript of Alexander David Monaghan
<b>(w) Francene Maree MULDER</b>		
30.	06.08.2013	S19 Transcript of 1 <sup>st</sup> examination of Francene Maree Mulder
31.	06.02.2014	S19 Transcript of 2 <sup>nd</sup> examination of Francene Maree Mulder
32.	07.02.2014	S19 Transcript of 3 <sup>rd</sup> examination of Francene Maree Mulder

No.	Date	Description
33.	11.02.2014	S19 Transcript of 4 <sup>th</sup> examination of Francene Maree Mulder
(c) Katherine Jane PHILLIPS		
34.	20.02.2014	S19 Transcript of Katherine Jane Phillips
(s) Simon Jeremy TICKNER		
35.	06.06.2013	S19 Transcript of 1 <sup>st</sup> examination of Simon Jeremy Tickner
36.	12.12.2013	S19 Transcript of 2 <sup>nd</sup> examination of Simon Jeremy Tickner
37.	09.01.2014	S19 Transcript of 3 <sup>rd</sup> examination of Simon Jeremy Tickner
38.	10.01.2014	S19 Transcript of 4 <sup>th</sup> examination of Simon Jeremy Tickner
39.	14.01.2014	S19 Transcript of 5 <sup>th</sup> examination of Simon Jeremy Tickner
(b) Eghard VAN DER HOVEN		
40.	07.08.2013	S19 Transcript of 1 <sup>st</sup> examination of Eghard van der Hoven
41.	30.01.2014	S19 Transcript of 2 <sup>nd</sup> examination of Eghard van der Hoven
42.	31.01.2014	S19 Transcript of 3 <sup>rd</sup> examination of Eghard van der Hoven
(u) Reginald Lance WILLIAMS		
43.	24.10.2013	S19 Transcript of 1 <sup>st</sup> examination of Reginald Lance Williams WPIAS Pty Ltd
44.	29.11.2013	S19 Transcript of 2 <sup>nd</sup> examination of Reginald Lance Williams WPIAS Pty Ltd

## 5. Annexure D - Production of documents

Notice Type	Provider
Notice ASICA 30	American Express Australia Limited
Notice ASICA 30	Australia and New Zealand Banking Group Ltd
Notice ASICA 30	Bank of Western Australia Ltd
Notice ASICA 33	BDO Australia Limited
Voluntary	Bentleys Corporate Recovery
Notice ASICA 33	Bentleys Corporate Recovery
Notice ASICA 33	BIS Shrapnel Pty Ltd
Notice ASICA 33	Citigroup Pty Limited
Notice ASICA 33	Commissioner of State Revenue
Notice ASICA 30	Commonwealth Bank of Australia
Notice ASICA 19 (2)(a)	Darcy, Lisa
Notice ASICA 30	Deutsche Bank AG
Notice ASICA 33	Drake, Peter
Notice ASICA 30	Ernst & Young
Notice ASICA 33	Fischer, Grant
Notice ASICA 33	GE Automotive Financial Services
Notice ASICA 33	Gold Coast City Council
Notice ASICA 33	Herron Todd White Gold Coast & NSW Far North Coast Pty Ltd
Notice ASICA 33	HSBC Bank Australia Limited
Notice ASICA 30	ING Bank (Australia) Limited
Notice ASICA 33	KordaMentha Pty Ltd
Notice ASICA 33	LandMark White (Gold Coast) Pty Ltd
Voluntary	LM Administration Pty Ltd



Notice Type	Provider
Notice ASICA 30	LM Administration Pty Ltd
Notice ASICA 19 (2)(a)	LM Investment Management Ltd
Voluntary	LM Investment Management Ltd
Notice ASICA 30	LM Investment Management Ltd
Notice ASICA 19 (2)(a)	Monaghan, David
Notice ASICA 19 (2)(a)	Mulder, Francene
Notice ASICA 30	National Australia Bank Limited
Notice ASICA 33	Phillips, Katherine
Notice ASICA 33	PKF (Gold Coast) Pty Ltd
Notice ASICA 30	St George Bank
Notice ASICA 30	Suncorp-Metway Limited
Notice ASICA 33	The Trust Company PTAL Ltd
Notice ASICA 19 (2)(a)	Tickner, Simon
Notice ASICA 19 (2)(a)	Van Der Hoven, Eghard
Notice ASICA 30	Westpac Banking Corporation
Notice ASICA 33	Williams Partners Independent Audit Specialists
Notice ASICA 33	WMS Chartered Accountants

## **6. Annexure E - Full list of email custodians appearing on the LM Email Server**

Mailbox - Accounts  
Mailbox - adminconfirm  
Mailbox - Administrator  
Mailbox - Alison Miller  
Mailbox - Allina Leal  
Mailbox - Amanda Gardner  
Mailbox - Amber Koeman  
Mailbox - Amy Duke  
Mailbox - Andrew Petrik  
Mailbox - Ann McCallum  
Mailbox - Ashleigh McKenna  
Mailbox - Audit  
Mailbox - Ax  
Mailbox - backupexec  
Mailbox - Bangkok Boardroom  
Mailbox - Batch Man  
Mailbox - Ben Fisher  
Mailbox - BESAdmin  
Mailbox - Bianca Gray  
Mailbox - Birgit Zammit  
Mailbox - Bo Hanmateekuna  
Mailbox - Bree Howe  
Mailbox - Brian Christiansen  
Mailbox - Bronwyn Kingston  
Mailbox - Caela Moss  
Mailbox - Caitlin Drinkwater  
Mailbox - Cameron Kohring  
Mailbox - Careers  
Mailbox - Caroline Barton  
Mailbox - Caroline Lough  
Mailbox - Carolyn Hodge  
Mailbox - CBA Credit Advice  
Mailbox - Changes  
Mailbox - Chris Phillips  
Mailbox - Christie Tucker  
Mailbox - Client Response Mailbox  
Mailbox - CodeTwo Update Agent  
Mailbox - Commissions  
Mailbox - commvault  
Mailbox - Commvault Backup Service Account  
Mailbox - Correspondence  
Mailbox - Courtney Mulder  
Mailbox - CPAIF Correspondence  
Mailbox - Dan Longan  
Mailbox - David Harman  
Mailbox - David Harman SA  
Mailbox - David Nunn  
Mailbox - dbmonitor

Mailbox - Debbie Leung  
Mailbox - Debby Bishop  
Mailbox - Denise Hollidge  
Mailbox - Devi Pillay  
Mailbox - Disaster Recovery Test  
Mailbox - Donna Alexander  
Mailbox - Eghard van der Hoven  
Mailbox - Eloise Mulder  
Mailbox - Enquiries  
Mailbox - Eryn Vannucci  
Mailbox - Evelyn Lugiarto  
Mailbox - exch2ad  
Mailbox - Expense Claim  
Mailbox - Faiz Khan  
Mailbox - Felicity Williams  
Mailbox - Finance Fax  
Mailbox - Fiona Draney  
Mailbox - Francene Mulder  
Mailbox - Fran Gordon  
Mailbox - FX Reports  
Mailbox - FX Trading  
Mailbox - Glen Curley  
Mailbox - Global Service  
Mailbox - Gold Coast - MR1 B/Room Beach Rd  
Mailbox - Gold Coast - MR2 Kitchen - Beach Rd  
Mailbox - Gold Coast - MR3 Training/Conf Cavill Ave  
Mailbox - Gold Coast - MR4 - Level 1- Cavill Ave  
Mailbox - Gold Coast - MR5 - Level 3 Cavil Ave  
Mailbox - Grace Gowdie  
Mailbox - Grant Fischer  
Mailbox - Guy Runde  
Mailbox - Hayley Serblin  
Mailbox - Hiroshi Matsunaga  
Mailbox - HK Boardroom  
Mailbox - Hong Kong Fax  
Mailbox - Hong Kong - MR1  
Mailbox - Hong Kong - MR2  
Mailbox - Institutional CPAIF  
Mailbox - Introducer Day  
Mailbox - Investment Services  
Mailbox - Irene Caling  
Mailbox - IS Fax  
Mailbox - issupport  
Mailbox - James Unterweger  
Mailbox - James Young  
Mailbox - Jason Brindley  
Mailbox - Jason Brindley SA  
Mailbox - Jason McGeachin  
Mailbox - Jasyiyah Abdul Kadir  
Mailbox - Jernaine Nuguid  
Mailbox - Jingwen Zhang

Mailbox - Jo-Anne Ulrich  
Mailbox - Jodie Mercier  
Mailbox - Joe Camm  
Mailbox - Joe Samuel  
Mailbox - John O'Sullivan  
Mailbox - Jose Robbmond  
Mailbox - June Burt  
Mailbox - Karin Ringas  
Mailbox - Katie Scott  
Mailbox - Katy Phillips  
Mailbox - Kay Sunonethong  
Mailbox - Kelly-Joe Uccetta  
Mailbox - Kelly Roetman  
Mailbox - Kelvin Fair  
Mailbox - Ken Scott-Hamilton  
Mailbox - Kerry Glubb  
Mailbox - Leanne Troy  
Mailbox - Lee Roebig  
Mailbox - Leigh ODwyer  
Mailbox - Lending  
Mailbox - Lisa Darcy  
Mailbox - Liz Clarke  
Mailbox - LMCorrespondence  
Mailbox - LM Investment Management  
Mailbox - LM Investment Management (BK)  
Mailbox - LM Investment Management (HK)  
Mailbox - LM Investment Management Ltd  
Mailbox - LM Investment Management Ltd  
Mailbox - LM Investment Management Ltd - Dubai  
Mailbox - LM Investment Management Ltd - London  
Mailbox - LM Investment Management Ltd - Perth  
Mailbox - LM Investment Management Ltd - Sydney  
Mailbox - LM Investment Management Ltd - Tokyo  
Mailbox - LMLOCSVR  
Mailbox - London - MR1  
Mailbox - london user  
Mailbox - Lucy Bloomfield  
Mailbox - Luke Barnett  
Mailbox - Maggie Mavris  
Mailbox - Mailbox Admin  
Mailbox - Mailbox Admin2  
Mailbox - Maria Magi  
Mailbox - Maria Magi SA  
Mailbox - Maribel Bell  
Mailbox - Marija Mladenovic  
Mailbox - Martin Venier  
Mailbox - Matt Birtwistle  
Mailbox - Matthew Ayre  
Mailbox - Matthew Batchelder  
Mailbox - Matthew McCarthy  
Mailbox - Matt Jackson

Mailbox - Melanie Darcy  
Mailbox - Melanie Gomez  
Mailbox - Melanie McLennan  
Mailbox - Menke Albrecht  
Mailbox - Michael Dawson  
Mailbox - Michael Parker  
Mailbox - Michael Skeggs  
Mailbox - Michael Steyn  
Mailbox - Michelle Ballard  
Mailbox - Michelle Jackson  
Mailbox - Michelle Pearce  
Mailbox - Microsoft System Attendant  
Mailbox - Mike Gudsell  
Mailbox - MOSSAdmin  
Mailbox - MSSQL Server  
Mailbox - Natasha Kende  
Mailbox - Nathalie Zoethout  
Mailbox - Nathan de Lyster  
Mailbox - Natsumi Sato  
Mailbox - NEC admin  
Mailbox - New Business  
Mailbox - New Zealand  
Mailbox - Nick Daking  
Mailbox - Nick Glover  
Mailbox - Nicky Wright  
Mailbox - Nicole Hannan  
Mailbox - Nikki Kay  
Mailbox - Nik Siggers  
Mailbox - no-reply  
Mailbox - NZ Fax  
Mailbox - Paddy Burt  
Mailbox - Paula Kimlin  
Mailbox - Paula Leslie  
Mailbox - Paul Seow  
Mailbox - Payment Confirmation  
Mailbox - Payments  
Mailbox - Payroll  
Mailbox - Pen Suwannarat  
Mailbox - Permissions  
Mailbox - Peta Iott  
Mailbox - Peter Drake  
Mailbox - Peter Hilditch  
Mailbox - Peter Lynch  
Mailbox - Phil Klein  
Mailbox - PI Insurance  
Mailbox - Portfolio  
Mailbox - Print Correspondence  
Mailbox - Project Test  
Mailbox - Rachael Gilligan  
Mailbox - Radek Laszewski  
Mailbox - Regan Mackie

Mailbox - ReportServer2008  
Mailbox - Richard Angus  
Mailbox - Ricky Smith  
Mailbox - Rockfast International  
Mailbox - Sally Snow  
Mailbox - Samuel Forner  
Mailbox - Sarah Williams  
Mailbox - Scott King  
Mailbox - Scott Willis  
Mailbox - Sean Haydock  
Mailbox - Service account for TFS Server Deployment  
Mailbox - Sharon Duffy  
Mailbox - Shauna Larkin  
Mailbox - Shelley Chalmers  
Mailbox - Simon Bottle  
Mailbox - Simone Baker  
Mailbox - Simon Tickner  
Mailbox - South Africa  
Mailbox - SQL Alerts  
Mailbox - ssrs test  
Mailbox - Steve Hannan  
Mailbox - Surety IT SA  
Mailbox - Susan Dillon  
Mailbox - Sydney Boardroom Level 1  
Mailbox - Sydney Boardroom Level 2  
Mailbox - Sydney Car  
Mailbox - Sydney Commercial Lending Fax  
Mailbox - Sydney MR1  
Mailbox - SystemMailbox{82659E7C-9167-4A5D-90EC-87ADE7B5F320}  
Mailbox - Taras Hucal  
Mailbox - Tariq AlWathaify  
Mailbox - Tasley Rautenbach  
Mailbox - Temp User  
Mailbox - TestExt  
Mailbox - testuser  
Mailbox - tfs-web  
Mailbox - Tim Bolton  
Mailbox - Toby James  
Mailbox - Tony Beer  
Mailbox - Tony DePalo  
Mailbox - Tony Kemp-Knight  
Mailbox - Toronto  
Mailbox - Tracey Brant  
Mailbox - Tracey Windley  
Mailbox - TransformAOS  
Mailbox - Trevor Fenwick  
Mailbox - USA  
Mailbox - viewuser  
Mailbox - Virginia Battisson  
Mailbox - VMAdmin  
Mailbox - Vote



Mailbox - WebEx  
Mailbox - Wendy List  
Mailbox - Willie Fair  
Mailbox - Yury Maklakov  
Mailbox - Zoran Milosevic

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## **7. Annexure F - Document exchange standards and protocol**

### **1. Purpose of this Document**

- 1.1 This is the Advanced Document Management Protocol prepared in accordance with Practice Note CM 6.
- 1.2 The Protocol sets out the agreement of the parties in the matter of *ASIC v Peter Charles Drake and others* (Federal Court Proceeding No QUD596 of 2014) in relation to the scope, means and format in which Electronic Documents are to be exchanged between the parties during the discovery process.

### **2. Document Descriptions**

- 2.1 All Documents to be exchanged between the parties will be described in a List of Documents containing the following information for each Document:
  - (a) Document ID (*see Schedule 1 for details*)
  - (b) Document Title
  - (c) Document Type (*see Schedule 7 for details*)
  - (d) Document Date
  - (e) Author (*see Schedule 2 for details*)
  - (f) Recipient (*see Schedule 2 for details*)
  - (g) Host Document ID (*see Schedule 3 for details*)
  - (h) Folder and Filename<sup>3</sup> (*Refer Schedule 4 for details*)
- 2.2 In addition to the mandatory information outlined above, the parties may agree to include further descriptive information in the List of Documents, for example:-
  - (a) Redacted (*to indicate whether or not file has been redacted, values may be 'Yes', 'No' or blank*)
  - (b) Privileged – Legal Professional Privilege (*to indicate whether the whole or part of the Document is subject to a claim of privilege, values may be 'Yes', 'No', 'Part' or blank*)
  - (c) Confidential (*to indicate whether the whole or part of the Document is subject to a claim of confidentiality, values may be 'Yes', 'No', 'Part' or blank*)
  - (d) Discovery Category (*where the parties have agreed or the court has ordered discovery by category*)
  - (e) Estimated Date (*'yes' if date is estimated, otherwise 'no'*)

### **3. Document Structure and Format**

- 3.1 Documents to be exchanged between the parties will be described in accordance with the format and structure described in Schedule 6.

<sup>3</sup> This refers to the file name and folder of the renamed electronic image files (For example, PDF or Native Electronic Documents) not the source path and name of the original file.



- 3.2 Parties will avoid converting Native Electronic Documents to paper for exchange purposes and will instead exchange them as Searchable Images.
- 3.3 Where Documents are to be provided or exchanged as Searchable Images, Native Electronic Documents should be rendered *directly* to Portable Document Format (PDF) to create Searchable Images. They should not be printed to paper and scanned or rendered to Tagged Image File Format (TIFF) format and then converted to PDF. Rendering Native Electronic Documents directly to PDF will minimise the costs and avoid inaccuracies associated with the Optical Character Recognition (OCR) process.
- 3.4 The native version of all electronically sourced documents will be provided in addition to the rendered PDF version.
- 3.5 If it is not appropriate to render a particular document to PDF (for example MS Excel), a placeholder Searchable Image should also be exchanged with the Native Electronic Document as the first page of the document. The file will be named in accordance with the format described in Schedule 4.
- 3.6 Native Electronic Documents that are imaged files or not searchable (for example PDF files without OCR text) in their native form will be rendered with OCR to improve their searchability where this is technically possible.
- 3.7 Where requested and agreed to, the disclosing party will rescan black and white documents to colour and resupply to all parties.
- 3.8 Blank, irrelevant pages will be removed where practicable and will not be allocated Page Number Labels.

#### **4. Page Numbers**

- 4.1 Subject to this section, a unique Page Number Label in the format described in Schedule 1 will be placed on each page of every Searchable Image for a Document as described in Schedule 5.
- 4.2 The Page Number assigned to the first page of a Document will also be assigned as the Document ID for that Document.
- 4.3 Native Electronic Documents will be assigned a single Document ID and individual Page Number Labels are not required. The placeholder Searchable Image will be given a unique Page Number Label in the format described in Schedule 1 that will be placed on the page as described in Schedule 5.

#### **5. Electronic Exchange Media**

- 5.1 Unless otherwise agreed or ordered by the Court, the information to be exchanged between the parties will be contained on read-only optical media (for example, CD-ROM, DVD-ROM), USB drive or portable hard drive.
- 5.2 Where portable hard drives are used, they will be returned to the supplying party as soon as the data has been copied by the recipient party.

#### **6. Data Security**

- 6.1 A party producing data to another party will take reasonable steps to ensure that the data is useable and is not infected by Malicious Software.
- 6.2 Notwithstanding paragraph 10.1, the onus is on each party receiving the data to test the contents of any exchange media prior to its use to ensure that the data does not contain Malicious Software.

6.3 If data is found to be corrupted, infected by Malicious Software or is otherwise unusable, the producing party will, within 2 working days of receipt of a written request from a receiving party, provide to the receiving party a copy of the data that is not corrupted, infected by Malicious Software or otherwise unusable (as the case may be).

## **7. Errors in exchanged documents**

7.1 If errors are found in any exchanged Document, the producing party must provide a corrected version of the Document to the receiving party.

7.2 If errors are found in more than 25% of the exchanged Documents, the producing party must, if requested by the receiving party, provide a correct version of all Documents to the receiving party.

7.3 In addition to the requirements of paragraphs 9.1 and 9.2, if errors are found in any exchanged Document a written explanation will also be sent to each receiving party setting out the reasons for the errors in the Documents and describing the data affected.

7.4 For the avoidance of doubt, if a document over which privilege is claimed (in whole or in part) is disclosed due to a technical error privilege is deemed not to be waived over that document.

## **8. Redaction for Privileged or Confidential Documents**

8.1 If the whole or part of a Document is subject to a claim of privilege or confidentiality, the parts of the Document that are subject to the claim should be identified or, if appropriate, Redacted pending determination of the claim with redacted sections marked in black. If the whole or part of the Document is redacted, the party producing the Document must retain an un-redacted version of the Document which must be produced to the Court if required to do so.

8.2 If the Court makes an order that the whole or part of a Document is subject to privilege, the copy of the Document to be exchanged between the parties and provided to the Court may be permanently redacted in accordance with that order.

8.3 If the whole or part of a Document is subject to a claim of privilege or confidentiality it will be:

- (a) allocated a Document ID;
- (b) given a Document Description that does not disclose the information that is the subject of the claim of privilege or confidentiality; and
- (c) if the claim of privilege or confidentiality relates to the whole Document – represented by a single Placeholder Page with the words 'Document subject to claim of privilege/confidentiality' inserted under the Document ID.

8.4 If the whole or part of an Attached Document is subject to a claim of privilege or confidentiality it will be:

- (a) identified as an Attached Document;
- (b) allocated a Document ID;
- (c) given a Document Description that does not disclose the information that is the subject of the claim of privilege or confidentiality; and

- (d) if the claim of privilege or confidentiality relates to the whole Document – represented in the Document Group to which it belongs by a single Placeholder Page with the words 'Document subject to claim of privilege/confidentiality' inserted under the Document ID.

8.5 If the whole or part of a Host Document is subject to a claim of privilege or confidentiality it will be:

- (a) identified as a Host Document;
- (b) allocated a Document ID;
- (c) given a Document Description that does not disclose the information that is the subject of the claim of privilege or confidentiality; and
- (d) if the claim of privilege or confidentiality relates to the whole Document – represented in the Document Group to which it belongs by a single Placeholder Page with the words 'Document subject to claim of privilege/confidentiality' inserted under the Document ID.

## **9. De-Duplication of Documents**

- 9.1 Where appropriate, each party will take reasonable steps to ensure that duplicated Documents are removed from the exchanged material ('De-Duplication').
- 9.2 However, the Court acknowledges that there may be circumstances where Duplicates need to be identified and retained for evidential purposes.<sup>4</sup> When a technical duplicate is identified and disclosed, a "yes/no" field must be populated to identify that the document has previously been provided. The field is titled "Technical Duplicate". As duplication is considered at a Document Group level, this field will be provided at the host level.
- 9.3 Duplication will be considered at a Document Group level. That is, all the Documents within a Document Group (that is, a Host Document and Attached Documents) will be treated as Duplicates if the *entire* Document Group is duplicated elsewhere within the collection. An Attached Document in a Document Group will not be treated as a duplicate if it is merely duplicated elsewhere as an individual, stand-alone Document that is not associated with another Document Group.
- 9.4 The method of de-duplication is described in Schedule 8.

## **10. Textual Near Duplicate Detection**

- 10.1 It is recommended that textual near duplicate identification technology is used throughout the review process to minimize the number of non-technical duplicates exchanged. The use of this technology can be utilized when completing a manual review process. Examples of products that may assist with this process include NUIX, Equivio and Relativity etc.

<sup>4</sup> For example, it may be relevant to retain multiple copies of an email in sender and recipient email boxes due to the fact that it will be of evidential relevance to know who actually received the email after it was sent.

## Schedule 1 – Document IDs and Page Numbers

- 1.1. Document IDs and Page Numbers will be *unique* because it is the sole means by which Documents will be referenced
- 1.2. Document IDs and Page Numbers will be in the following format

**SSS.BBBB.FFFF.NNNN\_XX** (*italics represent optional elements*)

- 1.3. This format is described in the table below.

Level	Description
<b>SSS</b>	The Party Code (also, often referred to as 'Source') identifies a party to the proceedings. It should comprise three alpha characters. The determination of the Party Codes to be used for a particular case will take place prior to the commencement of discovery in order to ensure that all Document IDs will be unique (i.e. to ensure that no two documents have the same Document ID so that each Document can be uniquely referenced). Refer to Schedule 1.4 for the list of available Party Codes.
<b>BBBB</b>	The Box Number identifies a specific physical archive box, email mailbox or any other Container or physical or virtual classification that is appropriate for the party to use.  Use of the Box Number is optional. The box number should comprise 4 digits
<b>FFFF</b>	The Folder Number identifies a unique folder number allocated by each party in their own Document collection. <sup>5</sup> The Folder Number should be padded with zeros to consistently result in a 4 digit structure. The Folder Number may, where appropriate, correspond to the Box Number of any Container in which the Document is contained.
<b>NNNN</b>	This refers to each individual page within each Folder for Paper Documents, Unsearchable Images and Searchable Images. For Native Electronic Documents, this number applies to the whole Document irrespective of the number of pages within it. In such cases, it therefore operates as a Document Number rather than a Page Number because individual pages are not numbered.  This number is padded with zeros to consistently result in a 4 or 5 digit structure.
<b>_XX</b>	This number is optional and is only required where additional pages need to be inserted into a Document. A suffix will be used, preceded by an underscore, padded with zeros to consistently result in a 2 digit

	structure.
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#### 1.4. Party Codes for the Document ID

For the purposes of the Document ID, the following Party Codes are available.

Party Code	Party
LMI	Australian Securities and Investments Commission (Applicant)
SML	Suncorp (self numbered production)
Tracker	Confirm inclusion of Notices and Receipts



## **Schedule 2 – Describing People and Organisations**

- 2.1. Where objectively coded, people names may be referenced using:
  - (a) email addresses (for example, icitizen@abc.com.au); or
  - (b) Surname [comma or space] First Name (for example, Citizen, John)
  - (c) Surname [comma or space] Initial (for example, Citizen, J) where first name is not available; or
  - (d) by reference to an organisation associated with the person where email address, Surname, Initial and Position are not available.
- 2.2. Where objectively coded, organisation names will be captured where available.
- 2.3. Emails supplied in their original electronic format will use the extracted metadata to populate the Parties table. Where possible, the names will be normalised<sup>6</sup> as outlined in paragraph 2.1 above. The original metadata value may be used where a name cannot be easily identified. The parties acknowledge that the Person value may not match the information directly on the face of the document.
- 2.4. Native electronic documents will not have any metadata provided in the Parties table unless they have been objectively coded.
- 2.5. Multiple people and/or organisations will be entered as separate rows in the Parties Table.

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<sup>6</sup> Normalisation is undertaken to reduce the number of variations of a person's name to assist in the process of searching the database.

### **Schedule 3 – Document Hosts and Attachments<sup>7</sup>**

- 3.1 Every Document that is attached to or embedded within another Document will be called an Attached Document.
- 3.2 A Container is not a Host Document for the purposes of this Protocol.<sup>8</sup>
- 3.3 Attached Documents will have the Document ID of their Host Document in the descriptive field called 'Host Document ID'.
- 3.4 Host Documents and Attached Documents are jointly referred to as a 'Document Group'.
- 3.5 Subject to paragraphs 3.6 and 3.7 below, in a Document Group the Host Document will be immediately followed by each Attached Document in the order in which the Attached Documents are numbered in their Document ID. If a Document Group includes Documents that are subject to a claim of privilege or confidentiality, the Documents should be treated in accordance with Section 8 of this Protocol.
- 3.6 If a Document is contained within a Container (for example, a single ZIP file) that is attached to an email then the email should be treated as the Host Document and the Document in the Container should be treated as an Attached Document to that Host Document (that is, the Host Document will be the email and not the Container within which the Document is contained).
- 3.7 If the Document Group consists of a number of Paper Documents fastened together, the first Document will be treated as the Host Document and the remaining Documents will be treated as the Attached Documents within the Document Group unless those Documents are not related, in which case each Document will be treated as a separate Document without a Host Document.
- 3.8 Annexures, Attachments and Schedules that are attached to an Agreement, Report, Legal Document or Minutes of a Meeting may be described as separate Attached Documents associated with the relevant Host Document.

<sup>7</sup> May be referred to as Document Delimiting.

<sup>8</sup> See the Glossary to Practice Note CM 6 and Related Materials for further information on Host Documents and Containers.

#### Schedule 4 – Electronic Folders and Filenames

- 4.1 This schedule specifies how Electronic Images are to be located and named for the purposes of Document exchange. It does not relate to the capture and exchange of the original source location of an Electronic Document.
- 4.2 Documents produced as Searchable Images will be named 'DocumentID.pdf'
- 4.3 Documents produced as Native Electronic Documents will be named 'DocumentID.xxx(x)' where 'xxx(x)' is the original default file extension typically assigned to source Native Electronic Files of that type.<sup>8</sup> The placeholder Searchable Image will be named 'DocumentID\_PH.pdf'.
- 4.4 The Documents folder will be structured in accordance with the Document ID hierarchy, for example:
- The Document produced as a Searchable Image called 'ABC.0001.0004.0392.pdf' would be located in the folder called 'ABC\0001\0004\'. So, it will appear in the directory listing as *ABC\0001\0004\ABC.0001.0004.0392.pdf*.
  - Where a Document has been produced as a Native Electronic Document, and, assuming it is a Microsoft Excel spreadsheet file, for example, it would be called 'ABC.0001.0004.0392.xls' and will be located in the folder called 'ABC\0001\0004\'. So it will appear in the directory listing as *'ABC\0001\0004\ABC.001.0004.0392.xls'*
  - Where a Native Electronic Document has been produced with a placeholder, the Searchable Image would be called *ABC.0001.0004.0392\_PH.pdf*. So it will appear in the directory listing as *ABC\0001\0004\ABC.0001.0004.0392\_PH.pdf*

<sup>8</sup> For example, Microsoft Word documents will have a '.doc' extension, Microsoft Excel spreadsheets will have a '.xls' extension, so Native Electronic Documents will be named along the following lines *ABC.001.003.0456.xls (Excel Spreadsheet)*, *XYZ.099.456.0093.doc (Word Document)*. A four character extension may be required for particular file types.



## **Schedule 5 – Page Number Labels**

- 5.1 Wherever possible, Page Number Labels will be placed on the top right corner<sup>10</sup> at least 3 millimetres from both edges of the page in the correct orientation of the text.
- 5.2 Documents exchanged in PDF format will have an electronic page number stamped in the top right of the documents. As this is an automated process, there may be instances where the stamp does not match the orientation of the text on the page.
- 5.3 If there is insufficient space for a Page Number Label on a Searchable Image or an Unsearchable Image, the electronic image of the page will, if possible, be reduced in size to make room for the Page Number Label.
- 5.4 Page Number Labels may also include machine readable barcodes.
- 5.5 The parties may apply Page Number Labels to the following Paper Documents where they contain relevant content:
  - (a) folder covers, spines, separator sheets and dividers
  - (b) hanging file labels
  - (c) the reverse pages of any Document
- 5.6 Adhesive notes should not normally be labelled but should be scanned in place on the page to which they were attached. If this cannot be done without obscuring text, the adhesive note should be numbered as the page after the page to which it was attached and the page should be scanned twice – first with and then without the adhesive note.

<sup>10</sup> This ensures that upon electronic retrieval, images will not need to be scrolled down manually on the screen in order to view the Page Number Label.

## Schedule 6 – Document Descriptions

Document Descriptions are to be structured in the following tables in Microsoft Access Database format.

Table Name	Table Description
Export	Main Document information
Parties	People and organisation information for each Document
Pages	Listing of electronic image filenames for each Document
Export_Extras	Additional data fields for each Document

### Export Table

Field	Data Type	Explanation – Document Types and Coding Method and possible values	
Document_ID	Text, 255	Document ID in accordance with Schedule 1.	
Document_Type	Text, 255		
		Paper Documents	Refer Document Types in Schedule 7.
		Electronic Documents (including email, email attachments, loose files etc)	Email, Attachment, Electronic File; or Objective coding using Document Type in Schedule 7
Document_Date	Date, 11	DD-MMM-YYYY	
		Paper Documents	Determined on the basis of the Date appearing on the face of the Document
		Undated Documents	Leave field blank
		Incomplete Date (Year Only)	For example, 01-JAN-1900

Field	Data Type	Explanation – Document Types and Coding Method and possible values	
		Incomplete Date (Month and Year Only or Day and Month only)	For example, 01-MMM-YYYY, DD-MMM-1900
		emails	Electronic Metadata – Sent Date <sup>11</sup>
		Unsent emails	Last Saved Date
		Other Electronic Documents	Extracted Metadata – File Modified, File Created <sup>12</sup> , or Objective coding
<b>Estimated</b>	Text, 3	Yes OR No OR Blank	
		Default	No or Blank
		Undated Documents	No or Blank
		Incomplete Date	Yes
		Electronic Documents	Yes
<b>Host_Reference</b>	Text, 255	If the Document is an Attachment, this field contains the Document ID of its Host Document. Please refer to Schedule 3.	
<b>Title</b>	Text, 255	Paper Documents	Determined on the basis of the title appearing on the face of the Document
		Email	Subject Field
		Other Electronic Documents	Extracted Metadata – File Name; or Objective coding

<sup>11</sup> The concept of time zones can be difficult to manage where emails are sent from one location and time zone and received in many different locations and time zones. The emerging convention seems to be to record the time zone of the server that sent the e-mail in the primary date field for an email. The received date associated with the local email server for the recipient of a 'Duplicated' e-mail may also be captured in other metadata date fields (that is, other than the primary Date field). New conventions are likely to emerge in this area over time.

<sup>12</sup> Other metadata dates maybe used where neither of these is available. Where an attachment to an email does not have any available date metadata, the date of the host email will be used.

Field	Data Type	Explanation - Document Types and Coding Method and possible values
Level_1	Text, 10	The Party level of the Document ID (see Schedule 1)
Level_2	Text, 10	The Box level of the Document ID (see Schedule 1)
Level_3	Text, 10	The Folder level of the Document ID (see Schedule 1) under which the Searchable Images or Native Electronic Documents are stored.

### Parties Table

This table holds the names of people associated with a particular Document and their relationship to the Document. It may also hold organisation information for these people. There is a one-to-many relationship between the Export table containing the primary Document information and the Parties table because multiple people could be associated with a single Document.

Field	Data Type	Explanation	
Document_ID	Text, 255	Document ID in accordance with Schedule 1.	
Correspondence_Type	Text, 100	Correspondence Type (Sent or Received)	
		Paper Documents	FROM, TO, BETWEEN, ATTENDEES, CC, BCC  To be determined on the basis of the face of the Document.
		emails	FROM, TO, CC, BCC
		Other Electronic Documents	Extracted metadata; or  Blank; or  FROM, TO, BETWEEN, ATTENDEES, CC, BCC
Organisations	Text, 255		
		Paper Documents	Name of organisation

Field	Data Type	Explanation	
			the produced the Document as determined on the basis of the face of the Document.
		emails	Blank; or Objective coding
		Other Electronic Documents	Extracted metadata; or Blank; or Objective coding
<b>Persons</b>	Text, 255	Please refer to [Schedule 2 – Describing People].	
		Paper Documents	To be determined on the basis of the face of the Document.
		emails	Extracted metadata, normalised where possible in Schedule 2.
		Other Electronic Documents	Extracted metadata; or Blank; or Objective coding

### Pages Table

There will be an entry in the Pages table for every Searchable Image (PDF) document that relates to a single Document in the Export table i.e. there is a one-to-many relationship between the Export table and the Pages table. Where Native Electronic Documents only are exchanged, a placeholder page will also be exchanged. Therefore there will be multiple entries in the pages table corresponding to each Native Electronic Document.

Field	Data Type	Explanation
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Field	Data Type	Explanation
<b>Document_ID</b>	Text, 255	Document ID
<b>File_Name</b>	Text, 128	<p>Filename, including extension of each indexed Document</p> <p>Searchable Images – DocumentID plus PDF extension eg ABC.001.0004.0392.pdf</p> <p>Native Electronic Documents – DocumentID plus file extension eg ABC.001.0004.0392.xlsx</p> <p>Placeholder Searchable Images – DocumentID_PH plus extension eg ABC.001.0004.0392_PH.pdf</p>
<b>Page_Label</b>	Text, 32	<p>Searchable Images – Document ID eg ABC.001.0004.0392</p> <p>Native Electronic Documents – NATIVE</p>
<b>Page_Num</b>	Number, Double	<p>An integer indicating the order in which the files related to the Document ID should be sequenced when viewing the full Document.</p> <p>Searchable Images will appear as the first page of each document. The value will be set to 1</p> <p>Seachable Images that are placeholders will appear as the first page. The value will be set to 1</p> <p>Native Electronic Documents will appear as the second page. The value will be set to 2</p>
<b>num_pages</b>	Number, Double	An integer indicating the number of pages within the Searchable Image. For example, a Searchable Image (PDF) with four pages will have a value of 4.

#### Export\_Extras Table<sup>13</sup>

This table holds any additional metadata the parties wish to exchange that is not held in the other three tables mentioned above.

<sup>13</sup> Where the parties agree, an 'Electronic Document Source' field will be included where possible to specify the original source directory and filename of the original electronic Document.

Field	Data Type	Explanation
<b>Document_ID</b>	Text, 255	Unique Document Identifier (Document ID)
<b>theCategory</b>	Text, 50	TEXT or DATE or NUMB or BOOL or PICK or MEMO or UTEXT or UMEMO
<b>theLabel</b>	Text, 255	Custom Field Name
<b>theValue</b>	Text, 255	Field contents for TEXT or DATE or NUMB or BOOL or PICK or UTEXT
<b>memoValue</b>	Memo	Field contents for MEMO or UMEMO fields

Additional fields of information for exchange between the parties are:

theLabel	theCategory	theValue or memoValue
<b>Privilege</b>	PICK	Field denotes whether a claim of privilege is being made over part or all of a document. Values are "No", "Part" or "Yes"
<b>Privilege Basis</b>	PICK	Field denotes the basis for a claim of privilege over part or all of a document. Values are "Legal Professional Privilege" and "Confidentiality"  This field is not required for non-privileged documents
<b>Discovery Category</b>	PICK	Field denotes which of the agreed discovery categories a document relates to
<b>Redacted</b>	PICK	Field denotes whether redactions have been applied to part or all of a document. Values are "No" or "Yes"
<b>File Type</b>	UTEXT	Field denotes the type of application that the file was created with. For example, .doc files are created in Microsoft Word.
<b>File Name</b>	UTEXT	Field denotes the name of the file when it was saved onto the system from which NUIX imaged it.
<b>Path Name</b>	UTEXT	Field denotes the folder location in which the file was housed when it was saved onto the system from which NUIX imaged it.
<b>MD5 Hash</b>	UTEXT	Field denotes the unique number string allocated

		to the document in the NUIX system, it is used to determine duplicates.
<b>Technical Duplicate</b>	PICK	Values are "Yes" or "No". Field denotes whether the document has been provided in earlier discovery tranches. This field should not be provided for any attachments.
<b>Producing Party</b>	UTEXT	Field denotes the person/organisation that provided the document, either under Notice or voluntarily



## Schedule 7 – Document Type List

The following table should be completed in accordance with the particular needs of the case.

Document Type	Description
Affidavit	Affidavits prepared by ASIC
Agreement	Contract, Cover Note, Debenture, Deed, Deed of Guarantee, Deed of Indemnity, Draft Deed, Draft Deed of Covenant, Guarantee, Lease, Memorandum of Understanding, Mortgage, Offer, Promissory Note, Terms and Conditions, Undertaking, Processing agents Statement
Attachment	Attachment to an email supplied in native electronic format
ASIC Notice	Section 19, Section 30, Section 30A, Section 31, Section 32A, Section 33, Section 672A, Section 912C, Section CA1317, Section CA1317(1), Request for Assistance, etc
ASIC Notice of Hearing	Stop Order Hearing, Banning Hearing, License Revocation Hearing, Licence Suspension Hearing
ASIC Receipt	Receipt for incoming and outgoing consignment
Banking Record	Account Application (Deposit, Credit Card Or Other Account), Account Authorities, Applications For Credit/Finance, Bank Debit, Bankers Diary, Bank Statement (Savings Account, Credit Account, Personal Loan Account, Mortgage Loan Account, Marginal Loan Account and Term Deposits), Bills Of Exchange, Call Reports, Cheque, Cheque Book, Cheque Book Stub, Credit Summary Slip, Credit Voucher, Customer Record Card, Daily Banking Sheet, Debit Note, Deposit Book, Deposit Slip, Deposit Summary, Foreign Payment Requisition, Funds Transfer Request, Money Order, Signatory Authority Card, Statement of Account for Bank Statements, Trace Record, Transaction Summary, Transfer Document, Withdrawal
Company Record	Business Registration, Certificate Of Currency, Certificate Of Solvency, Company Seals, Constitution, Information Memorandum, Memorandum & Articles Of Association, Offer, Offering Memorandum, Prospectus, Proxy

Document Type	Description
Court Document	All Documents Filed in Court (specifically identify each document including Court exhibit), Court Judgement, Court Order, Notice of Appearance, Notice of Motion, Pleadings, Statement of Claim, Submission, Subpoena, Summons, Warrant, Writ, Originating Process
Diagram	Chart, Drawing, Floor/Land Plan, Graph, Sketch
Diary	Diary Extracts, Diary Note, Headliners, Printed Outlook Calendars
Electronic File	Document supplied in native electronic format that is not attached to an email
Email	Draft Email, Electronic mail
Facsimile	Cover Sheet, Draft Facsimile, Facsimile Transmission Report, Fax, Fax Facsimile Confirmation, Fax Receipt
Financial Record	Account, Accounting Records, Bank Reconciliation, Cashbooks (Cash Payment, Cash Receipts), Chart Of Accounts, Cheque Requisition, Credit Note, Delivery Docket, Delivery Slip, Financial Data, Fixed Asset Register, General Journal, General Ledger (Debtors Ledger, Creditors Ledger), Invoice, Journal, Payroll, Purchase Order, Receipt Voucher, Remittance Advice, Transaction Record, Trial Balance, Trust Account, Wage Record, Annual Report, Balance Sheet, Budget, Calculation, Cashflow Statement, Computer Printout, Dividend Statement, Financial Model, Financial Report, Financial Statement, Forecast, Plans, Profit and Loss Statement, Statement of Financial Position, Tax Record, Trading Budget , Lists where there are \$ values present
Form	Forms Lodged With ASIC, Internal Forms, Non-ASIC Forms, Pro Forma Documents
Legal Document	Certificate, Certificate of Title (Land Title Documents), Consent to Act, Patents, Power of Attorney, Memorandum of Understanding, Statutory Declaration
Letter	Advice, Draft Letter
List	Client List, Contents List, Index, Issue List, Label, List of items, Outline, Schedule, Spreadsheet, Summary, Table, Table of Contents, All lists that do not contain \$ values
Manual	Guidelines, Methodologies, Policy Procedures, Protocols
Meeting – Minutes	Board Minutes, Minutes of Meeting

Document Type	Description
Meeting – Papers/Agenda	Agenda for Meeting, Board Papers, Meeting Agenda, Meeting Papers
Memorandum	Draft Memorandum, Memorandum
Note	Draft Notes, File Notes, Handwritten Notes, Meeting Notes, Message, Notebook, Notebook Extracts, Post it Note, Telephone Message, With Compliments Slip
Notice - non-ASIC	APRA Notice, Class Action Notice, Drawdown Notice, Notice of Application of Public Officer, Notice of General Meeting, Notice of Resolution, RC Notice, Requisition Notice
Personal Information	Address Book, Asset Allocation Strategy Workbook, Bankruptcy Records, Business Card, Client Detail Form, Client Record, Customer Record, Financial Planning Questionnaire, CV, Individual Tax Records Address Details, Licence, Passport, Personal Declarations, Personal Details, Personnel Records, Photograph, Profile, Resume
Plan	Business Plans, Marketing Plans, Statement of Advice, Statement of Additional Advice, Record of Advice, Strategic Plans
Presentation	Power Point Presentation, Slides Overheads
Publication	Article, Booklet, Brochure, Circular, Drafts, Extracts of Published Legislation/Acts, Legal Text Books, Newsletter, Newspaper articles, Pamphlet, Press/Media Release
Report	Discussion Paper, Marketing Reports, Papers (Non meeting), Proposals, Question & Answer Papers, Recommendations, Strategic Reports
Stationery	Dividers, blank pages, blank letterhead, unmarked folder spines and covers
Trading Record	Authority Form, Buy Contract, Buy/Sell Order, Client Ledger Statement, Contract By Security Report, Contract Note, Convertible Note Certificate, Day Book, Dealers Licence, Deal Sheets, Security Papers, Security Sharing Deed, Sell Contract, Share Application, Share Certificate, Share Purchase Approval, Shares Document, Sponsorship Agreement, Trading Floor Slip, Trading Statement, Transfer Form
Transcript	Section 19 Transcript, Voluntary Interview Transcript

Document Type	Description
Undefined	To be Selected When Unsure of Document Type
Working Papers	Audit Work Paper, Legal Work Paper, Non-ASIC Working Papers, Worksheets

## Schedule 8 – De-duplication Methodology

- 8.1 ASIC will use MD5 hash values to identify and, where appropriate, remove Duplicates from the process of Discovery.
- 8.2 MD5 hash values are a unique number or barcode allocated to every file. For emails, MD5 hash values are generated by combining the metadata fields in accordance with paragraph 8.3, and converting the results into a long number string. When two files have the exact same MD5 hash value they are considered duplicates.
- 8.3 Deduplication of emails requires the comparison of specific fields. There are 2 options for the selection of the combination of metadata fields for deduplication in this matter:
- (a) Option 1 - 'Communication Date', 'Sender', 'To', 'CC', 'BCC', 'Body' and 'MD5 hash values of Attachments'<sup>14</sup>
  - (b) Option 2 – "Attachment MD5# Values", "BCC", "Body Text", "CC", "From", "Subject", "To"
- 8.4 MD5 hash values will be stored in the export extras table.

<sup>14</sup> There is a general trend to simply use the fields 'Sender', 'To' and 'Date Sent' for de-duplication however, the additional field 'Number of Attachments' is recommended to address the potential problem associated with 'Sent' times being rounded to minutes rather than seconds by some e-mail servers. On such servers it would be possible for the same author to send two entirely different emails to the same recipients at what appears to be the same time.

Federal Court of Australia  
District Registry: Queensland  
Division: General

**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**  
Applicant

**PETER CHARLES DRAKE** and others named in the schedule  
Respondents

**ORDER**

**JUDGE:** Justice Edelman  
**DATE OF ORDER:** 12 October 2015  
**WHERE MADE:** Brisbane

**THE COURT ORDERS THAT:**

1. The Discovery Plan appearing as Schedule A to the orders made in these proceedings on 22 May 2015 be amended in the form attached as Annexure A to these orders.
2. The applicant give the respondents copies of the transcripts of examinations (and documents referred in the examinations) listed at paragraphs (b) and (u) of Annexure C to the Discovery Plan by 4 pm on 19 October 2015.
3. The applicant provide to each respondent (but not to any other respondent) copies of all emails from the Respondents' Emails (as that term is defined in the orders made in this proceeding on 30 June 2015) (including the emails on the Email List (as that term is defined in the orders made in this proceeding on 30 June 2015)) sent or received by that respondent, by 4 pm on 19 October 2015.
4. The matter be listed for directions at \_\_\_\_am on \_\_\_\_ 2015.
5. Costs be reserved.

Date that entry is stamped:

Deputy District Registrar



**Schedule**

No: QUD596/2014

Federal Court of Australia  
District Registry: Queensland  
Division: General

Second Respondent: **FRANCENE MAREE MULDER**

Third Respondent: **EGHARD VAN DER HOVEN**

Fourth Respondent: **SIMON JEREMY TICKNER**

Fifth Respondent: **LISA MAREE DARCY**



**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 20131545 the amount of \$106,941.79 (one hundred and six thousand nine hundred and forty-one dollars and seventy-nine cents) comprising:
  - a. Professional Fees \$74,811.40
  - b. Disbursements \$32,130.39
4. My fees of \$4,002.45 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

**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 20140653 the amount of \$72,291.62 (seventy-two thousand two hundred and ninety-one dollars and sixty-two cents) comprising:

a. Professional Fees	\$57,431.66
b. Disbursements	\$14,856.96
4. My fees of \$2,699.84 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:

2/11/16

**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

**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 20141556 the amount of \$10,690.71 (ten thousand six hundred and ninety dollars and seventy-one cents) comprising:
  - a. Professional Fees \$7,591.38
  - b. Disbursements \$3,099.33
4. My fees of \$399.21 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  
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Ph: (07) 3181 4387  
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## Dallys Pyers

**From:** Geoff Hancock [GHandcock@tuckercowen.com.au]  
**Sent:** Wednesday, 11 May 2016 4:20 PM  
**To:** Ashley Tiplady; Sean Russell  
**Cc:** David Schwarz  
**Subject:** LMFMIF FTI indemnity claim  
**Attachments:** Letter to Russells 11 May 2016 re indemnity claim.pdf; LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed)

**Saved:** -1

Gentlemen,

Please find attached the response we foreshadowed yesterday, and a copy of a letter sent to your clients by ours a short while ago in relation to unpaid fees.

Regards

**Geoff Hancock**  
Special Counsel

E: [ghancock@tuckercowen.com.au](mailto:ghandcock@tuckercowen.com.au)

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**Tucker&CowenSolicitors.**

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Our reference: Mr Schwarz / Mr Hancock

11 May 2016

Your reference: Mr Tiplady / Mr Sean Russell

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

Email: [seanrussell@russellslaw.com.au](mailto:seanrussell@russellslaw.com.au)  
[atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)

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

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

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

Dear Colleagues

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

We refer to your recent correspondence about the payment of the sum of \$84,954.41, the amount of indemnity claims accepted by our client.

There are, as our client has said in recent affidavits and in submissions made on his behalf during the March, 2016 hearing before Justice Jackson, serious questions about the propriety and reasonableness of a number of payments which LMIM caused the FMIF to make to LMA for "loan management fees" in the March-July 2013 period.

The payments in question amount to just under \$1 million and are:

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

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

We expect that His Honour's reasons for judgment, when delivered, will clarify whether the making of these payments calls for the application of the "clear accounts" rule, and, consequently, our client suggests that any payment from the FMIF in respect of the indemnity claim be deferred until after due consideration of those reasons for judgment, *vis a vis* the loan management fees.

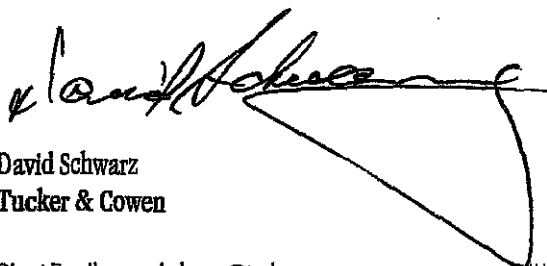
11 May 2016

There also falls for consideration an amount of \$779,266 which LMIM has owed to FMIF since 2014. The details are set out in BDO's letter to FTI of 11 May, 2016, a copy of which is enclosed.

That debt arose in connection with arrangements in place in 2014 pursuant to which Mr Clout, as liquidator of LMA, kept LMA's office open and kept some LMA staff in employment for the purpose of dealing with requests for information and copies of documents relating to the affairs of LMIM and the various funds in the LM Group.

The debt represents LMIM's unpaid share of sums paid to Mr Clout by the FMIF. It would appear to raise a reasonably clear claim available for set-off against the amount of the accepted indemnity claims, to the extent necessary to extinguish them, and it furnishes at least a further reason for the deferral suggested above.

Yours faithfully



David Schwarz  
Tucker & Cowen

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

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