

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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

AND

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

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT
2001

AFFIDAVIT OF DAVID WHYTE

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

1. I am an Official Liquidator and a Partner of the firm BDO. I am the Respondent to this
Proceeding.

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Signed:

Witnessed by:


AFFIDAVIT:
Form 46, R.431

Filed on behalf of the Respondent

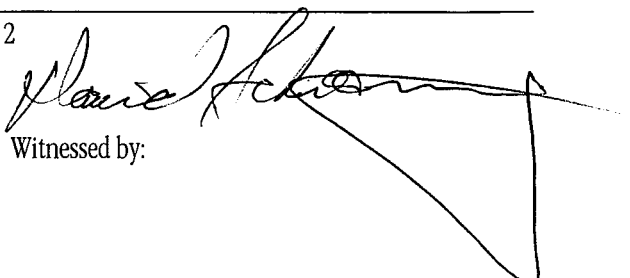
TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
Brisbane, Qld, 4000.
Tel: (07) 300 300 00
Fax: (07) 300 300 33

2. I make this Affidavit in connection with my response to an Application filed by the Applicants in this proceeding on 20 May 2016 (“**Indemnity Application**”).
3. I refer to my affidavit sworn and filed in this proceeding on 29 May 2017 (“**my May 2017 Affidavit**”), in connection with the Indemnity Application. In my May 2017 Affidavit I have defined certain terms and expressions which I intend will have the same meaning in this Affidavit unless that is inconsistent with the context.
4. In particular, in this Affidavit, the terms “Mr Park’s October Affidavit”, and “Mr Park’s March 2017 Affidavit” have the same meanings as in paragraph 6 of my May 2017 Affidavit.
5. I refer in my May 2017 Affidavit:-
 - (a) at paragraphs 48 to 51, to the ‘**Appeal Costs Indemnity Claim**’ made by the Applicants on 10 February 2016 and to my response to that claim; and
 - (b) at paragraphs 52 to 59, to the ‘**Second Indemnity Claim**’ made by the Applicants on 15 February 2016 and to my response to that claim.
6. In this Affidavit I will address the Second Indemnity Claim. I address the Appeal Costs Indemnity Claim in a separate affidavit.
7. Exhibited hereto and marked “**DW-74**” is a bundle containing copies of relevant correspondence (but, where relevant, without copies of documents that were provided or enclosed with the correspondence) in relation to the Second Indemnity Claim as described in the following table:-

	Document description	Date
(a)	Letter from FTI Consulting to BDO (David Whyte) –Administration and Recoupment Indemnity Claim (“ Second Indemnity Claim Letter ”)	15.02.2016


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Witnessed by:

	Document description	Date
(b)	Schedule of indemnity claims received with the letter from FTI Consulting to BDO referred to at paragraph 7(a)	15.02.2016
(c)	Letter from BDO to FTI requesting information	29.02.2016
(d)	Letter from Russells to David Whyte	11.03.2016
(e)	Letter from Tucker & Cowen to Russells	21.03.2016
(f)	Email from Russells to Tucker & Cowen	21.03.2016
(g)	Letter (received by email) from Russells to BDO responding to my request for information	24.03.2016
(h)	Email from Geoff Hancock, Tucker & Cowen, to Ashley Tiplady, Russells, requesting copy of retainer agreement	19.04.2016
(i)	Email from Ashley Tiplady to Geoff Hancock confirming that Russells will provide the retainer agreements	19.04.2016
(j)	Email from Ashley Tiplady to Geoff Hancock attaching documents	22.04.2016
(k)	Letter from BDO to FTI, giving notice of my decisions on indemnity claims, and schedule ("Decisions Notice")	22.04.2016
(l)	Letter from BDO to John Park, FTI Consulting, providing reasons for rejection of certain indemnity claims ("Reasons Letter")	27.04.2016

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Witnessed by:

8. I have not exhibited to this affidavit all of the documents provided to me in connection with the Second Indemnity Claim, due to the volume of documentation provided. I understand, however, that it is intended that a bundle of relevant documents will be agreed, and that the agreed bundle will be tendered for the purposes of the hearing of the Indemnity Application on 19 and 20 June 2017.

Categories of claims

9. In general terms, the Second Indemnity Claim concerned claims that fall within certain categories of similar claims, and my Reasons Letter addressed the claims in those categories. I note that Mr Park's October 2016 Affidavit also refers at paragraph 16 to categories of Eligible Claims which are the subject of the Indemnity Application, although that list of categories is not a comprehensive summary of all the Eligible Claims the subject of the Second Indemnity Claim.
10. In summary, the Eligible Claims which were the subject of the Second Indemnity Claim notified to me by the letter from Mr Park to me dated 15 February 2016, fall into the following categories:-
- (a) Further legal costs in respect of the appeal from the Orders of Dalton J, in addition to those claimed as part of the Appeal Costs Indemnity Claim ("**Appeal costs**");
 - (b) Legal costs in respect of claims by the Applicants for indemnity from the property of the FMIF ("**FMIF indemnity costs**");
 - (c) Legal costs in respect of advice to LMIM concerning the books and records of LMIM ("**Books and Records costs**");
 - (d) Legal costs in respect of advice to LMIM, and representation of LMIM, in connection with my applications for remuneration in connection with my Appointment ("**Whyte Remuneration costs**"); I note that the letter from Mr Park to me dated 15 February 2016 separates the claims for Whyte Remuneration costs between:-

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- (i) costs relating to my application filed on 2 May 2014, leading to the order of P McMurdo J dated 28 August 2014; and
 - (ii) costs relating to my subsequent applications for remuneration;
- (e) Legal costs (incurred with Russells Lawyers) relating to my application for directions filed on 16 September 2015 in proceeding 3383 of 2013, in which I sought directions concerning my role in respect of an assessment of certain costs of LMIM (“**Assessment Directions costs**”), and the costs of the assessor, Mr Hartwell, appointed to conduct the assessment of those costs (“**Hartwell assessment fees**”); I will refer to these claims collectively below as “**Assessment costs**”;
- (f) Premiums paid in relation to a professional indemnity insurance policy taken out by LMIM, LMA, Mr Park and Ms Muller (“**Professional Indemnity Insurance costs**”);
- (g) Legal costs (incurred with Clayton Utz) in respect of advice to LMIM relating to a scheme proposed by the Applicants to be entered into with LMIM’s professional indemnity insurer (“**Insurance scheme costs**”). I note that this claim was withdrawn by LMIM, by the letter from Russells to me dated 24 March 2016, which is referred to at paragraph 7(g) above.
11. Both the schedule which was received with the letter from FTI Consulting dated 15 February 2016 making the Second Indemnity Claim and the schedule enclosed with my letter dated 22 April 2016 providing notice of my decisions in relation to the Second Indemnity Claim, contained a column titled “Notes” which contained reference to a general description of the category of claim.
12. In determining the Appeal Costs Indemnity Claim and the Second Indemnity Claim, I regarded my role in accordance with paragraph 8(b) of the Residual Powers Orders, to be to determine, in essence, whether the relevant expense or cost for which indemnity was being claimed was “*one for which LMIM has a right to be indemnified from the property of the FMIF*”, to use the words of paragraph 8(b)(i) of the Residual Powers Orders. In making that determination, I had regard to the provisions of the FMIF Constitution and I took advice from Tucker & Cowen Solicitors (in

relation to the Second Indemnity Claim) and from Gadens Lawyers (in relation to the Appeal Costs Claim), the privilege in which I do not intend to waive.

13. I note that I had previously informed the Applicants by correspondence from my solicitors (both Tucker & Cowen and Gadens) to Russells that I considered that the “clear accounts rule” had potential application to the claims for indemnity by LMIM. However, I regarded my role in determining whether to accept any indemnity claims, as being to decide whether there was a *prima facie* right to indemnity, and that questions of the potential application of the “clear accounts rule” were matters that I ought to raise, but which were not necessarily within my role to determine in deciding whether to accept or reject an Eligible Claim for the purposes of the Residual Powers Orders.

Withdrawal of claims, deferred claims and accepted claims

14. In the course of the correspondence to which I have referred above, between LMIM and me (either directly or through our respective solicitors) following the making of the Second Indemnity Claim, the Applicants either deferred or withdrew certain of the claims, and reduced the amounts of other claims, in the Second Indemnity Claim, so that the total amount of the Second Indemnity Claim falling for my decision was reduced from an amount of \$375,499.78 (inclusive of GST) to an amount of \$262,693.11 (inclusive of GST).
15. In my Decisions Notice, I notified LMIM that I had:-
- (a) accepted certain of the claims, either in whole or in part (“Accepted Claims”); and
 - (b) rejected the balance of the claims (“Rejected Claims”).
16. The amount which I accepted as being amounts “to which LMIM has a right to be indemnified from the property of the FMIF” (within the meaning of paragraph 8(b)(i) of the Residual Powers Orders) was \$84,954.41; that amount was the GST-exclusive amount of the Accepted Claims. As I explain further below, my position was that, in circumstances where I understood LMIM to have had the benefit of input tax credits, their claim on the FMIF could not be inclusive of GST.

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Witnessed by:

17. As I have explained at paragraph 57 of my May 2017 Affidavit, and in the circumstances further explained in my May 2017 Affidavit, I paid the amount mentioned in the previous paragraph, to Russells Solicitors Law Practice Trust Account on about 30 May 2016.
18. Exhibited hereto and marked "DW-75" is a further copy of the schedule enclosed with my Decisions Notice ("Claims Decisions Summary Schedule"), but printed afresh; I intend that my solicitors will have a copy printed on A3 paper available at the hearing of the Indemnity Application in order to be more legible for the Court.
19. The Claims Decisions Summary Schedule identifies each of the claims made by the Second Indemnity Claim, as well as:-
 - (a) The claims which were withdrawn by LMIM;
 - (b) The claims which LMIM agreed to defer;
 - (c) The Accepted Claims; and
 - (d) The Rejected Claims.
20. The Rejected Claims were the subject of paragraph 1(b) of the Indemnity Application.

Revised Schedule – summary of Second Indemnity Claim

21. I note that, in both Mr Park's October Affidavit and in Mr Park's March 2017 Affidavit, some claims have been withdrawn or agreed to be deferred by LMIM, or are no longer pressed in connection with the orders sought in paragraph 1(b) of the Indemnity Application.
22. Accordingly, for ease of reference, I have caused a further schedule to be prepared by Tucker & Cowen Solicitors copying the schedule to the Indemnity Application, and identifying in it those claims which I understand are no longer pressed by reason of what is said in those affidavits of Mr Park, thereby summarising what I now understand to be the claims made in relation to

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Witnessed by:

paragraph 1(b) of the Indemnity Application. A copy of that schedule is exhibited hereto and marked "DW-76".

Appeal costs

23. The Second Indemnity Claim included amounts totalling \$30,742.27 in respect of Appeal costs, which were in addition to the amounts claimed by the Appeal Costs Indemnity Claim. I have caused a schedule to be prepared from an extract of the Claims Decisions Summary Schedule identifying those claims, a copy of which is exhibited hereto and marked "DW-77".
24. That amount comprised three invoices, as follows:
- (a) A Russells' disbursement only invoice dated 10 March 2014 (numbered B17294), for further counsels' fees in relation to the appeal from the orders of Dalton J, which had not been claimed by the Appeal Costs Indemnity Claim. Although the invoice was for the sum of \$30,481.94 (inclusive of GST), the further claim was reduced by the amount of an invoice from Mr Sheahan QC for \$5,005 (inclusive of GST). That invoice had already been claimed as part of the Appeal Costs Indemnity Claim;
 - (b) An invoice from Mr Sheahan QC to Russells dated 11 September 2014 (numbered 1042) for \$4,950 (including GST), for his costs relating to considering and conferencing about the judgment of the Court of Appeal; and
 - (c) A Russells' invoice dated 15 July 2015 (numbered B22299) for \$315.33 (inclusive of GST) for costs incurred in seeking to exercise a right of indemnity in relation to a costs order made in favour of a Mr Shotton against LMIM, by the Court of Appeal.
25. However, there was no explanation in the Second Indemnity Claim Letter, in Mr Park's October Affidavit or in Mr Park's March 2017 Affidavit, for why the additional legal costs relating to the appeal from Dalton J's decisions were not included in the assessment of the costs of that appeal which LMIM caused to be carried out by Mr Hartwell, and which was the basis of the Appeal Costs Indemnity Claim.

26. By my Decisions Notice, I rejected the Appeal costs claims, and in my Reasons Letter I explained that my reasons for doing so were the same as my reasons for rejecting the Appeal Costs Indemnity Claim. I have sworn a separate affidavit in this proceeding regarding the Appeal Costs Indemnity Claim, and accordingly I will not address these claims further in this affidavit.

FMIF indemnity costs

27. The Second Indemnity Claim included amounts totalling \$7,399.84 in respect of FMIF indemnity costs. I have caused a schedule to be prepared from an extract of the Claims Decisions Summary Schedule, identifying those claims, a copy of which is exhibited hereto and marked "DW-78".
28. As appears from that schedule, a claim for an amount of \$3,327.09 in respect of invoice B19396 was initially made, and was then reduced to an amount of \$3,189.60. LMIM agreed (by the letter from Russells to me of 24 March 2016 mentioned at paragraph 7(g) above) to defer that claim until after delivery of judgment in respect of the Remuneration Application, so that it did not fall for decision by me at the time of my Decisions Notice.
29. Paragraph 47 of Mr Park's October Affidavit identifies those FMIF indemnity costs claims in respect of which a claim for indemnity is maintained, totalling an amount of \$3,751.91 (inclusive of GST).
30. Since making my decision in respect of the Second Indemnity Claim, I have considered Mr Park's October Affidavit and Mr Park's March 2017 Affidavit, and I have also had the benefit of further legal advice (the privilege in which I do not intend to waive). As a result:-
- (a) having regard to paragraph 48(a) of Mr Park's October Affidavit, I consider that, if this Honourable Court directs that LMIM has a *prima facie* right to an indemnity in respect of the Appeal costs (subject to the operation of the 'clear accounts' rule), then it follows that LMIM has a *prima facie* right to an indemnity from the property of the FMIF in respect of the GST-exclusive amount of invoices B17488 and B18884; and

- (b) I accept that the GST-exclusive amount of invoice B24316 (being the amount of \$1,745.83) is an amount for which LMIM has a *prima facie* right to an indemnity from the property of the FMIF (subject to the operation of the 'clear accounts' rule).

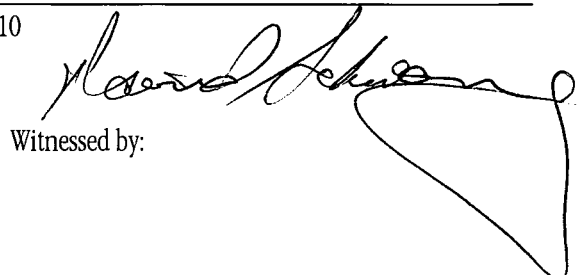
Books and Records costs

31. The Second Indemnity Claim included amounts totalling \$52,537.04 in respect of Books and Records costs, for legal services. I have caused a schedule to be prepared from an extract of the Claims Decisions Summary Schedule, identifying those claims, a copy of which is exhibited hereto and marked "DW-79".
32. For the reasons I explain below, I rejected a total of \$25,480.43 (inclusive of GST) of those claims, all of which is now claimed by the Applicants by the Indemnity Application.
33. I refer to Mr Park's October Affidavit, and in particular to paragraphs 73 to 77, in which Mr Park refers to the Books and Records costs included in the Second Indemnity Claim, and the invoices relating to such costs that were among the Rejected Claims. I note that paragraph 11 of Mr Park's March 2017 Affidavit, Mr Park refers to a Russells invoice no. B22433 dated 2 January 2016 for a claimed amount of \$1,920.42, but I assume that the reference was intended to be to Russells invoice no B22433, dated 31 July 2015, for a claimed amount of \$9,967.32 (inclusive of GST); I make that assumption because that amount for that invoice appears in the "Updated Claim Schedule" at paragraph 31 of Mr Park's March 2017 Affidavit and in the Indemnity Application.
34. In Mr Park's October Affidavit, Mr Park explains (at paragraphs 50 to 72) that the Books and Records costs relate to distinct but related matters. I understand that, in very general terms, those costs relate to:-
- (a) legal services and advice provided to LMIM in connection with issues arising regarding the intermingling of the books and records of LMIM, which were the subject of applications to this Honourable Court. Relevantly, orders were made concerning (in general terms) access to and the use of the books and records held by LMA and LMIM, in the proceedings to which I have referred at paragraph 34(a). As I understood the claim,



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Witnessed by:

the costs claimed related to the orders of Justice Daubney dated 18 December 2014 and 29 January 2015 made in proceedings numbered 3383/13 and 3691/13, and orders of Justice Jackson made on 14 May 2015 in proceeding 4526/15 (“**the First Books and Records Claims**”); and

- (b) legal services and advice provided to LMIM in connection with Federal Court Proceeding No. QUD 596 of 2014 (referred to in paragraph 53 of Mr Park’s October Affidavit as “**the ASIC Proceedings**”), which concerned proceedings by the Australian Securities and Investments Commission (“**ASIC**”) against the directors of LMIM in relation to a loan made by LMIM as trustee of the MPF (“**the Second Books and Records Claims**”).

35. I observe that, in making the Books and Records costs claims in the Second Indemnity Claim Letter, the Applicants have apportioned those costs to the various funds, first, until 14 May 2015 by reference to funds under management and, thereafter, to the FMIF in the fixed proportion of 76.62%.

36. However, in paragraph 72 of Mr Park’s October Affidavit, Mr Park states that he intends to claim the Books and Records costs relating to the review of documents in connection with the ASIC Proceedings, in the proportion in which the remuneration of the First Applicants for dealing with these books and records issues is approved (if any), in the judgment to be delivered in respect of the Remuneration Application.

The First Books and Records Claims

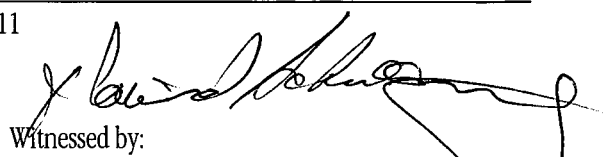
37. As explained in my Reasons Letter, I accepted the GST-exclusive amount of the First Books and Records Claims, subject to one correction.

38. In the letter from Russells to me dated 24 March 2016, which is referred to at paragraph 7(g) above, Russells referred to the claim made in respect of invoice B18603 and (at page 4 of 8 of that letter) stated that:-



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Witnessed by:

“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 no. B18603 is \$926.35 (excl. GST).”

39. However, the letter from Russells had, I calculated, erroneously referred to the remaining amount of that invoice as “\$926.35 (excl. GST)” when, by my calculation, the balance of that invoice which was claimed was \$926.35 inclusive of GST. It is for that reason that the amount of \$92.69 appears in the “Rejected” column of the Claims Decisions Summary Schedule.

The Second Books and Records Claims

40. My Reasons Letter explains my reasons for rejecting the Second Books and Records Claims. In general terms, I considered that those costs related to legal services obtained by LMIM in relation to the ASIC Proceedings, and that the ASIC Proceedings was not a proceeding in relation to or concerning the FMIF.
41. The Books and Records costs in relation to the ASIC Proceedings arose, I understand, from the correspondence from ASIC to LMIM dated 26 May 2015, a copy of which appears at pages 210 and 211 of exhibit JRP-5 to Mr Park’s October Affidavit (“ASIC Letter”). The ASIC Letter relevantly gave notice that:-
- (a) ASIC had been ordered to make discovery of certain documents in its possession to the other parties to the ASIC Proceedings;
 - (b) The documents that ASIC had been ordered to discover and produce may include documents produced by LMIM to ASIC;
 - (c) The documents to be discovered may contain material in respect of which LMIM or a third party may wish to make a claim for legal professional privilege or in respect of which LMIM might otherwise object to it being discovered or produced; and
 - (d) If LMIM wished to assert a claim for privilege, then LMIM was to notify ASIC by 5pm on 9 June 2015.

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Witnessed by:

42. The ASIC Letter also noted that the discovery and production of documents would be for the purposes of the ASIC Proceedings only and that any party who obtained access to the documents would not be able to use them for any purpose other than the ASIC Proceedings.
43. Gadens sent a letter to Russells dated 23 July 2015, on my instructions, a copy of which appears at page 222 of exhibit JRP-5 to Mr Park's October Affidavit. That letter relevantly:-
- (a) noted that the task of reviewing the documents proposed to be disclosed by ASIC would require considerable resources;
 - (b) noted that it was proposed to discover documents and emails to the respondents to the ASIC Proceedings, being the current or former directors of LMIM, and that (as Gadens understood the position) it was not proposed to disclose the documents or emails to any third parties; and
 - (c) stated that "*given the time and cost which would be involved in identifying each document or email and reviewing the 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*".
44. I gave instructions for that letter to be sent because I had formed the view that it was not in the interests of the members of the FMIF to expend considerable resources reviewing documents of LMIM that were unlikely (in my view) to relate to the FMIF, and would only be disclosed to persons who had been, in any event, directors of LMIM, namely the respondents to the ASIC Proceedings, in circumstances where those respondents could only use the documents for the purpose of the ASIC Proceedings (which concerned a transaction of LMIM as former trustee for the MPF, not as RE of the FMIF).
45. That is not to say that I did not consider that it would be proper for LMIM (in its own corporate capacity or as trustee for the MPF) to consider claims for privilege in relation to documents in the possession of ASIC, which ASIC proposed to disclose in the ASIC Proceedings; however I did not

consider that such costs should properly be incurred in LMIM's capacity as responsible entity for the FMIF.

46. My view in respect of this matter was conveyed to the Applicants by a letter from Gadens (acting on my behalf) to Russells dated 14 September 2015, a copy of which appears at page 252 of exhibit JRP-5 to Mr Park's October Affidavit, in which Gadens said the following:-

"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."

47. Mr Park's October Affidavit refers at paragraph 64 to various items of correspondence "regarding the issue", i.e. whether claims for privilege in respect of the documents proposed to be disclosed by ASIC in the ASIC Proceedings, were LMIM's claims to make. Mr Park states that copies of that correspondence appears at pages 226 to 258 of exhibit JRP-5 to Mr Park's October Affidavit.
48. However, the email from Gadens dated 29 July 2015 and attached draft document protocol (appearing at pages 226 to 249 of Mr Park's October Affidavit), in fact do not relate to the ASIC Proceedings, but instead relate to Supreme Court proceeding 12317/14, in which I have caused proceedings to be commenced in the name of LMIM as RE for the FMIF against eight defendants, including LMIM and its directors.
49. I also note that invoices B23460 and B23746, which I rejected, also contain references to a public examination of certain persons (including Mr Monaghan), arising from an application by me for summonses to be issued for a public examination of certain persons. I did not (and do not) see any reason why LMIM ought to have incurred costs in connection with that public examination, in the performance of its role as RE of the FMIF.

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Whyte Remuneration costs

50. The Second Indemnity Claim included amounts totalling \$82,134.90 in respect of Whyte Remuneration costs. I have caused a schedule to be prepared from an extract of the Claims Decisions Summary Schedule, identifying those claims, a copy of which is exhibited hereto and marked "DW-80".
51. Of the amounts claimed in respect of this category, I rejected amounts totalling \$11,950 as related to costs incurred in connection with an application filed by me on 24 July 2014, which resulted in an Order of Justice Atkinson made on 31 July 2014 that LMIM pay my costs of the application.
52. However I note that, although those amounts are mentioned at paragraphs 79 to 83 of Mr Park's October Affidavit, Mr Park states at paragraph 82 that he no longer presses a claim for those amounts.

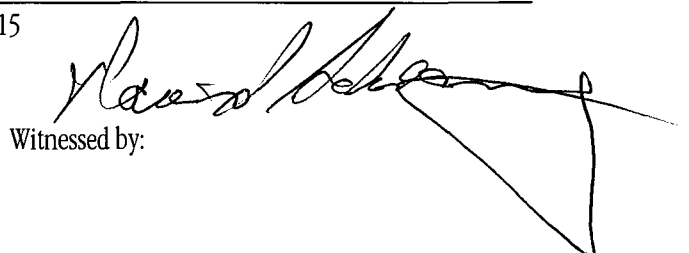
Assessment costs

53. On 23 July 2015, Russells applied by Originating Application in proceeding 7211 of 2015 in this Honourable Court, for an order for the assessment of certain invoices issued by Russells to LMIM. LMIM was named as the Respondent. A copy of the application is exhibited hereto and marked "DW-81".
54. The application was not served on me, but came to my attention.
55. On 29 July 2015, Mr Stephen Hartwell was appointed by order of a Registrar of this Honourable Court made by consent of the parties; a copy of that Order is exhibited hereto and marked "DW-82".
56. On 16 September 2015, I filed an application in proceeding BS3383/13 in this Honourable Court for directions concerning that assessment, including whether it ought to have been served on me, whether I might make submissions and whether I was bound by the assessment. That application was heard on 20 October 2015.



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Witnessed by:

57. The Second Indemnity Claim included:-

- (a) an amount of \$20,578.33 (inclusive of GST) in respect of Assessment Directions Costs (being in respect of amounts invoiced by Russells Lawyers) (“**Assessment Directions Costs**”); and
- (b) amounts totalling \$15,348.54 in respect of Hartwell assessment costs, being invoices issued by Mr Hartwell for undertaking assessments of costs (“**Hartwell Assessment Fees**”).

Assessment Directions Costs

58. Paragraph 15 of Mr Park’s March 2017 Affidavit refers to invoices issued by Russells for a total amount of \$40,776.37.

59. However, I note that the first invoice identified in the table appearing at that paragraph of Mr Park’s March 2017 Affidavit is said to be Russells invoice B20191, dated 22 December 2014, for a claimed amount of \$2,200; that invoice in fact related to Whyte Remuneration costs, and the claim for that amount has been withdrawn by LMIM, as explained at paragraphs 51 and 52 above.

60. The invoices provided to me in connection with the claim for Assessment Directions Costs as part of the Second Indemnity Claim were the remaining invoices mentioned in the table in paragraph 15 of Mr Park’s March 2017 Affidavit, namely the following invoices, with the amount claimed being calculated as follows:-

Consultant	Invoice No.	Invoice Date	Claimed Amount
Russells	B22835	31/08/2015	\$7,826.96
Russells	B23062	30/09/2015	\$3,506.23
Russells	B23465	30/10/2015	\$10,000.83
Russells	B23749	30/11/2015	\$16,174.44

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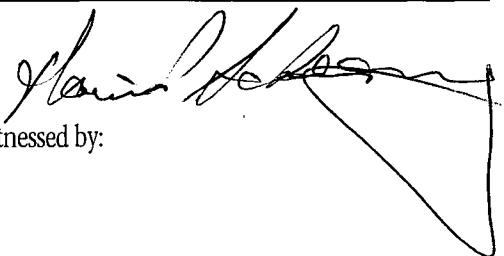
Russells	B23944	21/12/2015	\$1,067.91
		Subtotal:	\$38,576.37
<i>Less partial payment of B22835, B23062, B23465, B23749, B23944</i>			<i>(\$18,000.00)</i>
TOTAL CLAIMED:			\$20,576.37

61. A copy of the Judgment of Justice Jackson delivered on 29 October 2015 dismissing my application for directions and ordering that I pay LMIM's costs of the application on the standard basis, is exhibited to Mr Park's March Affidavit at pages 4 to 14 of exhibit JRP-6.
62. The amount of \$18,000.00 which has been paid is the amount which was agreed as between LMIM and myself as full and final satisfaction of LMIM's entitlement to costs under the costs Order made on 29 October 2015 (being for LMIM's costs on the standard basis).
63. Exhibited hereto and marked "DW-83" is a copy of the transcript of proceedings on 29 October 2015 when His Honour delivered judgment. I note that in those proceedings Mr Peden, first, referred to the fact that "no doubt Mr Whyte will be claiming [our costs] out of the fund" and then, subsequently, that "I'm instructed to seek those costs be assessed on an indemnity basis", on the basis that "the application was ultimately without legal foundation". His Honour refused costs on that basis.

Hartwell Assessment Fees

64. Amounts totalling \$15,348.54, in respect of invoices issued by Mr Hartwell for assessing LMIM's legal costs, were included in the Second Indemnity Claim. An extract of the Claims Decisions Summary Schedule identifying those claims is exhibited hereto and marked "DW-84".
65. I note that Mr Park's March 2017 Affidavit explains (at paragraphs 28 to 30) that the invoice from Mr Hartwell for an amount of \$9,068.68 (inclusive of GST) is no longer claimed under paragraph 1(b) of the Indemnity Application (relating to the Second Indemnity Claim), and the amount is claimed in relation to paragraph 1(a) of the Indemnity Application (relating to the Appeal Costs Indemnity Claim).


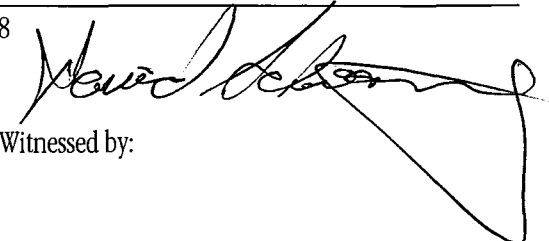
Signed: _____ Page 17

Witnessed by: 

66. Nonetheless, the issues of principle as to whether the Hartwell assessment fees are a proper expense for which LMIM has a prima facie right to indemnity from the FMIF also arise in respect of that invoice.
67. Exhibited hereto and marked:-
- (a) “DW-85” is a copy of LMIM’s Submissions dated 20 October 2015 in relation to that Application. I refer to paragraphs 4, and 11 of those submissions. In particular, at [4] it was submitted that *“LMIM and Russells accept that the assessment by Mr Hartwell of the costs due by LMIM is not determinative of the role to be played in the future by Mr Whyte in his assessment of which, if any, of the costs assessed by Mr Hartwell are payable out of the FMIF. That is a separate exercise.”*;
 - (b) “DW-86” is a copy of the transcript of the hearing on 20 October 2015. I refer in particular to Mr Peden’s submissions at page 1-14 line 31 to 37, page 1-18 lines 40 to 41, and page 1-24 at 19 to 32. Relevantly, at page 1-18 it was submitted as to the effect of the assessment a potential claim by LMIM to me for indemnity from the property of the FMIF that *“We’ll say it’s persuasive evidence that it’s fair and reasonable. But it doesn’t bind him to accept it.”*
68. My reasons for rejecting the claim for the Hartwell assessment fees are explained in my Reasons Letter; in summary, and as a result of the submissions made on 20 October 2015, I considered that the assessment of legal costs as between LMIM and Russells did not in any way relate to any claim for indemnity by LMIM from the property of the FMIF, but was concerned with matters only as between LMIM and its solicitors.

Professional Indemnity Insurance costs

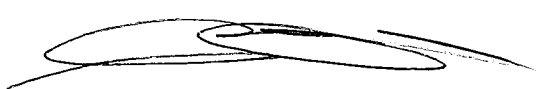
69. The Second Indemnity Claim included an amount of \$61,391.78 relating to an amount claimed from the FMIF in respect of invoices from Arthur J Gallagher, an insurance broker, for professional indemnity insurance costs.

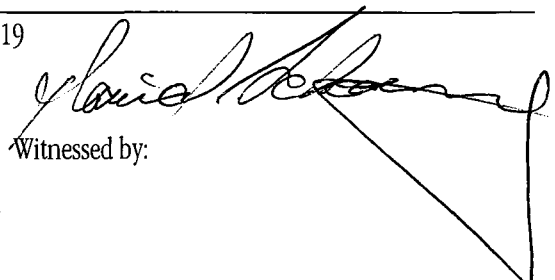
Signed:  Witnessed by: 

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70. I received (among the documents provided to me in connection with the Second Indemnity Claim) a copy of:
- (a) an invoice from Arthur J Gallagher (2) Pty Ltd to LMA Pty Ltd and LMIM Ltd (Admin Appt) (In Liq) dated 2 November 2015 for the sum of \$55,050 and schedule of insurance for a professional indemnity insurance policy ("**the First Policy**"); and
 - (b) an invoice from Arthur J Gallagher (2) Pty Ltd to LMA Pty Ltd and LMIM Ltd (Admin Appt) (In Liq) dated 2 November 2015 for the sum of \$25,075.00 and schedule of insurance for a professional indemnity insurance policy ("**the Second Policy**").
71. The amount claimed of \$61,391.78 is 76.62% of the aggregate cost of the two policies. At paragraphs 104 and 105 of Mr Park's October Affidavit, Mr Park deposes that he considers that the cost of the premiums for these policies should apportioned and borne by the FMIF on the basis of funds under management at the time the invoices were issued, or in such other proportion as this Honourable Court determines in relation to the Remuneration Application.
72. I rejected the claims for Professional Indemnity Insurance costs. My reasons for doing so are explained in my Reasons Letter, at pages 3 and 4 of the letter.
73. I note that, in the policy schedules for both the First Policy and the Second Policy:
- (a) the 'Insured' is "LM Administration Pty Ltd (Administrators Appointed) (In Liquidation), LM Investment Management Ltd (Administrators Appointed) (In Liquidation), John Park and Ginette Muller"; and
 - (b) the 'Professional Business' is "Manager and Loan Administrator of various Funds" and "Management and Loan Administrator of various Funds".
74. I do not otherwise exhibit or refer to the material terms of the policies in this affidavit, in order to maintain their confidentiality. I understand that they will be tendered, on a confidential basis if necessary, at the hearing.

Signed: 


Page 19 

Witnessed by:

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75. However, I note that, as at the date of each of those invoices, the assets of the FMIF were being realised by myself or, in a small number of cases, Mr Hayes and Mr Connelly of McGrath Nicol.
76. I am also aware, as a result of my access to the books and records of LMIM that concern the FMIF, that insurance policies had been taken out in connection with LMIM's funds management business operations during the period prior to my Appointment.
77. The policies of insurance prior to my Appointment did not name Mr Park or Ms Muller as Insured persons; only one of them named LMA. However, in order to maintain confidentiality, I have not exhibited to my affidavit a copy of or otherwise refer to the terms of those insurance policies.
78. I am a member of the Australian Restructuring Insolvency & Turnaround Association ("ARITA"), the main professional industry body for insolvency practitioners previously known as Insolvency Practitioners Association of Australia. I am familiar with the ARITA Code of Professional Practice 3rd Ed., dated 1 January 2014 (as amended 18 August 2014) ("the Code") and I observe that, at page 71 of that Code:-
- (a) "overheads" are described as costs that can only be charged for and recovered across all the administrations handled by the Practitioner's Firm; a distinction is drawn between overheads and out-of-pocket expenses (which may properly be reimbursed from the relevant insolvency administration);
 - (b) an "out-of-pocket expense" is described as "*an expense actually incurred in respect of that Administration. It can be claimed as a Disbursement. ...*"; and
 - (c) the Code provides examples of overheads, which relevantly include "rent, insurance, professional indemnity insurance, professional memberships ...".
79. In my view, professional indemnity insurance in respect of an insolvency administration would ordinarily be regarded as an overhead, rather than a disbursement to be charged to a particular insolvency administration. It may be that, in particular circumstances such as if it is required for a particular purpose, insurance might be regarded as a disbursement which may be charged to


Signed:


Witnessed by:

the particular relevant insolvency administration if the insurance relates solely to that particular administration but, in my view, professional indemnity insurance for the benefit of the insolvency practitioner would not ordinarily be regarded as such an expense.

80. On 21 April 2016, before I refused the Applicants' claim for the Professional Insurance Indemnity Costs, and at my request, Ms Nicola Kennedy (a senior accountant then in the employ of BDO) sought advice from Arthur J Gallagher, an insurance broker. Arthur J Gallagher confirmed to Ms Kennedy by email that discrete and additional professional indemnity insurance cover was not required for me, as the Court-appointed Receiver of the FMIF, as any claims in a professional capacity would be covered by BDO's professional indemnity policy. Exhibited hereto and marked "DW-87" is a copy of the email from Britta Green, of Arthur J Gallagher, to Nicola Kennedy dated 21 April 2016.
81. While that advice concerned my own position in respect of the FMIF, I did not see why the same would not also apply to the position of Mr Park and Ms Muller in connection with their roles as liquidators of LMIM.

Other matters

Further claims

82. I refer to paragraph 19 of Mr Park's October Affidavit, in which he states that he and I "have agreed to delay any request for information or decision ... in respect of [further indemnity claims] pending the resolution of the Application".
83. While I have not pressed the issue, in recent times, there has not been any agreement between the Applicants and me to delay notifications, requests for information or decisions in respect of such potential further claims, in accordance with paragraph 6 of the Residual Powers Orders, before the hearing of the Indemnity Application.
84. Rather, in respect of a schedule of expenses received by me from Renee Lobb of FTI Consulting on 17 October 2016, I clarified in response that I did not consider that email (or its attachment) to

constitute formal notice of claims pursuant to the Residual Powers Orders; I refer to paragraphs 169 to 173 of my May 2017 Affidavit, and to the parts of the affidavit of Mr David Schwarz sworn and filed on 16 February 2017 in this proceeding to which I refer in those paragraphs of that affidavit.

85. Nonetheless, I note that Counsel for the Applicants foreshadowed to the Court on 16 February 2017 further indemnity claims (presumably, as at that date) in the approximate amount of \$3,000.00 and that, as a result, the Court declined to make any direction at that time to require such claims to be made before determination of the Indemnity Application.

Amounts for GST

86. My inquiries and investigations have indicated that LMIM is registered for GST. Consequently, I have assumed that LMIM has claimed, or will claim, input tax credits for its expenses (paid or unpaid), including the liabilities for expenses claimed in the Indemnity Application. I have not been informed to the contrary by the Applicants.
87. On 3 June 2016, Tucker & Cowen sent a letter to Russells in relation to the amount to be paid under the order that the Applicants be paid their costs of the hearing which resulted in the making of the Residual Powers Orders from the property of the FMIF, and whether it should be inclusive or exclusive of GST. That letter communicated my view, formed after having taken legal advice in relation to the issue (the privilege in which I do not intend to waive), that such costs should be exclusive of GST in circumstances where the benefit of a GST input tax credit had been received. A copy of that letter is exhibited hereto and marked "DW-88".
88. I also note that, in the letter from Tucker & Cowen to Russells dated 13 May 2016 (a copy of which is exhibited to Mr Park's October Affidavit at pages 119 and 120 of exhibit JRP-5) in relation to payment of the Accepted Claims, the reasons why I considered that only the GST-exclusive amount of the Accepted Claims should be paid were explained.


Management Services Agreement

89. At paragraphs 98 to 101 of my May 2017 Affidavit, I refer to a series of "Management Services Agreements" which are mentioned in paragraph 70 of the ASOC, and at paragraph 99 I refer to an example of such a Management Services Agreement. Due to an oversight, I did not exhibit a copy of that example Management Services Agreement to my May 2017 Affidavit.
90. Exhibited hereto and marked "DW-89" is a copy of a Management Services Agreement entered into by PTAL, LMIM and LMA in respect of the borrower, Cameo Estates Lifestyle Villages (Launceston) Pty Ltd, being an example of the Management Services Agreements mentioned in the previous paragraph.
91. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by DAVID WHYTE on the 7th day of June 2017 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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

AND

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

AND

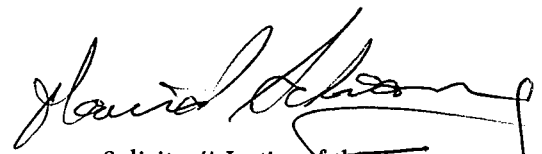
Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT
2001

CERTIFICATE OF EXHIBIT

Bound and marked DW-74 to DW-89 is a bundle of exhibits to the Affidavit of DAVID WHYTE sworn this
7th day of June 2017



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Respondent,
Mr David Whyte

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

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
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**IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
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AND

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

AND

Respondent: **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT
2001**

INDEX OF EXHIBITS

Exhibit	Description	Date	Page No.
DW-74	(a) Letter from FTI Consulting to BDO (David Whyte) – Administration and Recoupment Indemnity Claim	15.02.2016	1 – 5
	(b) Schedule of indemnity claims received with the letter from FTI Consulting to BDO referred to at paragraph 7(a)	15.02.2016	6
	(c) Letter from BDO to FTI requesting information	29.02.2016	7 – 24
	(d) Letter from Russells to David Whyte	11.03.2016	25
	(e) Letter from Tucker & Cowen to Russells	21.03.2016	26
	(f) Email from Russells to Tucker & Cowen	21.03.2016	27 – 28
	(g) Letter (received by email) from Russells to BDO responding to my request for information	24.03.2016	29 – 36

Exhibit	Description	Date	Page No.
	(h) Email from Geoff Hancock, Tucker & Cowen, to Ashley Tiplady, Russells, requesting copy of retainer agreement	19.04.2016	37
	(i) Email from Ashley Tiplady to Geoff Hancock confirming that Russells will provide the retainer agreements	19.04.2016	38 – 39
	(j) Email from Ashley Tiplady to Geoff Hancock attaching documents	22.04.2016	40
	(k) Letter from BDO to FTI, giving notice of my decisions on indemnity claims, and schedule (“ Decisions Notice ”)	22.04.2016	41 – 42
	(l) Letter from BDO to John Park, FTI Consulting, providing reasons for rejection of certain indemnity claims (“ Reasons Letter ”)	27.04.2016	43 – 50
DW-75	Schedule enclosed with Decisions Notice (“ Claims Decisions Summary Schedule ”)	22.04.2016	51
DW-76	Schedule prepared by Tucker & Cowen	Undated	52 – 53
DW-77	Schedule summary of invoices relating to Appeal costs	Undated	54
DW-78	Schedule summary of invoices relating to FMIF indemnity costs	Undated	55
DW-79	Schedule summary of the Books and Records costs	Undated	56
DW-80	Schedule summary of the Whyte Remuneration costs	Undated	57
DW-81	Originating Application in proceeding 7211/15	23.07.2015	58 – 61
DW-82	Order of Registrar appointing costs assessor	29.07.2015	62 – 64
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DW-85	LMIM’s Submissions	20.10.2015	70 – 73
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DW-87	Email from Arthur J Gallagher to Nicola Kennedy, BDO	21.04.2016	108 – 110
DW-88	Letter from Tucker & Cowen to Russells	03.06.2016	111 – 113
DW-89	Management Services Agreement	Undated	114 – 138



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

FTI Consulting (Australia) Pty Limited
ABN 49 160 397 811 | ACN 160 397 811
22 Market Street | Brisbane QLD 4000 | Australia
Postal Address | GPO Box 3127 | Brisbane QLD 4001 | Australia
+61 7 3225 4900 telephone | +61 7 3225 4999 fax | fticonsulting.com

Liability limited by a scheme approved under Professional Standards Legislation.

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.

Yours faithfully
FTI Consulting



John Park
Liquidator

LW First Mortgage Income Fund										Indemnity Claim	
Consultant	Invoice Date	Invoice Number	Total amount	GST Exc	GST	Amount Paid to date by LWIM - "Recoupment Indemnity Claim"		Amount Outstanding - "Administration Indemnity Claim"		Matter Number	Notes
Russells	10-Mar-14	817294	\$ 25,476.94	\$ 23,160.85	\$ 2,316.09	\$ 25,476.94	\$ -	\$ -		20131268	Appeal from decision of Dalton J. Reduced for double claim of disbursement invoice 973 John C Sheahan
Russells	28-Mar-14	817488	\$ 1,585.85	\$ 1,441.68	\$ 144.17	\$ 1,441.68	\$ -	\$ 1,462.10		20131259	FMIF indemnity
Russells	29-May-14	818011	\$ 774.48	\$ 704.07	\$ 70.41	\$ -	\$ -	\$ 774.48		20131545	Books and Records
Russells	05-Jun-14	818111	\$ 12,848.43	\$ 11,680.43	\$ 1,168.00	\$ -	\$ -	\$ 12,848.43		20140653	Remuneration claim
Russells	25-Jun-14	818258	\$ 3,300.00	\$ 3,000.00	\$ 300.00	\$ -	\$ -	\$ 3,300.00		20140653	Remuneration claim
Russells	18-Jul-14	818335	\$ 3,134.11	\$ 2,849.22	\$ 284.89	\$ -	\$ -	\$ 3,134.11		20140653	Remuneration claim
Russells	28-Jul-14	818603	\$ 4,810.64	\$ 4,373.31	\$ 437.33	\$ -	\$ -	\$ 4,810.64		20131545	Books and Records
Russells	20-Aug-14	818824	\$ 26,685.63	\$ 24,259.66	\$ 2,425.97	\$ -	\$ -	\$ 26,685.63		20140653	Remuneration claim
Russells	26-Aug-14	818884	\$ 566.48	\$ 514.98	\$ 51.50	\$ -	\$ -	\$ 566.48		20131259	FMIF indemnity
Russells	11-Sep-14	1042	\$ 4,950.00	\$ 4,500.00	\$ 450.00	\$ 4,950.00	\$ -	\$ -		20131268	Appeal from decision of Dalton J.
Russells	29-Sep-14	819396	\$ 3,327.09	\$ 3,024.63	\$ 302.46	\$ -	\$ -	\$ 3,327.09		20131259	FMIF indemnity
Russells	22-Dec-14	820191	\$ 23,563.49	\$ 21,421.35	\$ 2,142.14	\$ -	\$ -	\$ 23,563.49		20140653	Remuneration claim
Russells	22-Dec-14	820178	\$ 6,865.52	\$ 6,285.02	\$ 628.50	\$ 2,640.00	\$ -	\$ 4,223.52		20141556	Remuneration of Receiver. Reduction from costs assessment applied to this invoice. \$50 deducted.
Russells	30-Apr-15	821563	\$ 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.
Russells	29-May-15	821751	\$ 4,786.74	\$ 4,351.58	\$ 435.16	\$ -	\$ -	\$ 4,786.74		20131545	Books and Records
Clayton Utz	29-May-15	3863377	\$ 10,650.20	\$ 9,687.20	\$ 968.20	\$ -	\$ -	\$ 10,650.20		80143342	Insurance scheme costs
Russells	29-Jun-15	822048	\$ 3,367.86	\$ 3,061.69	\$ 306.17	\$ -	\$ -	\$ 3,367.86		20141556	Remuneration of Receiver
Russells	30-Jun-15	Cost of application		\$ 997.48	\$ -	\$ 997.48	\$ -	\$ -		20131545	Books and Records
Russells	30-Jun-15	822024	\$ 8,579.32	\$ 7,799.38	\$ 779.94	\$ -	\$ -	\$ 8,579.32		20131545	Books and Records
Russells	15-Jul-15	822299	\$ 315.33	\$ 286.66	\$ 28.67	\$ -	\$ -	\$ 315.33		20131268	Appeal from decision of Dalton J.
Russells	31-Jul-15	822433	\$ 9,967.32	\$ 9,061.20	\$ 906.12	\$ -	\$ -	\$ 9,967.32		20131545	Books and Records
Clayton Utz	31-Jul-15	3873098	\$ 15,285.05	\$ 13,895.50	\$ 1,389.55	\$ -	\$ -	\$ 15,285.05		80143342	Insurance scheme costs
Russells	31-Aug-15	822832	\$ 3,525.82	\$ 3,205.29	\$ 320.53	\$ -	\$ -	\$ 3,525.82		20131545	Books and Records
Russells	Various	Various	\$ 20,578.33	\$ 18,707.57	\$ 1,870.76	\$ -	\$ -	\$ 20,578.33		20150954	Costs Assessment - Total invoices less settled Cost Order
Hartwell Lawyers	02-Jan-16	Disbursement paid		\$ 9,068.68	\$ 8,244.25	\$ 9,068.68	\$ -	\$ -		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	\$ 212.76	\$ -	\$ -		Disbursement	Cost of costs assessment - russells matter 20131259
Hartwell Lawyers	02-Jan-16	Disbursement paid		\$ 2,361.45	\$ 2,146.77	\$ 2,361.45	\$ -	\$ -		Disbursement	Cost of costs assessment - russells matter 20131545. 59% to FMIF.
Hartwell Lawyers	02-Jan-16	Disbursement paid		\$ 2,699.84	\$ 2,454.40	\$ 2,699.84	\$ -	\$ -		Disbursement	Cost of costs assessment - russells matter 20140653
Hartwell Lawyers	02-Jan-16	Disbursement paid		\$ 606.60	\$ 551.45	\$ 606.60	\$ -	\$ -		Disbursement	Cost of costs assessment - russells matter 20140947 (Controllership resignation)
Hartwell Lawyers	02-Jan-16	Disbursement paid		\$ 399.21	\$ 362.92	\$ 399.21	\$ -	\$ -		Disbursement	Cost of costs assessment - russells matter 20141556
Clayton Utz	31-Aug-15	3876572	\$ 30,805.23	\$ 28,004.75	\$ 2,800.48	\$ -	\$ -	\$ 30,805.23		80143342	Insurance scheme costs
Clayton Utz	30-Sep-15	3880734	\$ 11,254.65	\$ 10,231.50	\$ 1,023.15	\$ -	\$ -	\$ 11,254.65		80143342	Insurance scheme costs
Russells	30-Sep-15	823055	\$ 1,390.62	\$ 1,264.20	\$ 126.42	\$ -	\$ -	\$ 1,390.62		20131545	Books and Records
Russells	30-Oct-15	823460	\$ 4,646.14	\$ 4,223.76	\$ 422.38	\$ -	\$ -	\$ 4,646.14		20131545	Books and Records
Clayton Utz	30-Oct-15	3884463	\$ 13,609.75	\$ 12,372.50	\$ 1,237.25	\$ -	\$ -	\$ 13,609.75		80143342	Insurance scheme costs
Arthur J Gallagher	02-Nov-15	289543/289547	\$ 61,391.78	\$ 61,315.16	\$ 76.62	\$ -	\$ -	\$ 61,391.78			PI Insurance
Clayton Utz	27-Nov-15	3887238	\$ 17,397.05	\$ 15,815.50	\$ 1,581.55	\$ -	\$ -	\$ 17,397.05		80143442	Insurance scheme costs
Russells	30-Nov-15	823746	\$ 5,857.84	\$ 5,325.08	\$ 532.51	\$ -	\$ -	\$ 5,857.84		20131545	Books and Records
Russells	21-Dec-15	823946	\$ 2,371.86	\$ 2,156.24	\$ 215.62	\$ -	\$ -	\$ 2,371.86		20141556	Remuneration of Receiver
Clayton Utz	24-Dec-15	3891981	\$ 6,365.15	\$ 5,786.50	\$ 578.65	\$ -	\$ -	\$ 6,365.15		80143442	Insurance scheme costs
Russells	29-Jan-16	824516	\$ 1,920.42	\$ 1,745.84	\$ 174.58	\$ -	\$ -	\$ 1,920.42		20131259	FMIF indemnity
Total			\$ 375,499.78	\$ 347,003.85	\$ 28,545.72	\$ 110,928.49	\$ -	\$ 264,571.29			



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John Park
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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 LMIM;
 - for the benefit of FMIF;

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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 black 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

Partner

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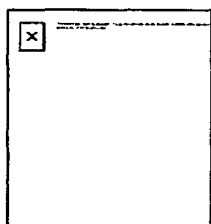
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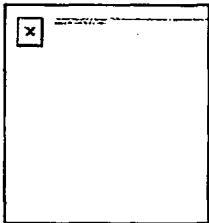
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From: Trenfield, Kelly [<mailto:Kelly.Trenfield@fticonsulting.com>]

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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kelly.trenfield@fticonsulting.com

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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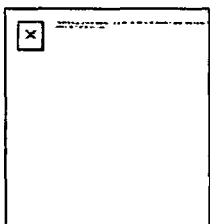
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RUSSELLS

11 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 Mr Whyte

MIF Indemnity Claim

We refer to your letter to our clients dated 29 February, 2016 and to the orders of Justice Jackson dated 17 December, 2015.

Pursuant to paragraph 7(b) of the Order, our clients are to respond to your request for information by 14 March, 2016.

Your letter contains 12 pages of information requests and several documents. Our clients will respond to the requests made in your letter but require further time to collate the subject information and material.

Accordingly, would you please let us have your agreement to extending the period for response by seven days, such that our clients will deliver their response by 21 March, 2016.

Yours faithfully



Sean Russell
Associate

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

cc: *David Schwarz*
By email: dschwarz@tuckercowen.com.au

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

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

Our reference: Mr Schwarz / Mr Hancock
Your reference: Mr Tiplady – Mr Sean Russell

21 March 2016

Russells
GPO Box 5408
Sydney NSW 2001

Email:
SeanRussell@RussellsLaw.com.au

Dear Russell

MIF Indemnity Claim

We have been instructed to reply to your letter of 11 March, 2016 addressed to Mr Whyte.

Our client is agreeable to the period of response to his letter of 29 February, 2016 being extended to 21 March, 2016.

Would your clients, at the same time, clarify the following matter concerning an aspect of your firm's fees?

Mr Hartwell has assessed your firm's professional costs and outlays in a number of matters, as his certificates of 2 January 2016 show.

When you advised us last year that your firm was engaging Mr Hartwell to carry out a number of assessments, there was some reference to the possibility that the costs to be assessed might include some costs which were to be re-allocated from the matter relating to the proceedings in which Mr Whyte was appointed.

We understand that your firm has been paid its professional costs in those proceedings (we do not include the appeal from Dalton J).

In light of the re-allocation comment, our client requests your clients' advice whether any of the costs in the invoices which accompany their letter of 15 February, 2016 included any sums transferred from the matter of the proceedings before Dalton J.

Yours faithfully



Geoff Hancock
Tucker & Cowen
Accredited Specialist Commercial Litigation



Direct Email: ghancock@tuckercowen.com.au
Direct Line: (07) 3210 3533

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Jayleigh Sargent

From: Sean Russell [SeanRussell@russellslaw.com.au]
Sent: Monday, 21 March 2016 5:28 PM
To: Geoff Hancock
Cc: David Schwarz
Subject: RE: LMFMIF

Geoff

Thank you for your email.

We are currently finalising our clients' response to your client's letter of 29 February, 2016 which will include a response to your letter of today. We have not yet received final instructions but expect to deliver our clients' response tomorrow.

We trust this short delay will not be objectionable.

Yours faithfully

RUSSELLS

Sean Russell
Associate

Direct 07 3004 8844
Mobile 0400 521 611
SeanRussell@russellslaw.com.au

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RussellsLaw.com.au

From: Geoff Hancock [<mailto:GHancock@tuckercowen.com.au>]
Sent: Monday, 21 March 2016 9:11 AM
To: Sean Russell
Cc: David Schwarz
Subject: LMFMIF

Sean,

Attached is a reply to your letter of 11 March. Apologies for not getting back to you earlier. It is in order for to extend the time for your client's responses to Mr Whyte's recent questions until today.

Regards

Geoff Hancock
Special Counsel

E: ghancock@tuckercowen.com.au
D: 07 3210 3533 | M: 0409 055 584 | 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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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).

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.
-

-
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.

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,

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

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

Jayleigh Sargent

From: Geoff Hancock
Sent: Tuesday, 19 April 2016 5:46 PM
To: atiplady@russellsllaw.com.au
Cc: David Schwarz
Subject: LMFMIF - FTI indemnity claim

Dear Mr Tiplady,

We refer to your letter of 24 March, 2016 which was a response, on behalf of your clients, to our client's request for information in his letter of 29 February, 2016.

So far as concerns your own firm's fees and expenses the subject of the indemnity claim, our client's first request has not been responded to. That request was:

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

Would you send us a copy of each of these agreements by 4.00 pm tomorrow, in order that our client may finalise his response to the indemnity claims pursuant to Justice Jackson's order of 17 December, 2015.

Regards

Geoff Hancock
Special Counsel

E: ghancock@tuckercowen.com.au
D: 07 3210 3533 | M: 0409 055 584 | T: 07 300 300 00 | F: 07 300 300 33
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001
TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

First Tier for Insolvency - Doyle's Guide to the Australian Legal Profession 2015 - and ranked for Litigation and Dispute Resolution with the most ranked litigators - David Tucker, Richard Cowen, David Schwarz and Justin Marschke - recognised again as one of Australia's Best Lawyers for litigation and regulatory practice **Best Lawyers® International 2017**

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Jayleigh Sargent

From: Ashley Tiplady [atiplady@russellslaw.com.au]
Sent: Tuesday, 19 April 2016 5:55 PM
To: Geoff Hancock
Cc: David Schwarz; Sean Russell
Subject: RE: LMFMIF - FTI indemnity claim

My apologies Geoff if this was overlooked.

We will have these to you tomorrow.

Kind regards,

RUSSELLS

Ashley Tiplady
Partner

Direct 07 3004 8833
Mobile 0419 727 626
atiplady@russellslaw.com.au

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Brisbane / Sydney

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

From: Geoff Hancock [<mailto:GHancock@tuckercowen.com.au>]
Sent: Tuesday, 19 April 2016 5:46 PM
To: Ashley Tiplady
Cc: David Schwarz
Subject: LMFMIF - FTI indemnity claim

Dear Mr Tiplady,

We refer to your letter of 24 March, 2016 which was a response, on behalf of your clients, to our client's request for information in his letter of 29 February ,2016.

So far as concerns your own firm's fees and expenses the subject of the indemnity claim, our client's first request has not been responded to. That request was:

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

Would you send us a copy of each of these agreements by 4.00 pm tomorrow, in order that our client may finalise his response to the indemnity claims pursuant to Justice Jackson's order of 17 December, 2015.

Regards

Geoff Hancock

Special Counsel

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Jayleigh Sargent

From: Dallys Pyers [dpyers@russellslaw.com.au] on behalf of Ashley Tiplady [atiplady@russellslaw.com.au]
Sent: Friday, 22 April 2016 11:40 AM
To: Geoff Hancock
Cc: Ashley Tiplady; Sean Russell
Subject: LMIM - FMIF Indemnity
Attachments: Professional Services Agreement (1).pdf; L - expanding scope of work (2).pdf; Professional Services Agreement (3).pdf; Professional Services Agreement (4).pdf

Dear Geoff

Further to our telephone discussion this morning, attached are the Professional Services Agreements that I have been able to quickly put my hands on in Sean's absence.

Please let me know if you require anything further.

Yours faithfully

RUSSELLS

Dallys Pyers
Secretary

Direct 07 3004 8833
dpyers@russellslaw.com.au

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RussellsLaw.com.au

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Via email: john.park@fticonsulting.com

John Park
FTI Consulting
22 Market Street
BRISBANE QLD 4000

22 April 2016

Dear Sir/Mr 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 date by LMIM - "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 Dalton J. Reduced for double claim of disbursement invoice 973 John C					
Russells	28-Mar-14	B17488	\$ 1,585.85	\$ 1,481.68	\$ 104.17	\$ 1,585.85	\$ 1,237.75	20131259	Sheehan	1,265.01	NII			25,476.94
Russells	29-May-14	B18011	\$ 774.48	\$ 704.07	\$ 70.41	\$ -	\$ -	20131259	PAIIF Indemnity					1,237.75
Russells	05-Jun-14	B18111	\$ 12,848.43	\$ 11,680.43	\$ 1,168.00	\$ -	\$ -	20131259	Books and Records		774.48	70.41	704.07	1,237.75
Russells	25-Jun-14	B18258	\$ 3,300.00	\$ 3,000.00	\$ 300.00	\$ -	\$ -	20131259	Remuneration claim		12,848.43	1,168.00	11,680.39	-
Russells	28-Jul-14	B18535	\$ 3,134.11	\$ 2,849.22	\$ 284.89	\$ -	\$ -	20131259	Remuneration claim		3,300.00	300.00	3,000.00	-
Russells	28-Jul-14	B18535	\$ 4,310.64	\$ 4,373.31	\$ 437.33	\$ -	\$ -	20131259	Books and Records		3,134.11	284.92	2,849.19	-
Russells	20-Aug-14	B18824	\$ 26,685.63	\$ 24,259.66	\$ 2,425.97	\$ -	\$ -	20131259	Books and Records		1,018.98	926.29	842.08	92.69
Russells	20-Aug-14	B18824	\$ 566.48	\$ 514.08	\$ 51.50	\$ -	\$ -	20131259	Remuneration claim		16,935.63	1,530.60	15,396.03	9,750.00
Russells	11-Sep-14	B19396	\$ 4,950.00	\$ 4,500.00	\$ 450.00	\$ 4,950.00	\$ -	20131268	PAIIF Indemnity					566.48
Russells	29-Sep-14	B20191	\$ 3,327.09	\$ 3,024.63	\$ 302.46	\$ -	\$ -	20131259	Appeal from decision of Dalton J.					4,950.00
Russells	22-Dec-14	B20191	\$ 23,563.49	\$ 21,421.35	\$ 2,142.14	\$ -	\$ -	20131259	FMIF Indemnity	3,189.60	DEFERRED			4,950.00
Russells	22-Dec-14	B20178	\$ 6,863.52	\$ 6,285.02	\$ 578.50	\$ 2,640.00	\$ 4,223.32	20141556	Remuneration of Receiver. Reduction of costs assessment applied to this invoice. \$50 deducted.		21,363.49	1,942.14	19,421.35	2,200.00
Russells	30-Apr-15	B21563	\$ 7,200.64	\$ 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.		6,863.52	623.96	6,239.56	-
Russells	29-May-15	B21751	\$ 4,786.74	\$ 4,351.16	\$ 435.58	\$ -	\$ -	20131545	Books and Records		2,200.64	654.60	1,545.04	-
Clayton Utz	29-May-15	B21751	\$ 10,650.20	\$ 9,682.00	\$ 968.20	\$ -	\$ -	20131545	Insurance scheme costs		4,786.74	435.16	4,351.58	-
Russells	29-Jun-15	B22048	\$ 3,367.86	\$ 3,061.69	\$ 306.17	\$ -	\$ -	20131545	Remuneration of Receiver		WITHDRAWN			WITHDRAWN
Russells	30-Jun-15	Cost of application	\$ 997.48	\$ 997.48	\$ -	\$ 997.48	\$ -	20131545	Books and Records		3,367.86	306.17	3,061.69	-
Russells	30-Jun-15	Cost of application	\$ 8,579.32	\$ 7,799.38	\$ 779.94	\$ -	\$ -	20131545	Books and Records		997.48	906.80	906.80	-
Russells	15-Jul-15	B22259	\$ 315.33	\$ 286.66	\$ 28.67	\$ -	\$ -	20131545	Appeal from decision of Dalton J.		8,579.32	779.94	7,799.38	-
Russells	31-Jul-15	B22433	\$ 9,967.32	\$ 9,061.20	\$ 906.12	\$ -	\$ -	20131545	Books and Records					315.33
Clayton Utz	31-Jul-15	B273098	\$ 15,285.05	\$ 13,895.50	\$ 1,389.55	\$ -	\$ -	20131545	Insurance scheme costs		9,967.32			9,967.32
Russells	31-Aug-15	B22832	\$ 3,525.82	\$ 3,205.29	\$ 320.53	\$ -	\$ -	20131545	Books and Records		WITHDRAWN			WITHDRAWN
Russells	Various	Various	\$ 20,578.33	\$ 18,707.57	\$ 1,870.76	\$ -	\$ -	20150954	Costs Assessment - Total invoices less settled Cost Order					3,525.82
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 Dalton J.)					20,578.33
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 212.76	\$ 193.42	\$ 19.34	\$ 212.76	\$ -	Disbursement	Cost of costs assessment - russells matter 20131259					9,068.68
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, 59% to FMIF.					212.76
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 2,695.84	\$ 2,454.40	\$ 245.44	\$ 2,695.84	\$ -	Disbursement	Cost of costs assessment - russells matter 20140653					2,361.45
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 606.60	\$ 551.45	\$ 55.15	\$ 606.60	\$ -	Disbursement	Cost of costs assessment - russells matter 20140947 (Controlship resignation)					2,695.84
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$ 399.21	\$ 362.92	\$ 36.29	\$ 399.21	\$ -	Disbursement	Cost of costs assessment - russells matter 20141556					606.60
Clayton Utz	31-Aug-15	B21751	\$ 30,805.23	\$ 28,004.75	\$ 2,800.48	\$ -	\$ -	20131545	Insurance scheme costs					399.21
Clayton Utz	30-Sep-15	B230734	\$ 11,254.65	\$ 10,231.50	\$ 1,023.15	\$ -	\$ -	20131545	Insurance scheme costs		WITHDRAWN			WITHDRAWN
Russells	30-Sep-15	B23055	\$ 4,646.14	\$ 4,223.76	\$ 423.38	\$ -	\$ -	20131545	Books and Records		11,254.65			WITHDRAWN
Russells	30-Oct-15	B23460	\$ 13,609.75	\$ 12,372.50	\$ 1,237.25	\$ -	\$ -	20131545	Books and Records		4,646.14			1,390.62
Clayton Utz	30-Oct-15	B23463	\$ 61,391.78	\$ 55,151.16	\$ 6,240.62	\$ -	\$ -	20131545	Insurance scheme costs		13,609.75			WITHDRAWN
Arthur J Gallagher	02-Nov-15	B285437289447	\$ 17,397.05	\$ 15,815.50	\$ 1,581.55	\$ -	\$ -	20131545	PA Insurance		WITHDRAWN			WITHDRAWN
Russells	27-Nov-15	B287238	\$ 5,857.84	\$ 5,325.08	\$ 532.76	\$ -	\$ -	20131545	Insurance scheme costs					61,391.78
Russells	30-Nov-15	B23746	\$ 2,371.86	\$ 2,156.24	\$ 215.62	\$ -	\$ -	20131545	Books and records		5,857.84			5,857.84
Russells	21-Dec-15	B23946	\$ 6,365.15	\$ 5,786.65	\$ 578.50	\$ -	\$ -	20131545	Remuneration of Receiver		2,371.86	215.62	2,156.24	-
Clayton Utz	24-Dec-15	B239181	\$ 1,920.42	\$ 1,745.84	\$ 174.58	\$ -	\$ -	20131259	Insurance scheme costs		6,365.15			WITHDRAWN
Russells	29-Jan-16	B24316	\$ 375,499.78	\$ 347,003.83	\$ 28,495.95	\$ 110,926.49	\$ 264,571.29	20131259	PAIIF Indemnity	\$ 5,473.59	\$ 93,449.85	\$ 8,495.44	\$ 84,954.41	\$ 168,243.26
Total			\$ 375,499.78	\$ 347,003.83	\$ 28,495.95	\$ 110,926.49	\$ 264,571.29			\$ 5,473.59	\$ 93,449.85	\$ 8,495.44	\$ 84,954.41	\$ 168,243.26

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

L.M. First Mortgage Income Fund
Indemnity Claim

Consultant	Invoice Date	Invoice Number	Total amount	GST Exc	GST	Amount date by LMIM - "Recompent Indemnity Claim"	Amount Outstanding - "Admin/strat 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 Dalton J. Reduced for double claim of disbursement invoice 973 John C Sheahan	-	NIL	-	-	25,476.94
Russells	28-Mar-14	B17488	\$ 1,585.85	\$ 1,441.68	\$ 144.17	\$ 123.75	\$ 1,462.10	20131259	FMIF Indemnity	1,265.01	NIL	-	-	1,265.01
Russells	29-Mar-14	B18011	\$ 774.48	\$ 704.07	\$ 70.41	\$ -	\$ 774.48	20131545	Books and Records	-	774.48	70.41	704.07	-
Russells	05-Jun-14	B18111	\$ 12,848.43	\$ 11,680.43	\$ 1,168.04	\$ -	\$ 12,848.43	20140653	Remuneration claim	-	12,848.43	1,168.04	11,680.39	-
Russells	25-Jun-14	B18258	\$ 3,900.00	\$ 3,000.00	\$ 900.00	\$ -	\$ 3,900.00	20140653	Remuneration claim	-	3,900.00	900.00	3,000.00	-
Russells	18-Jul-14	B18535	\$ 3,134.11	\$ 2,849.22	\$ 284.89	\$ -	\$ 3,134.11	20140653	Remuneration claim	-	3,134.11	284.92	2,849.19	-
Russells	28-Jul-14	B18603	\$ 4,810.64	\$ 4,373.31	\$ 437.33	\$ -	\$ 4,810.64	20131545	Books and Records	1,018.98	926.29	84.21	842.08	92.69
Russells	20-Aug-14	B18824	\$ 26,685.63	\$ 24,239.66	\$ 2,445.97	\$ -	\$ 26,685.63	20140653	Remuneration claim	-	16,935.63	1,539.60	15,396.03	9,750.00
Russells	26-Aug-14	B18884	\$ 566.48	\$ 514.98	\$ 51.50	\$ -	\$ 566.48	20131259	FMIF Indemnity	-	-	-	-	566.48
Russells	11-Sep-14	1042	\$ 4,950.00	\$ 4,500.00	\$ 450.00	\$ 4,950.00	\$ -	20131268	Appeal from decision of Dalton J.	3,189.60	DEFERRED	-	-	4,950.00
Russells	29-Sep-14	B19396	\$ 3,327.09	\$ 3,024.63	\$ 302.46	\$ -	\$ 3,327.09	20131259	FMIF Indemnity	-	DEFERRED	-	-	DEFERRED
Russells	22-Dec-14	B20191	\$ 23,563.49	\$ 21,421.35	\$ 2,142.14	\$ -	\$ 23,563.49	20140653	Remuneration claim	-	21,563.49	1,942.14	19,421.35	2,200.00
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.	-	6,863.52	623.96	6,239.56	-
Russells	30-Apr-15	B21563	\$ 7,200.64	\$ 6,546.04	\$ 654.60	\$ -	\$ 7,200.64	20131545	Books and Records	-	7,200.64	654.60	6,546.04	-
Russells	29-May-15	B21761	\$ 4,786.74	\$ 4,351.58	\$ 435.16	\$ -	\$ 4,786.74	20131545	Books and Records	-	4,786.74	435.16	4,351.58	-
Clayton Utz	29-May-15	B21761	\$ 10,650.20	\$ 9,682.00	\$ 968.20	\$ -	\$ 10,650.20	2014342	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	-	3,367.86	306.17	3,061.69	-
Russells	30-Jun-15	Cost of Application	\$ 997.48	\$ 997.48	\$ -	\$ 997.48	\$ -	20131545	Books and Records	-	997.48	90.68	906.80	-
Russells	30-Jun-15	B22209	\$ 8,579.32	\$ 7,799.38	\$ 779.94	\$ -	\$ 8,579.32	20131545	Books and Records	-	8,579.32	779.94	7,799.38	-
Russells	15-Jul-15	B22433	\$ 3,153.33	\$ 2,865.66	\$ 286.67	\$ -	\$ 3,153.33	20131268	Appeal from decision of Dalton J.	-	-	-	-	3,153.33
Russells	31-Jul-15	B22433	\$ 9,967.32	\$ 9,061.20	\$ 906.12	\$ -	\$ 9,967.32	20131545	Books and Records	-	-	-	-	9,967.32
Clayton Utz	31-Jul-15	B23008	\$ 15,285.05	\$ 13,895.50	\$ 1,389.55	\$ -	\$ 15,285.05	2014342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	31-Aug-15	B23232	\$ 3,525.82	\$ 3,205.29	\$ 320.53	\$ -	\$ 3,525.82	20131545	Books and Records	-	-	-	-	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 Cost Order	-	-	-	-	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 Dalton J)	-	-	-	-	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	-	-	-	-	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, 59% to FMIF.	-	-	-	-	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	-	-	-	-	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 (Controlship resignation)	-	-	-	-	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	-	-	-	-	399.21
Clayton Utz	31-Aug-15	B276572	\$ 30,805.23	\$ 28,004.75	\$ 2,800.48	\$ -	\$ 30,805.23	2014342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Clayton Utz	30-Sep-15	B280734	\$ 11,254.65	\$ 10,231.50	\$ 1,023.15	\$ -	\$ 11,254.65	2014342	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	-	-	-	-	1,390.62
Russells	30-Oct-15	B23460	\$ 4,646.14	\$ 4,223.76	\$ 422.38	\$ -	\$ 4,646.14	20131545	Books and Records	-	-	-	-	4,646.14
Clayton Utz	30-Oct-15	B23463	\$ 13,609.75	\$ 12,372.50	\$ 1,237.25	\$ -	\$ 13,609.75	2014342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Arthur J Gallagher	27-Nov-15	B25541289547	\$ 61,391.78	\$ 61,315.16	\$ 76.62	\$ 61,391.78	\$ -	PI Insurance	PI Insurance	-	-	-	-	61,391.78
Clayton Utz	27-Nov-15	B257238	\$ 17,397.05	\$ 15,815.50	\$ 1,581.55	\$ -	\$ 17,397.05	2014342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	30-Nov-15	B23746	\$ 5,857.84	\$ 5,325.08	\$ 532.76	\$ -	\$ 5,857.84	20131545	Books and Records	-	-	-	-	5,857.84
Russells	21-Dec-15	B23946	\$ 2,371.86	\$ 2,156.24	\$ 215.62	\$ -	\$ 2,371.86	20141556	Remuneration of Receiver	-	2,371.86	215.62	2,156.24	-
Clayton Utz	24-Dec-15	B239191	\$ 6,365.15	\$ 5,786.50	\$ 578.65	\$ -	\$ 6,365.15	2014342	Insurance scheme costs	-	WITHDRAWN	-	-	WITHDRAWN
Russells	29-Jan-16	B24316	\$ 1,920.42	\$ 1,745.84	\$ 174.58	\$ -	\$ 1,920.42	20131259	FMIF Indemnity	-	-	-	-	1,920.42
Total			\$ 375,499.78	\$ 347,003.83	\$ 28,495.95	\$ 110,938.49	\$ 284,571.29			\$ 5,476.59	\$ 93,439.85	\$ 8,495.44	\$ 84,944.41	\$ 169,233.26

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; 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.

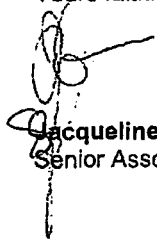
We therefore repeat our previous proposal that the parties agree to our client delivering a final determination (together with written reasons) in respect of your clients' claim within 7 days of receipt of Justice Jackson's judgment in proceedings 3508 of 2015.

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

LMI First Mortgage Income Fund Indemnity Claim									
Consultant	Invoice Date	Invoice Number	Total Amount	GST Exc	GST	Amount Paid to date by LMI Indemnity Claim	Amount Outstanding - "Administration Indemnity Claim"	Notes	Rejected
Russells	10-Mar-14	817294	\$25,476.94	\$23,160.85	\$2,316.09	\$25,476.94	-	20131268 Appeal from decision of Dalton J. Reduced for double claim of disbursement invoice 973 John C Sheahan	\$25,476.94
Russells	28-Mar-14	817488			\$1,441.68	\$1,441.17	\$1,462.10	20131259 FMIF Indemnity	
Russells	29-May-14	818011	\$1,585.85	\$704.07	\$704.41	\$704.41	\$774.48	Books and Records	\$1,265.01
Russells	05-Jun-14	818111	\$1,680.43	\$1,680.43	\$1,168.04	\$1,168.04	\$12,848.43	Remuneration claim	\$704.07
Russells	25-Jun-14	818258	\$3,300.00	\$3,300.00	\$3,300.00	\$3,300.00	\$3,300.00	Remuneration claim	\$1,680.39
Russells	18-Jul-14	818535	\$3,134.11	\$2,846.22	\$284.89	\$284.89	\$3,134.11	Remuneration claim	\$500.00
Russells	24-Jul-14	818603	\$4,810.64	\$4,373.31	\$437.33	\$437.33	\$4,810.64	Books and Records	\$2,849.19
Russells	20-Aug-14	818624	\$26,685.63	\$24,259.66	\$2,425.97	\$2,425.97	\$26,685.63	Remuneration claim	\$842.08
Russells	26-Aug-14	818884	\$556.48	\$514.98	\$51.50	\$51.50	\$566.48	FMIF Indemnity	\$15,396.03
Russells	11-Sep-14	1042	\$4,950.00	\$4,500.00	\$450.00	\$450.00	\$3,321.09	Appeal from decision of Dalton J	\$1,539.60
Russells	29-Sep-14	819596	\$3,327.09	\$3,024.63	\$302.46	\$302.46	\$3,327.09	FMIF Indemnity	\$1,539.60
Russells	22-Dec-14	820151	\$21,421.14	\$21,421.14	\$2,640.00	\$2,640.00	\$23,563.49	Remuneration of Receiver	\$1,942.14
Russells	22-Dec-14	820178	\$6,863.52	\$6,285.02	\$578.50	\$578.50	\$4,223.52	Remuneration of Receiver	\$623.96
Russells	30-Apr-15	821563	\$7,200.64	\$6,546.04	\$654.60	\$654.60	\$7,200.64	Books and records. Reduced from costs assessment applied to this invoice. \$50 deducted.	\$6,546.04
Russells	29-May-15	821751	\$4,786.74	\$4,351.58	\$435.16	\$435.16	\$4,786.74	FMIF allocation.	\$4,351.58
Clayton Utz	29-May-15	8263377	\$10,650.20	\$9,682.00	\$968.20	\$968.20	\$10,650.20	Insurance scheme costs	WITHDRAWN
Russells	29-Jun-15	822048	\$3,367.86	\$3,061.69	\$306.17	\$306.17	\$3,367.86	Remuneration of Receiver	\$3,061.69
Russells	30-Jun-15	Cost of application	\$997.48	\$997.48	\$997.48	\$997.48	\$997.48	Books and Records	\$906.80
Russells	30-Jun-15	822024	\$8,579.32	\$7,799.94	\$779.94	\$779.94	\$8,579.32	Books and Records	\$779.94
Russells	15-Jul-15	822299	\$315.33	\$286.66	\$28.67	\$28.67	\$315.33	Appeal from decision of Dalton J	\$315.33
Russells	31-Jul-15	822433	\$9,867.32	\$9,061.12	\$806.20	\$806.20	\$9,867.32	Books and Records	\$9,867.32
Clayton Utz	31-Jul-15	827098	\$15,285.05	\$13,895.50	\$1,389.55	\$1,389.55	\$15,285.05	Insurance scheme costs	WITHDRAWN
Russells	31-Aug-15	822832	\$3,525.82	\$3,205.29	\$320.53	\$320.53	\$3,525.82	Books and Records	\$3,525.82
Russells	Various	Various	\$18,707.57	\$18,707.57	\$1,870.76	\$1,870.76	\$20,578.33	Costs Assessment - Total invoices less settled Cost Order	\$30,578.33
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$9,068.68	\$8,244.25	\$824.43	\$824.43	\$9,068.68	Cost of costs assessment - Russells matter 20131268 (Appeal of decision from Dalton J)	\$9,068.68
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$212.76	\$193.42	\$19.34	\$19.34	\$212.76	Cost of costs assessment - Russells matter 20131259	\$212.76
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$2,361.45	\$2,146.77	\$214.68	\$214.68	\$2,361.45	Cost of costs assessment - Russells matter 20131545, 59% to FMIF	\$2,361.45
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$2,699.84	\$2,454.40	\$245.44	\$245.44	\$2,699.84	Cost of costs assessment - Russells matter 2010653	\$2,699.84
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$606.60	\$551.45	\$55.15	\$55.15	\$606.60	Cost of costs assessment - Russells matter 20140947 (Controlship resignation)	\$606.60
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$399.21	\$361.92	\$37.29	\$37.29	\$399.21	Cost of costs assessment - Russells matter 20141556	\$399.21
Clayton Utz	31-Aug-15	8270572	\$30,805.23	\$28,004.75	\$2,800.48	\$2,800.48	\$30,805.23	Insurance scheme costs	WITHDRAWN
Clayton Utz	30-Sep-15	8280734	\$11,254.65	\$10,231.50	\$1,023.15	\$1,023.15	\$11,254.65	Insurance scheme costs	WITHDRAWN
Russells	30-Sep-15	823055	\$1,390.62	\$1,264.20	\$126.42	\$126.42	\$1,390.62	Books and Records	\$1,390.62
Russells	30-Oct-15	823460	\$4,646.14	\$4,223.76	\$423.38	\$423.38	\$4,646.14	Books and Records	\$4,646.14
Clayton Utz	30-Oct-15	8284463	\$13,609.75	\$12,372.50	\$1,237.25	\$1,237.25	\$13,609.75	Insurance scheme costs	WITHDRAWN
Arthur J Gallagher	2-Nov-15	2895437/89547	\$61,391.78	\$56,131.16	\$5,260.62	\$5,260.62	\$61,391.78	PI Insurance	\$61,391.78
Clayton Utz	27-Nov-15	8282238	\$17,397.05	\$15,815.50	\$1,581.55	\$1,581.55	\$17,397.05	Insurance scheme costs	WITHDRAWN
Russells	30-Nov-15	823746	\$5,857.84	\$5,325.08	\$532.76	\$532.76	\$5,857.84	Books and Records	\$5,857.84
Russells	21-Dec-15	823946	\$2,156.24	\$2,156.24	\$2,156.24	\$2,156.24	\$2,156.24	Remuneration of Receiver	\$2,156.24
Clayton Utz	24-Dec-15	823981	\$6,365.15	\$5,786.50	\$578.65	\$578.65	\$6,365.15	Insurance scheme costs	WITHDRAWN
Russells	29-Jan-16	824316	\$1,920.42	\$1,745.84	\$174.58	\$174.58	\$1,920.42	FMIF Indemnity	\$1,920.42
Total			\$375,499.78	\$347,003.83	\$28,495.95	\$28,495.95	\$5,473.59		\$84,954.41

SCHEDULE

to Application filed 20 May 2016; comparison to schedule at para 31, Park March 2017 Affidavit, with annotations

Item	Consultant	Invoice No.	Invoice Date	Claimed Amount	Comment
1.	Russells	B17294	10/03/2014	\$25,476.94	
2.	Russells	1042	11/09/2014	\$4,950.00	
3.	Russells	B22299	15/07/2015	\$315.33	
4.	Hartwell Lawyers	N/A	02/01/2016	\$9,068.68	Park March 2017 affidavit, para's 28-30
5.	Russells	B17488	28/03/2014	\$1,265.01	
6.	Russells	B18884	26/08/2014	\$566.48	
7.	Russells	B24316	29/01/2016	\$1,920.42	
8.	Russells	B18603	28/07/2014	\$92.69	
9.	Russells	B22433	02/01/2016	\$9,967.32	Note - presume the inv. date is intended to be 31/07/2016
10.	Russells	B22832	31/08/2015	\$3,525.82	
11.	Russells	B23055	30/09/2015	\$1,390.62	
12.	Russells	B13460	30/10/2015	\$4,646.14	Note - presume this should refer to inv. B23460
13.	Russells	B23746	30/11/2015	\$5,857.84	
14.	Russells	B18824	20/08/2014	\$9,750.00	Park October Affidavit, para 82
15.	Russells	B20191	22/12/2014	\$2,200.00	Park October Affidavit, para 82
16.	Russells	B22835	31/08/2015	\$7,826.96	
17.	Russells	B23062	30/09/2015	\$3,506.23	
18.	Russells	B23465	30/10/2015	\$10,000.83	
19.	Russells	B23749	30/11/2015	\$16,174.44	
20.	Russells	B23944	21/12/2015	\$1,067.91	
Less partial payment of B22835, B23062, B23465, B23749, B23944				(\$18,000.00)	
21.	Hartwell Lawyers	N/A	02/01/2016	\$399.21	
22.	Hartwell Lawyers	N/A	02/01/2016	\$606.60	

Item	Consultant	Invoice No.	Invoice Date	Claimed Amount	Comment
23.	Hartwell Lawyers	N/A	02/01/2016	\$2,699.84	
24.	Hartwell Lawyers	N/A	02/01/2016	\$2,361.45	
25.	Hartwell Lawyers	N/A	02/01/2016	\$212.76	
26.	Arthur Gallagher J	289543/2895 47	02/11/2015	\$61,391.78	
			Total:	\$169,241.30 <u>\$148,222.62</u>	

"DW-77"

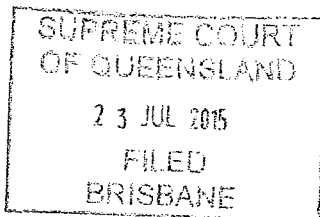
LW First Mortgage Income Fund														
Indemnity Claim														
Consultant	Invoice Date	Invoice Number	Total Amount	GST Exc	GST	Amount Paid to date by LWIM "Recoupment Indemnity Claim"	Amount Outstanding - "Administration Indemnity Claim"	Matter Number	Notes	Reduced Claim	Accepted	Less GST	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 Dalton J. Reduced for double claim of disbursement invoice 973 John C Sheahan		Nil			\$25,476.94
Russells	11-Sep-14	1042	\$4,950.00	\$4,500.00	\$450.00	\$4,950.00		20131268	Appeal from decision of Dalton J		Nil			\$4,950.00
Russells	15-Jul-15	B22299	\$315.33	\$286.66	\$28.67		\$315.33	20131268	Appeal from decision of Dalton J		Nil			\$315.33
TOTAL:														\$30,742.27

"DW-78"

LM First Mortgage Income Fund Indemnity Claim													
Consultant	Invoice Date	Invoice Number	Total Amount	GST Exc	GST	Amount Paid to date by LMIF "Recoupment Indemnity Claim"	Amount Outstanding - Matter Number "Administration Indemnity Claim"	Notes	Reduced Claim	Accepted	Less GST	Amount Payable	Rejected
Russells	28-Mar-14	B17488	\$1,585.85	\$1,441.68	\$144.17	\$123.75	\$1,462.10	20131259 FMIF Indemnity	\$1,265.01	Nil			\$1,265.01
Russells	26-Aug-14	B18884	\$566.48	\$514.98	\$51.50		\$566.48	20131259 FMIF Indemnity		Nil			\$566.48
Russells	29-Sep-14	B19396	\$3,327.09	\$3,024.63	\$302.46		\$3,327.09	20131259 FMIF Indemnity	\$3,189.60	DEFERRED			DEFERRED
Russells	29-Jan-16	B24316	\$1,920.42	\$1,745.84	\$174.58		\$1,920.42	20131259 FMIF Indemnity		Nil			\$1,920.42
TOTAL:			\$7,399.44									TOTAL:	\$3,751.91

56

LM First Mortgage Income Fund Indemnity Claim													
Consultant	Invoice Date	Invoice Number	Total Amount	GST Exc	GST	Amount Paid to date by LWM "Recoupment Indemnity Claim"	Amount Outstanding - Matter Number "Administration Indemnity Claim"	Notes	Reduced Claim	Accepted	Less GST	Amount Payable	Rejected
Russells	05-Jun-14	B18111	\$12,848.43	\$11,680.43	\$1,168.04		\$12,848.43 20140653	Remuneration claim		\$12,848.43	\$1,168.04	\$11,680.39	
Russells	25-Jun-14	B18258	\$3,300.00	\$3,000.00	\$300.00		\$3,300.00 20140653	Remuneration claim		\$3,300.00	\$300.00	\$3,000.00	
Russells	18-Jul-14	B18535	\$3,134.11	\$2,849.22	\$284.89		\$3,134.11 20140653	Remuneration claim		\$3,134.11	\$284.92	\$2,849.19	
Russells	20-Aug-14	B18824	\$26,685.63	\$24,259.66	\$2,425.97		\$26,685.63 20140653	Remuneration claim		\$16,935.63	\$1,539.60	\$15,396.03	\$9,750.00
Russells	22-Dec-14	B20191	\$23,563.49	\$21,421.35	\$2,142.14	\$2,640.00	\$23,563.49 20140653	Remuneration claim		\$21,363.49	\$1,942.14	\$19,421.36	\$2,200.00
Russells	22-Dec-14	B20178	\$6,863.52	\$6,285.02	\$578.50		\$4,223.52 20141556	Remuneration of receiver. Reduction of costs assessment applied to this invoice. \$50 deducted.		\$6,863.52	\$623.96	\$6,239.56	
Russells	29-Jun-15	B22048	\$3,367.86	\$3,061.69	\$306.17		\$3,367.86 20141556	Remuneration of Receiver		\$3,367.86	\$306.17	\$3,061.69	
Russells	21-Dec-15	B23946	\$2,371.86	\$2,156.24	\$215.62		\$2,371.86 20141556	Remuneration of Receiver		\$2,371.86	\$215.62	\$2,156.24	
TOTAL:			\$82,134.90										
													\$11,950.00
TOTAL:													
													TOTAL: \$11,950.00



SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 7211 of 2015

Applicant:

RUSSELLS (A FIRM)

AND

Respondents:

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

APPLICATION FOR COSTS ASSESSMENT

COPY



TO: The Respondent

TAKE NOTICE that the Applicant is applying to the Court for an Order for the assessment of the invoices for legal costs described in Schedule 1 to this Application.

There will be a directions hearing in relation to the Application at:-

Place: 415 George Street, Brisbane, Queensland

Date: 31/7/15

Time: 10 am

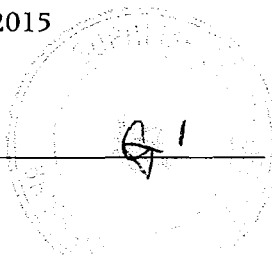
Filed in the Brisbane Registry on 23 July, 2015

FEE	1749.50
INTL	SR
REC	433902
ENT	

Signed:

23 JUL 2015

Registrar



If you wish to oppose this Application or to argue that any different Order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the Orders sought may be made without further notice to you.

APPLICATION FOR COSTS ASSESSMENT

Filed on behalf of the Applicant

Form 60 Rule 743

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


On the hearing of the Application the Applicant intends to rely on the following Affidavits:-

1. Affidavit of Sean Charles Russell sworn 23 July, 2015;
2. Consent of Stephen Hartwell dated 15 July, 2015.

THE APPLICANT ESTIMATES THE HEARING SHOULD BE ALLOWED FIVE MINUTES.

The Costs Assessor nominated to perform the assessment is Stephen Hartwell. The applicable hourly rate of the Costs Assessor is \$275.00.

PARTICULARS OF THE APPLICANT

Name:	RUSSELLS (A FIRM)
Plaintiff's residential or business address:	Level 18, 300 Queen Street, Brisbane, Queensland
Plaintiff's Solicitor's name and firm name:	Ashley Tiplady Russells
Solicitor's business address:	GPO Box 1402, Brisbane, Queensland, 4001
Address for service:	Level 18, 300 Queen Street, Brisbane, Queensland, 4000
Telephone:	07 3004 8833
Fax:	07 3004 8899
Signed:	 Russells
Description:	Applicant
Dated:	23rd day of July, 2015

This Application is to be served on:-
the Respondents of
22 Market Street, Brisbane, Queensland

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: of 2015

Applicant: RUSSELLS (A FIRM)

AND

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

SCHEDULE 1

Applicant's Reference Number	Date of Invoice	Invoice Number
20130471	09/05/13	B14778
20130471	30/06/13	B15201
20130471	31/07/13	B15450
20130471	10/10/13	B16042
20130471	06/05/15	B20958
20131259	28/03/14	B17488
20131259	27/08/14	B18884
20131259	29/09/14	B19396
20131268	13/12/13	B16611
20131268	29/05/15	B21820
20131545	28/11/13	B16379
20131545	30/11/13	B16524
20131545	20/12/13	B16658
20131545	29/01/14	B16909
20131545	28/02/14	B17205
20131545	29/05/14	B18011
20131545	28/07/14	B18603
20131545	11/09/14	B19123
20131545	22/12/14	B20196
20131545	30/04/15	B21563
20131545	30/04/15	B21576
20131545	29/05/15	B21751
20131545	26/06/15	B22024
20140653	05/06/14	B18111
20140653	25/06/14	B18258
20140653	18/07/14	B18535
20140653	20/08/14	B18824
20140653	22/12/14	B20191
20140947	29/07/14	B18585
20140947	29/09/14	B19408
20140947	24/10/14	B19606
20140947	22/12/14	B20186

20141556	22/12/14	B20178
20141556	29/06/15	B22048
20141637	23/12/14	B20299
20141637	30/01/15	B20535
20141637	27/02/15	B20846
20141637	31/03/15	B21194

SUPREME COURT
OF QUEENSLAND

SUPREME COURT OF QUEENSLAND

31 JUL 2015

FILED
BRISBANE

REGISTRY: Brisbane
NUMBER: 7211 of 2015

Applicant:

RUSSELLS (A FIRM)

AND

Respondents:

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

ORDER

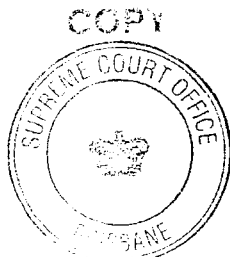
Before:

Date:

29/7/15

Initiating document:

Application filed 23 July, 2015



BY CONSENT THE ORDER OF THE COURT IS THAT:-

1. Pursuant to rule 743A of the *Uniform Civil Procedure Rules 1999* ("the Rules"), the invoices for legal costs described in Schedule 1 to this order be assessed.
2. Pursuant to rules 666 and 743(E) of the Rules, Stephen Hartwell be appointed the costs assessor to conduct that assessment.

Signed:

Registrar

ORDER

Filed on behalf of the Applicant

Form 59 Rule 661

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

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 7211 of 2015

Applicant: RUSSELLS (A FIRM)

AND

**Respondents: JOHN PARK AND GINETTE MULLER AS
LIQUIDATORS OF LM INVESTMENT
MANAGEMENT PTY LTD (IN
LIQUIDATION)(RECEIVERS APPOINTED)
ACN 077 208 461**

SCHEDULE 1

Applicant's Reference Number	Date of Invoice	Invoice Number
20130471	09/05/13	B14778
20130471	30/06/13	B15201
20130471	31/07/13	B15450
20130471	10/10/13	B16042
20130471	06/05/15	B20958
20131259	28/03/14	B17488
20131259	27/08/14	B18884
20131259	29/09/14	B19396
20131268	13/12/13	B16611
20131268	29/05/15	B21820
20131545	28/11/13	B16379
20131545	30/11/13	B16524
20131545	20/12/13	B16658
20131545	29/01/14	B16909
20131545	28/02/14	B17205
20131545	29/05/14	B18011
20131545	28/07/14	B18603
20131545	11/09/14	B19123
20131545	22/12/14	B20196
20131545	30/04/15	B21563
20131545	30/04/15	B21576
20131545	29/05/15	B21751
20131545	26/06/15	B22024
20140653	05/06/14	B18111
20140653	25/06/14	B18258
20140653	18/07/14	B18535
20140653	20/08/14	B18824
20140653	22/12/14	B20191
20140947	29/07/14	B18585
20140947	29/09/14	B19408
20140947	24/10/14	B19606
20140947	22/12/14	B20186

20141556	22/12/14	B20178
20141556	29/06/15	B22048
20141637	23/12/14	B20299
20141637	30/01/15	B20535
20141637	27/02/15	B20846
20141637	31/03/15	B21194

AUSCRIPT AUSTRALASIA PTY LIMITED
ACN 110 028 825

T: 1800 AUSCRIPT (1800 287 274)
W: www.auscript.com.au
E: clientservices@auscript.com.au

AUSCRIPT
FAST PRECISE SECURE EST 1921

Ordered by: Simone Mulvey
For: Tucker & Cowen Solicitors
Email: mziebell@tuckercowen.com.au

TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JACKSON J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER Applicants

and

LM INVESTMENT MANAGEMENT LIMITED
and ANOTHER Respondents

BRISBANE

9.40 AM, THURSDAY, 29 OCTOBER 2015

DAY 1

Any Rulings that may be included in this transcript may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: Could you call the next matter, please?

ASSOCIATE: Bruce and LM Investment Management Limited, file number 3383 of 13.

5

HIS HONOUR: Again, would you announce your appearances, please?

MR D. DE JERSEY: If it please the court, de Jersey, initial D. I appear instructed by Tucker and Cowen for Mr David White.

10

HIS HONOUR: Yes.

MR J.W. PEDEN: Yes. May it please the court, my name is Peden, P-e-d-e-n, initials J.W. I appear for the respondent, Russells the firm, instructed by Russells.

15

HIS HONOUR: Mr Peden, I had it in mind that you appeared on the hearing not just for the respondent but also for LMI and the liquidators.

MR PEDEN: And also for the company and for the liquidators, your Honour.

20

HIS HONOUR: Yes. All right. Yes. I publish my reasons. Again, it all got more complicated than I'd initially hoped but the conclusions, to summarise them, that I came to, Mr de Jersey, were that on the question of whether Mr White was analogously in a position of a non-associated third party payer that he's not on the footing that the members of the fund wouldn't be and therefore he couldn't be in any strong position about that. Secondly, that in terms of the application of rule 720 that within the meaning of the rule costs aren't payable out of the fund unless the costs ordered to be paid under an order with the consequence that there wasn't a requirement under rule 720(3) for Mr White as a person in charge of the fund to receive notice and – or to have the rights which would follow under rule 720 to make submissions to the cost assessor. On that footing it seemed to me provisionally that the costs would ordinarily follow the event unless there was some reason to the contrary.

25

30

35

MR DE JERSEY: Well, I see your Honour's made an order for costs - - -

HIS HONOUR: I haven't made an order. That - - -

MR DE JERSEY: Sorry.

40

HIS HONOUR: I published the reasons but I'm now raising the question of whether they should be the order for costs.

45

MR DE JERSEY: Your Honour, I don't like to ask your Honour to put things off, but could I put some submissions regarding costs in writing only because I've got an application at 10. It should - - -

HIS HONOUR: It just doesn't seem to me that it's a complicated question, Mr de Jersey. I don't see any reason to put it off. If you've lost on both issues that you raised I can't see why - - -

5 MR DE JERSEY: Well, in that event - - -

HIS HONOUR: Unless there's some basis that you could at least raise for me why the costs wouldn't follow the event.

10 MR DE JERSEY: Well look, all I'd say, your Honour, is that regarding costs given that the correspondence that went to the other side was, when asked for an unequivocal statement as to their intentions regarding this assessment and that wasn't forthcoming, in that circumstance it was reasonable for my client to bring this application albeit that it lost. And for that reason costs shouldn't be visited upon Mr
15 White.

HIS HONOUR: I think the difficulty with that submission is I didn't ultimately decide the case by reference to any discretion and consideration about the position adopted by the other side. I decided on it putting that Mr White just doesn't have a
20 right.

MR DE JERSEY: Yes, your Honour.

HIS HONOUR: Mr Peden.
25

MR PEDEN: We'd certainly seek our costs, your Honour. I mean, there's no doubt Mr White will be claiming it out of the fund so - - -

HIS HONOUR: We'll worry about that later on.
30

TAKE IN ORDER

35 MR PEDEN: Your Honour, I'm instructed to seek those costs be assessed on an indemnity basis.

HIS HONOUR: On what possible basis?

40 MR PEDEN: I think the best I could say, your Honour, is that the application was ultimately without any legal foundation.

HIS HONOUR: Mr Peden, no.

45 MR PEDEN: It was arguable. I accept that, your Honour.

HIS HONOUR: No. I think what we need to have in this case is a measure of restraint on the lawyers on both sides if I can offer that general consideration. We just need to end up in a situation where we are not spending our lives day in day out deciding interlocutory points that may be of interest but don't do anything for either
5 the creditors or the investors. Adjourn the Court, please.

ADJOURNED

[9.45 am]

"DW-84"

LM First Mortgage Income Fund														
Indemnity Claim														
Consultant	Invoice Date	Invoice Number	Total Amount	GST Etc	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
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 matter 20131268 (Appeal of decision from Dalton J)		Nil			\$9,068.68
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$212.76	\$193.42	\$19.34	\$212.76		Disbursement	Costs of costs assessment - Russell's 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 - Russell's matter 20131545, 59% 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	Costs of costs assessment - Russell's 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 - Russell's matter 20140947 (Controllership resignation)		Nil			\$606.60
Hartwell Lawyers	02-Jan-16	Disbursement paid	\$399.21	\$362.92	\$36.29	\$399.21		Disbursement	Cost of costs assessment - Russell's matter 20141556		Nil			\$399.21
TOTAL:			\$15,348.54										TOTAL:	\$15,348.54

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 3383 of 2013

Applicants: **RAYMOND EDWARD BRUCE AND VICKI
PATRICIA BRUCE**

AND

First Respondent: **LM INVESTMENT MANAGEMENT LIMITED
(IN LIQUIDATION) ACN 077 208 461 IN ITS
CAPACITY AS RESPONSIBLE ENTITY OF
THE LM FIRST MORTGAGE INCOME FUND**

AND

Second Respondent: **THE MEMBERS OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288**

AND

Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENT
COMMISSION**

**OUTLINE OF SUBMISSIONS OF THE FIRST RESPONDENT/RUSSELLS
20 October 2015**

**Respondents' material
From 7211/2015**

- Application filed 23 July 2015, being Court document 1
- Affidavit of Sean Charles Russell filed 23 July 2015, being Court document 2
- Order of Registrar dated 31 July 2015

From 3383/2013

- By leave, affidavit of Stephen Charles Russell sworn 19 October 2015

Overview

1. The receiver of the FMIF, being Mr David Whyte, has filed an interlocutory application dated 16 September 2015 for directions about his involvement in a cost assessment as between the first respondent, LM Investment Management Limited, and its solicitors, Russells under the *Legal Profession Act 2007* ("LPA") in proceedings BS7211/2015 ("Costs assessment"). Each of LMIM, the two liquidators of LMIM and Russells are named as respondents to the application by Mr Whyte.

2. In short, the application appears to be misconceived, because it conflates the reasonableness and quantum of the costs payable by LMIM to its own lawyers with the right of Mr Whyte to consider claims against the FMIF for indemnity out of Scheme Property. The application by Russells concerns only the former issue, and not the latter. The question of consideration by Mr Whyte does not yet arise because no claim has yet been made for indemnity out of the FMIF.
3. It is unclear why Mr Whyte, as receiver of the FMIF, would seek to be involved in the assessment of costs as between LMIM and its solicitors. Those are matters between LMIM and its solicitors.
4. LMIM and Russells accept that the assessment by Mr Hartwell of the costs due by LMIM is not determinative of the role to be played in the future by Mr Whyte in his assessment of which, if any, of the costs assessed by Mr Hartwell are payable out of the FMIF. That is a separate exercise. For present purposes, Mr Whyte has no real interest in the assessment as between LMIM and its lawyers and no directions are required, either as set out in the application filed 16 September 2015, or at all.

The application by Russells

5. The application by Russells for a costs assessment for an assessment of a party's own costs pursuant to r 743A of the *Uniform Civil Procedure Rules*, being an assessment under the LPA. It is not an application by which Russells or LMIM seek any Order in relation to the entitlement of LMIM itself to claim any legal costs out of any of the LM funds, including the FMIF. LMIM is not an Applicant; it seeks no relief.
6. The issues for determination on that assessment as to whether a particular charge is allowable requires reference to the criteria for assessment in s. 341 of the LPA. None of the criteria touch upon or concern the entitlement of LMIM's right to an indemnity out of the funds of the FMIF. Such an entitlement is a matter for the consideration by Mr Whyte (and ultimately the Court) when and if a claim for indemnity is made by LMIM, which has not yet occurred.

The involvement of Mr Whyte

7. The application by Russells for assessment of their costs was not served on Mr Whyte. Instead, Mr Whyte says that he obtained copies of the invoices from McGrath Nicol, the receivers appointed by Deutsche Bank: see affidavit of Mr Whyte filed 15 October 2015 at paragraph 27 and following. Mr Whyte details, in his expansive and extensive affidavit, various opinions that he holds on some aspects of the bills that he has seen. Those opinions may be relevant to his consideration of a claim for indemnity once made, but until a claim is made, his views are premature and irrelevant to the role to be carried out by the costs assessor under the LPA.
8. It cannot be argued by Mr Whyte that he has an interest in the assessment as a “third party payer” under the LPA. He has no legal obligation to pay the costs. That obligation falls upon the client, LMIM, as trustee: see *Legal Services Commissioner v Wright* [2012] 2 Qd.R. 360 at 359-360, *Equuscorp Pty Ltd v Short Punch Greatorix* [2001] 2 Qd.R. 580 and *Shillington v Harries* [2013] NSWSC 1202 at [32] to [36].
9. Nor can it be argued that Rule 720 has any application as the fees are payable by LMIM and its liquidators, and not directly out of any fund.
10. Moreover, it is not clear what Mr Whyte might say, or how he might involve himself in the assessment by Mr Hartwell of the costs that the liquidators and LMIM are liable to pay to Russells. Line by line taxations no longer occur. Mr Hartwell is an independent officer of the court and his role is not to consider any right of indemnity in respect of a particular attendance or group of attendances; nor could he decide such a question.
11. The matter is straightforward. Mr Whyte has no role to play in the assessment of costs as between LMIM and its lawyers. Such role that he has to play will arise as and when LMIM, by its liquidators, puts forward to Mr Whyte a claim to be indemnified out of the FMIF. His involvement at the anterior level of LMIM’s liability is without justification and a waste of funds of the FMIF members. It will delay the process that is due to be complete within a week or so.¹

¹ See affidavit of Mr Stephen Russell at paragraph 13

12. Accordingly, either no directions are necessary on Mr Whyte's application, or, if appropriate, he could be directed not to have any role in the assessment as between LMIM and its lawyers.

J W Peden

Counsel for the respondents, LMIM, the liquidators of LMIM and Russells

20 October 2015

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JACKSON J

No 3383 of 2013

RAYMOND EDWARD BRUCE

Applicant

and

LM INVESTMENT MANAGEMENT LIMITED and ANOTHER Respondent

BRISBANE

10.06 AM, TUESDAY, 20 OCTOBER 2015

DAY 1

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

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HIS HONOUR: Yes, Mr de Jersey.

MR D. DE JERSEY: Ah, de Jersey, initial D., I appear instructed by Tucker & Cowen for Mr David Whyte.

5

HIS HONOUR: Yes.

MR J.W. PEDEN: May it please the court, my name is Peden, P-e-d-e-n, initials J.W., I appear for the three parties that have been served with this application, being
10 LM Investment Management Limited - - -

HIS HONOUR: Yes.

MR PEDEN: - - - Messrs Park and Muller – Mr Park and Ms Muller - as liquidators
15 of LMIM, and furthermore, Russells Lawyers.

HIS HONOUR: Yes. Mr de Jersey.

MR DE JERSEY: Your Honour, I'll hand up two copies of a list of material, an
20 outline of submissions and an affidavit of Mr Mitch Zibel which I seek your Honour's leave to read and file.

HIS HONOUR: Any opposition to the affidavit of Mr Zibel?

25 MR PEDEN: No objection, your Honour.

HIS HONOUR: Leave to read and file the affidavit of Mr Zibel sworn on 20 October 2015. Mr Peden.

30 MR PEDEN: Yes, your Honour. Could I hand up two copies of the – of my outline of submissions on behalf of all three respondents together with an affidavit that I seek your Honour's leave to read and file of Stephen Charles Russell sworn yesterday - that's 19 October.

35 HIS HONOUR: Any opposition to Mr Russell's affidavit?

MR DE JERSEY: No, your Honour.

40 HIS HONOUR: Leave to read and file Mr Russell's affidavit. I give you leave in each case to file the outlines. Right.

ADJOURNED

[10.10 am]

45

RESUMED

[10.11 am]

HIS HONOUR: Right. Where should I start, Mr de Jersey?

MR DE JERSEY: Your Honour, it's an application for directions as your Honour knows. But I might be able to save your Honour some time actually by going to Mr Russell's affidavit - - -

HIS HONOUR: Yes.

MR DE JERSEY: - - - today. I'm taking your Honour to two letters in that.

HIS HONOUR: Yes.

MR DE JERSEY: Page – exhibit page 7 first, your Honour. And the third paragraph of that letter I'd ask your Honour to read.

HIS HONOUR: Yes.

MR DE JERSEY: And then if your Honour turns over to page 9 your Honour will find a letter written in response to that letter yesterday. And the relevant part of that letter appears on page 11, the numbered paragraphs under the heading Proposal numbers 1 to 5.

HIS HONOUR: Yes. I've read that.

MR DE JERSEY: Then - and, your Honour, that invitation obviously hasn't been taken up by the other side – by Russells. Can I then take your Honour to some parts of my outline.

HIS HONOUR: Sorry, what did you say? It hasn't been taken up.

MR DE JERSEY: It hasn't been taken up.

HIS HONOUR: How do paragraphs 1 and 4 sit together?

MR DE JERSEY: If - the concern and the motivation for this application is that if Mr Whyte is a third – non-associated third party payer under section 339 of the Act then he would have an entitlement to make submissions and he would also be bound under that section to the outcome of the assessment.

HIS HONOUR: Now, when you say if, that's the critical point.

MR DE JERSEY: Correct.

HIS HONOUR: If he's not he's got no entitlements.

MR DE JERSEY: Exactly.

HIS HONOUR: So you can't make an application unless you start on the footing that you are bound to pay - - -

MR DE JERSEY: Yes.

5

HIS HONOUR: - - - whatever the subject matter in general is of the costs.

MR DE JERSEY: Yes.

10 HIS HONOUR: And I don't understand that to be the basis of your application. But I understand the basis of your application is you want to effectively rummage around to see what there might be.

15 MR DE JERSEY: No, your Honour. No. We don't. That's what's alleged against us but - - -

HIS HONOUR: Well, what's the point of making a declaration if you're not – in respect of anything that you do not say you are bound to pay the bill if it's properly assessed.

20

MR DE JERSEY: Yeah. My client doesn't assert that it's bound – that he is bound to pay.

25 HIS HONOUR: If it doesn't how can it be a third party payer?

MR DE JERSEY: Because there's an issue that has been created on the correspondence which I'll take your Honour to as to whether or not he is. And what was sought was - - -

30 HIS HONOUR: Well, let's start on – let's break this into – my thinking into some simple steps. The first problem, of course, is there's a question about your client's capacity as the receiver. But assume that I were to make an order under section 601NF(2) of the sort that I mention in paragraph 79 of my reasons so that that's done away with as being a potential question. It still isn't the problem that when you're
35 talking about assessment of costs by somebody who's a third party payer. If they're not associated then the starting proposition is that they are not liable to the law practice. But they are liable to someone. In other words it is an acceptance of the indemnity obligation. And does your client make an application on the footing that it accepts that it has – if I fix 601NF(2) - - -

40

MR DE JERSEY: No.

HIS HONOUR: - - - an indemnity obligation?

45 MR DE JERSEY: No. No, your Honour.

HIS HONOUR: So how can I proceed in the footing that you have a right to an assessment of the costs?

5 MR DE JERSEY: Because it's been indicated to my clients that there will be a claim for indemnity when the costs are assessed in respect of part.

HIS HONOUR: But you don't get to sit on the fence and say I want a play in the assessment even though I don't want to say I'm liable to pay.

10 MR DE JERSEY: I understand your Honour's point.

HIS HONOUR: So how do you get over that problem under the statute?

15 MR DE JERSEY: I can – rely upon section 601NF(2). And, your Honour, the reason why I – the applicant - - -

HIS HONOUR: Can I – just for a moment let me – Jay, do you have the bundle of cases? Which is the section?

20 MR DE JERSEY: Six-O-one NF(2).

HIS HONOUR: Well, 601NF(2) is just about whether you can be put in the shoes of a person who would be a trustee of the fund.

25 MR DE JERSEY: Yes.

30 HIS HONOUR: I don't have any trouble about – assume that that's done in your favour. Even so you don't stand there and say well, I'm liable to pay this bill whatever the proper amount is. Therefore, I'm a non-party – non-associated third party payer.

MR DE JERSEY: I don't. I don't [indistinct] that.

35 HIS HONOUR: And so how, if you don't say that, can you get into the assessment process?

MR DE JERSEY: Only because in the future my client may become liable. That's the – yeah.

40 HIS HONOUR: So what. So what.

45 MR DE JERSEY: And if the application for directions isn't made now and later is – after the assessment is made, it's asserted against my client that it is a non-associated third party payer the opportunity will be lost at that point. And that's – and that - - -

HIS HONOUR: How is it asserted that you're a non – how can it be asserted that you're a non-associated third party payer under the legislation? Isn't the purpose of that category to give you the right to participate?

5 MR DE JERSEY: Yes. Yes, your Honour.

HIS HONOUR: So how does – if you're – if you don't apply and if the assessment for costs just simply proceeds between LMIM or its liquidators and its lawyers, how does that bind you as a non-party?

10

MR DE JERSEY: Because there's a particular letter that I really wanted to show your Honour which might assist.

15 HIS HONOUR: All right. But the reason – but my starting problem is – I mean, if – to take one of the cases under the New South Wales equivalent of these sections in the Court of Appeal called Boyce and McIntyre it says, well:

...the introduced provisions afford protection to persons who agree, in effect, to indemnify other parties...

20

Now, of course, you can have a right of indemnity by a law. But I just don't see as a starting point how you get to have it both ways. So you say there's a letter about it.

25 MR DE JERSEY: There is, your Honour. It's exhibited to Mr Schwarz's affidavit – exhibit pages 71 to 72. And the part that is relied upon is at 72 and it's the third paragraph.

HIS HONOUR: So this Mr Schwarz – 71 and 72.

30 MR DE JERSEY: Mr Schwarz's affidavit. At the third paragraph, the part beginning:

...ensure if and when a claim for indemnity is made.

35 HIS HONOUR: So is this from Russells to Tucker & Cowan on 3 September?

MR DE JERSEY: Tucker & Cowan. Yes.

HIS HONOUR: Third paragraph says:

40

We invite you to write to Mr Hartwell and withdraw your comments.

MR DE JERSEY: Yes. Yes, your Honour.

45 HIS HONOUR: And - - -

MR DE JERSEY: And then in the next paragraph makes it clear that the purpose of the assessment is that on my – on Mr Whyte's reading of that correspondence he would be bound by it. So if an indemnity's made – indemnity claim is made and a

5

HIS HONOUR: Sorry, where's the bit that you say it's been asserted that he'd be bound?

MR DE JERSEY: The paragraph beginning:

10

Our clients have adopted a plainly prudent course...

And then, obviously, the no suggestion that the - - -

15

HIS HONOUR: Sorry, this is on page 72.

MR DE JERSEY: Seventy-two.

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HIS HONOUR: All right. Let me read that. Well, that's not saying that you'd be bound by it in law.

MR DE JERSEY: Well, there would be no suggestion that the expenses wouldn't be reasonable.

25

HIS HONOUR: It still doesn't say that you would be bound by it in law. I mean, it's a prudent thing, isn't it, to do?

MR DE JERSEY: Well, that's what's – yeah. That's what's asserted.

30

HIS HONOUR: Irrespective of whether you'd be bound by it. I mean, did you write back and say are you saying we are bound in law by the result?

MR DE JERSEY: Yes, your Honour.

35

HIS HONOUR: And where's that?

MR DE JERSEY: It's 74 – page 74, second paragraph beginning:

40

It would be, of course, a simple matter for your client to provide an assurance...

And this is the letter at the end of that page which foreshadowed this application.

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HIS HONOUR: Well, there are two subject matters. The first one being the costs of the assessment which is availed at allegation of unreasonableness. But the first subject matter is saying well, we want assure us that you won't say it. But do they ever say that you are bound in law?

MR DE JERSEY: The high point is the letter I took your Honour to – the last one saying - where we said that there cannot be any – to ensure if and when a claim for indemnity against the fund is made and - - -

5 HIS HONOUR: I've read it. But it doesn't say you're bound in law by it and it's not a logical proposition in law to me - - -

MR DE JERSEY: Well, there can - - -

10 HIS HONOUR: - - - that you would be bound in law by it.

MR DE JERSEY: There can be no suggestion that the costs would be unreasonable.

HIS HONOUR: I've read it, Mr de Jersey.

15 MR DE JERSEY: Sorry.

HIS HONOUR: But the question I'm asking you about is the proposition in law. How could you be bound by it?

20 MR DE JERSEY: No. And - - -

HIS HONOUR: Well, I'm asking a straight question.

25 MR DE JERSEY: It's not - - -

HIS HONOUR: How could you in law be bound by an assessment between them?

30 MR DE JERSEY: Until any claim for indemnity is made my client cannot be bound in law.

HIS HONOUR: Well – but even assume that an – a claim for indemnity is made, how can your client be bound by it?

35 MR DE JERSEY: In my outline of submissions, your Honour, I've referred your Honour to a case which - - -

40 HIS HONOUR: All right. What's the cases about that? That's what I'm trying to get at. I'm trying to get what the legal structure that people are dancing around - - -

MR DE JERSEY: I'm sorry, your Honour. It's - - -

HIS HONOUR: - - - might be.

45 MR DE JERSEY: It begins at page 7, at paragraphs 30 and following – addresses the non-associated third party payer. And the reference to the case is paragraph 37 on page 9. And it's Legal Services Commissioner and Wright.

10 HIS HONOUR: I've read that case. That doesn't say this. But the – I don't have
any difficulty that if you're a person who is obliged to pay the bill then you are
someone who has a right to an assessment. If you've agreed to pay the amount that
A charges B, if that's your agreement you are obliged to pay the bill. And therefore
5 it's – the statute has the purpose of giving you as the person who's going to pay the
bill – A's bill – a right of assessment. That's the whole idea of it. But when you're
talking about the right of indemnity that is held by a trustee – or a former trustee
against trust assets it's for proper expenses. And it's a subject matter of
determination by the court. Now, is there any case that deals with that subject matter
10 which I think is a different problem?

MR DE JERSEY: Not that we've found, your Honour.

15 HIS HONOUR: Is Wright the first or the second of the Court of Appeal cases about
this? I can't remember. There are two. One of which where Justice White was
involved. One of them she qualified what she said in the first one.

MR PEDEN: Amos was the first one.

20 HIS HONOUR: Amos. That's right.

MR DE JERSEY: And this [indistinct]

25 HIS HONOUR: So Wright's the second one. All right. Tell me, as a practical
matter, what you see the outcome of this being.

MR DE JERSEY: Of the – sorry, your Honour, the assessment or of this
application?

30 HIS HONOUR: Well, your application.

MR DE JERSEY: Yeah.

35 HIS HONOUR: If you succeed in your application what do you – what happens?

MR DE JERSEY: Your Honour would either make – sorry, directions that my
client is a non-associated third party payer.

40 HIS HONOUR: I don't make a direction that you are. Where's my power to make
a direction? Where are we talking about that?

MR DE JERSEY: Well, I was relying on 601NF(2). That's - - -

45 HIS HONOUR: Oh, well, that's not what 601NF(2) is about. You either are or not
within the meaning of statute. The statute – the directions power doesn't change the
meaning of the statute which is the Legal Profession Act. I have a power to put you
in the place of a trustee.

MR DE JERSEY: Yes.

5 HIS HONOUR: I don't have any difficulty about that. And therefore, being the party, you would respond to any indemnity claim. But I can't change the meaning of whether you're a third party payer by calling it a direction. You either are or you aren't. So if I make the declaration that you are a third party payer as a non-associated payer a necessary consequence of that is that you're obliged to pay the bill which is then assessed.

10 MR DE JERSEY: Yes.

HIS HONOUR: You will not be able to contest it.

MR DE JERSEY: No.

15

HIS HONOUR: Now, is that position you are prepared to accept?

MR DE JERSEY: Well, no. I'm not. Because – and I can't - - -

20 HIS HONOUR: So that's why I'm asking you what do you say the outcome of this will be.

MR DE JERSEY: Well, the outcome of this would be that if your Honour made the declaration that my client were a non-associated third party payer then my client
25 would have rights to participate in the assessment and make submissions and also receive information about it. And at that point – if your Honour were to find - - -

30 HIS HONOUR: Well, assume you came along and you said, well, this bill's too high. I want it to be lower. And the amount's made lower. And then do you say - when the assessment is reached that your client would then be able to say but I'm not liable to pay it anyway?

MR DE JERSEY: If they don't relate to the first mortgage income fund. Yes.

35 HIS HONOUR: Well, you couldn't have been entitled to go to the assessment in the first place then.

MR DE JERSEY: I understand your Honour's point.

40 HIS HONOUR: You can't have it both ways, Mr de Jersey, unless you've got some authority that suggests you can.

MR DE JERSEY: I've taken it as high as I can. I mean, the correspondence in my submission with the risk of repeating myself - - -

45

HIS HONOUR: Well, they may have made a wrong assertion or you may have wrongly interpreted the extent of their assertion. But the law is still the law one way

or the other. It can't change according to what they say or what you say. All right. So that's so as I see the problem. But let's assume that the problem can be got over. Tell me what then happens.

5 MR DE JERSEY: Well, what then happens is if your Honour were to make a declaration that my client is a non-associated third party payer my client would participate in the process subject to, as your Honour's observed, the issue about whether those costs to be assessed would ultimately - - -

10 HIS HONOUR: Well, who pays for all those costs?

MR DE JERSEY: My client's costs?

HIS HONOUR: Yes.

15 MR DE JERSEY: Well, the fund.

HIS HONOUR: So your client, for example, might get to participate in a whole lot of assessments about things that ultimately aren't the subject of an indemnity but you get to charge those back to the members of the fund.

20 MR DE JERSEY: Your Honour, the extent of - it's asserted against my client - it's sworn against my client [indistinct] Mr Russell, that he can't understand why my client wishes to conduct a line by line assessment. That's not what he wishes to do. There are some examples that are highlighted in my client's affidavit material where it said - - -

HIS HONOUR: I think it said there's about \$650,000 worth of the - I can't remember what the total of the bills is - it's over \$1 million that he thinks he might have some involvement or alleged involvement in.

30 MR DE JERSEY: But there's some prior correspondence has indicated that some parts of the costs won't be claimed because it's not asserted by LMIM that - and those costs now seem to be swept up potentially in the assessment. The concern is that at the - - -

HIS HONOUR: But when you say "swept up in the assessment" I'm not sure what you mean.

40 MR DE JERSEY: Well, not left out the way they have been to date. Not excluded. I can take your Honour to the material that is relevant.

HIS HONOUR: But the assessment isn't, on its face, something that's brought against your client.

45 MR DE JERSEY: No. But the outcome - - -

HIS HONOUR: And yet you're addressing me as though it was.

MR DE JERSEY: Yeah. I – your Honour, I – well, sorry. I misunderstood. I thought we'd got beyond that point of – the legal difficulty of the application.

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HIS HONOUR: No. No. I'm - but I'm still trying to work out what would happen. So you say that you'd go to all the assessments and be involved in all of them according to how you feel about it. And then to the extent that all the relevant costs don't have anything to do with the FMIF and aren't either made the subject of a
10 claim for indemnity or can't be, all those costs that are incurred by you just go to the fund anyway as being part of being a good policeman about it.

MR DE JERSEY: There are specific issues which are identified which would be the subject of Mr Whyte's attention. Not – he doesn't wish to conduct, as I said, a line
15 by line assessment. He doesn't wish to go to all of the assessments and participate in relation to everything.

HIS HONOUR: And has he offered undertakings about that?

20 MR DE JERSEY: Sorry.

HIS HONOUR: Has he offered undertakings about that?

MR DE JERSEY: No. No. He hasn't. But he's made - - -
25

HIS HONOUR: You see, what seems to me to be the position is you're asserting that the other side should be doing all sorts of things for you but there doesn't seem to be much coming from your side about how to do it except for this proposition 1 to 5 which seems to me to start with the proposition that you say we want you to
30 promise us that you won't call us a payer. And then at the end we want to have a right to assess all the bills anyway.

MR DE JERSEY: Your Honour, that - - -

35 HIS HONOUR: That doesn't seem to be giving much away in a practical process of cooperation, Mr de Jersey.

MR DE JERSEY: What was the reason why 1 to 5 was advanced in the letter was because your Honour, in paragraph 79 of your Honour's reasons, has indicated that
40 the parties should work out a procedure for dealing with – and it thought by my side – my client – that were some time taken and this application adjourned that could have been gone through with avoiding the costs of today. And that issue could have been dealt with in tandem with this. But it wasn't, unfortunately.

45 HIS HONOUR: All right.

MR DE JERSEY: That was the purpose of the proposal that was put.

5 HIS HONOUR: All right. Mr Peden, where there is an item of costs for which your client says it's entitled to an indemnity from the fund - assuming the problem of constituting somebody who's liable on behalf of the fund solved - why wouldn't that be something which that person would be entitled to be involved in under - in an assessment as a non-associated third party payer?

MR PEDEN: At the legal level, it's a question of power. Justice McPherson has commented on this. I'll take your Honour to the case. It's Equuscorp and - - -

10 HIS HONOUR: So what's the power we're talking about?

MR PEDEN: Power to order an assessment in relation to someone in Mr Whyte's position, that is, effectively, the beneficiaries of a trust.

15 HIS HONOUR: So you say that if there's a trust the trustee - so let's assume that we get rid of Mr Whyte's special status under the - as a [indistinct] It may not be able to be done. But let's assume it can be done.

20 MR PEDEN: Yes.

HIS HONOUR: If there's a trustee in - of the trust to which a former trustee is entitled to indemnity, you say that's still a problem that means that the new trustee isn't someone legally entitled - sorry, liable upon the indemnity.

25 MR PEDEN: No. It's the beneficiary's interest. That's what, in effect, Mr Whyte is protecting. He's appointed to receiver of the fund.

30 HIS HONOUR: I understand he's the receiver the fund but, I mean, if I need to I can actually constitute Mr Whyte a trustee in law. There's no difficulty about that as a matter of power I don't think.

MR PEDEN: As a trustee of the fund.

35 HIS HONOUR: Of the FMIF.

MR PEDEN: Of the FMIF. I must say we hadn't approached the case on that basis but rather on the basis that Mr Whyte is appointed as receiver [indistinct]

40 HIS HONOUR: Anyway, this is bound up in the problem of can you fix the receivership issue.

MR PEDEN: Yes.

45 HIS HONOUR: So you say you can't. If Mr Whyte's simply a receiver he doesn't have a status whereby he's liable for the indemnity.

MR PEDEN: Quite. And is - - -

HIS HONOUR: Who is?

MR PEDEN: The trustee is the one which is - - -

5 HIS HONOUR: And so the problem is that you remain the trustee.

MR PEDEN: Yes.

10 HIS HONOUR: So the position your client takes is well, we're going to make a claim for indemnity from the fund even though we don't have possession of the assets. And there's no one who can defend that because - - -

15 MR PEDEN: No. Not at all. There's two quite separate questions. The first is the reasonableness and fairness of the charges. And they're a question for assessment as between the solicitor and client under the Legal Profession Act. And it's the specified section 341 that sets out what are the criteria that the costs assessment must take into account. None of those criteria deal with the question of whether or not there is an entitlement to indemnity out of the trust fund.

20 HIS HONOUR: No. No. But that's not - - -

MR PEDEN: We certainly accept - - -

25 HIS HONOUR: The whole point of the third party payer - - -

MR PEDEN: Yes.

30 HIS HONOUR: - - - classification is to say somebody is liable to pay the bill who otherwise not be involved – and is not the client – can come in.

35 MR PEDEN: Yes. It's a separate question of a claim for indemnity out of the trust fund. That's a separate question which we accept hasn't yet occurred. And just to take your Honour – your Honour was taken to the correspondence – the very next letter from Russells is what clarified that position that this assessment of the costs by Mr Hartwell isn't going to bind Mr Whyte in relation to his assessment of whether or not those costs are properly then the subject of a claim of indemnity out of the fund.

40 HIS HONOUR: I understand that problem. And – but the reason I asked you the question in the form I did was I took that bit out of it - - -

MR PEDEN: Yes.

45 HIS HONOUR: - - - which is I think there is a problem about not having it both ways as I – is the plain language that I – or simple language I've used for Mr de Jersey. But if you – if you take the position that the trustee – I'm using that language deliberately but I appreciate it's not precise in relation to Mr Whyte – the trustee accepts liability for the legal costs in the sense that their a person who is liable for the

costs within the meaning of the section because they are as trustee of a fund responsible for the payment of the indemnity entitlement. At that – once you’ve got to that point why wouldn’t they be entitled to participate in the assessment?

5 MR PEDEN: Because it’s a separate question. Mr Hartwell will have no role to say whether or not a particular line item or a particular bill is properly the subject of an indemnity – the claim for indemnity. That’s just not his role. All he looks at is the question of whether or not they are fair and reasonable given the criteria at 341. So

10

HIS HONOUR: I’m probably not putting myself clearly. What I’m trying to say is if that part of the issue which is whether or not I’m obliged to make an indemnity for the subject matter of the bill, generally speaking, is taken out.

15 MR PEDEN: Yes.

HIS HONOUR: Do you accept then that a trustee who says “whatever the proper amount is I’m liable to pay it” would be entitled to participate in the assessment as a non-associated third party?

20

MR PEDEN: If Mr Whyte were regarded as the trustee and he accepts the obligation to pay without further question, then potentially yes. But that’s not the position. And that’s not what Mr Whyte’s actually doing. He’s not - - -

25 HIS HONOUR: You’ve heard me - - -

MR PEDEN: Yes.

30 HIS HONOUR: - - - ask Mr de Jersey these questions and I think I understand what’s going on. All right. So that – what I was trying to expose, if there is, in these facts and the legal structure is whether there’s - whether that’s the critical point or whether there’s another point.

35 MR PEDEN: There’s a decision of the New South Wales Supreme Court. It’s a single judge decision of Justice Latham of Shillington and Harries. Did your Honour come across that?

HIS HONOUR: No.

40 MR PEDEN: I can hand up that. That was a decision where the beneficiaries – plus also I’ve got copies of the Equuscorp case and the Legal Services Commissioner and Wright – but Shillington and Harries was perhaps closer on point because that was a question directly where the beneficiaries could be classed as third party payers.

45 HIS HONOUR: That would depend on whether you got one of the Hardoon and Belilios problems, wouldn’t it, in if you have a direct right of recourse against the beneficiaries. So - I mean, a solicitors firm like any other creditor is – can be a

creditor of a trustee who can follow the trust assets ordinarily when beneficiaries aren't personally responsible. If they were personally responsible that would be one category of case. If you – so this is a non-personally responsible beneficiary.

5 MR PEDEN: Is simply a non-personally responsible.

HIS HONOUR: So the beneficiary wants to come in on behalf of the trust estate.

MR PEDEN: On behalf of the trust estate. That's right.

10

HIS HONOUR: All right. And so is the point that it has to be the trustee?

MR PEDEN: And the point was it is – there is no legal obligation to pay. It's in paragraph 32.

15

HIS HONOUR: In a beneficiary. Yes.

MR PEDEN: Yes.

20 HIS HONOUR: But - I think that's right.

MR PEDEN: So - - -

HIS HONOUR: I don't – in principle that seems to me to be right.

25

MR PEDEN: And so – but there was a focus there on the term otherwise. Because in – it's in paragraphs 32 onwards but in 36 the – well, 35 the question was well, is it a legal obligation or the equitable obligation arising out of indemnification. And that was rejected.

30

HIS HONOUR: So where's this?

MR PEDEN: At 35.

35 HIS HONOUR: Thirty-five. Oh, he says we're only talking about common law obligations. So this comes back to the statute in contract legislation or otherwise.

MR PEDEN: Yes.

40 HIS HONOUR: In subsection 301(4).

MR PEDEN: Yes. The equivalent provision was set out in section – in paragraph 17 of the New South Wales decision.

45 HIS HONOUR: But it'll be the same.

MR PEDEN: It's the same.

HIS HONOUR: I mean, the point is this legislation is supposed to be uniform - - -

MR PEDEN: Effectively the same.

5 HIS HONOUR: - - - even though it's not quite.

MR PEDEN: The question of the legal obligation, your Honour has seen Legal Services Commissioner and Wright. And Justice McMurdo really considered this point with respect. And unless Mr Whyte is under a legal obligation to pay then
10 there's no power.

HIS HONOUR: Well, he has no right to make an application for the - - -

15 MR PEDEN: I used the word power because - - -

HIS HONOUR: - - - for assessment as a non-associated third party - - -

MR PEDEN: I only used the word power because Justice McPherson uses that word in Equuscorp and Short Punch and Greatorix.
20

HIS HONOUR: So what was the point that was decided in Short Punch and Greatorix? I haven't – is that here?

MR PEDEN: That's the second of the decisions that I've handed up to your Honour.
25

HIS HONOUR: All right.

MR PEDEN: Justice McPherson's reasons start at page 584.
30

HIS HONOUR: All right. And which is the bit that I should look at?

MR PEDEN: And specifically he addresses the question in paragraph 45 on the bottom of that page. Well, the problem - - -
35

HIS HONOUR: Is it line – sorry, is it page - - -

MR PEDEN: Sorry, line 45 on page 584. And then over at 585 is - - -

40 HIS HONOUR: Oh, there you are. Justice McPherson found an 1845 case.

MR PEDEN: And at line 31 is the – is the reference to there being no power.

45 HIS HONOUR: Yes. Well, I mean, that's conventional. The proposition was that the right of taxation – as it used to be called – as between solicitor and client related to the client. And so that if the client was A the fact that B was going to be paying for it if there was no legal obligation and therefore wasn't client gave B no right. I

don't have any trouble with that proposition. And so the right to be involved in the assessment process depends on the application for statutory provision in section 301. All right. I understand that.

- 5 Let me then, sort of, work out in my own mind a little bit more practically. So assume that this application is made. Assume that you send all your bills off for assessment. And then – and, of course, that incurs the cost of assessment – assume that after that then a claim is to be made in the sense that a demand is to be made for indemnity and the issue as to what's recoverable is met at that point, if there is one,
10 do you say that the assessment process will have any effect apart from being evidentiary?

- MR PEDEN: Apart from the evidentiary issue that those costs which have been included or assessed by the costs assessor have been assessed in accordance with the
15 Legal Profession Act. Now, whether or not those costs are then the subject – relate to matters that are the FMIF, that's a question for Mr Whyte.

- HIS HONOUR: I don't know whether – what that means by answer. It sounds to me like you've given me a guarded answer that says we are going to say at that point
20 that reasonableness of the amount of the costs can't be disputed.

MR PEDEN: That's right. Reasonableness of the amount of the costs in accordance with the retainer - - -

- 25 HIS HONOUR: So why does it bind a non-party?

MR PEDEN: Well, it doesn't bind the non-party.

- HIS HONOUR: Well, then why can't it be disputed?
30

MR PEDEN: Well, it can be disputed by Mr Whyte.

HIS HONOUR: All right. You – but that's why I was asking.

- 35 MR PEDEN: Yes.

HIS HONOUR: I mean, I appreciate that getting the assessment will in any – will at the very least be an evidentiary - - -

- 40 MR PEDEN: We'll say it's persuasive evidence that it's fair and reasonable. But it doesn't bind him to accept it.

HIS HONOUR: All right.

- 45 MR PEDEN: We accept that.

15 HIS HONOUR: So what could happen is at that state we could have a fight which is two-fold. For that which you say is the subject of indemnity there could be a fight about the amount again and - though, perhaps with the benefit of the assessor's opinion, that may be minimised. There could be - there can be a fight about whether the indemnity's recoverable for differing sorts of reasons, including the sorts of set-off arguments that I didn't have to deal with in the directions application. There could then also be a fight about whether it was reasonable to incur the costs of assessment for things that are within what I'll call the indemnity bucket in circumstances where it won't quell any potential controversy about reasonableness.

10 MR PEDEN: Potentially. There's going to be a whole category, we expect, of - or a series of categories of issues which require consideration in light of your Honour's paragraph 79. This is going to be one of them.

15 HIS HONOUR: Yes. I understand. Do the bills that we're talking about include the bills that are - I suppose I should call them tax invoices in this day and age - but do they include the bills that are made in the proceeding which has been brought by Mr Whyte against the directors and LMIM?

20 MR PEDEN: My immediate response is no. But could I just check. Your Honour, might we just check that. I had understood them not to be included. But I'd need to check that. No. I'm instructed that they don't, your Honour. But I've only just started going back through them again with that question in mind.

25 HIS HONOUR: Well, you can see my obvious thinking about that being a potential subject matter for concern. There might be other things which, given the existence, that proceeding could be sensitive in any event.

30 MR PEDEN: And your Honour's right to raise that point. But that's really the task that Mr Whyte carries out once this process has been completed. He then looks at them and says, well, that's outside of the right of indemnity.

HIS HONOUR: Yes. I understand.

35 MR PEDEN: And that's not - it's just not something Mr Hartwell can talk about.

HIS HONOUR: So what do you say that should happen on the application?

40 MR PEDEN: Well, either no declaration as to right are needed at all or to the extent that one is needed is that Mr Whyte is directed not to be involved in our assessment because he has no entitlement to be involved.

45 HIS HONOUR: Well, that's just another way of saying that when you come to paragraph - let me get this precise - - -

MR PEDEN: He's asked for a direction in paragraph 1 that he is a non-associated third party payer. Sorry, he's asked for directions as to whether he is. But he asserts that he is.

5 HIS HONOUR: Well, he – I think I've asked Mr de Jersey that question squarely and he wants to have that question put to one side in relation to the relevant assessments. He wants to reserve his position about that as to whether he's liable on the bill if he's in the position of trustee. And that's a problem about making a declaration that – in that form. As I understand the legislation, you're either one –
10 you're either in or you're out.

MR PEDEN: Yes.

15 HIS HONOUR: I don't think you can have both ways.

MR PEDEN: Right.

HIS HONOUR: But – so if that direction is not – or declaration is not made - what's the point about rule 720?

20 MR PEDEN: Well, that rule applies if the costs are payable out of a fund. That – it's rule 720 sub (3).

HIS HONOUR: Well, this operates independently on the basis of the language - or
25 at least it looks like it – of the provisions under the Legal Profession Act.

MR PEDEN: Well, the rule couldn't be said to subvert the – that is to – this regulation couldn't give a power that the Act doesn't give.

30 HIS HONOUR: Of course it can. The Supreme Court Act confers power to pass regulations as to various matters including costs. And there are a whole lot of substantive legal provisions and powers that are in the rules and not in statutes, for example rule 621.

35 MR PEDEN: I meant to qualify that to the - - -

HIS HONOUR: But the – so the point I'm making to you is they seem to be two separate statutory provisions.

40 MR PEDEN: They do, except that the main statutory - - -

HIS HONOUR: Let's assume you're right. They're not under section 301 - - -

MR PEDEN: Yes.

45 HIS HONOUR: - - - is it, from memory?

MR PEDEN: Yes.

5 HIS HONOUR: Why aren't – why can't they be a person and - why can't Mr Whyte be a person who's – has charge of the fund and why can't the fund be one out of which you're saying costs are payable?

10 MR PEDEN: Well, it comes down to that same question. If Mr Whyte accepts that he's bound by the assessment then to pay the costs as assessed but without reference to the indemnification question.

HIS HONOUR: But it doesn't have to – doesn't this have to be a question for the applicant? I mean, this says the applicant must serve. So this would apply in all trustee cases, wouldn't it?

15 MR PEDEN: Potentially. That's right.

HIS HONOUR: This would ordinarily apply in the case of a trustee who's seeking to have their costs assessed.

20 MR PEDEN: Well, that's right. But for the provisions - - -

HIS HONOUR: And doesn't it say that in those circumstances if there's someone else who's got - - -

25 MR PEDEN: Well, except at 7 - - -

HIS HONOUR: - - - a claim against a trust that what they've got to do is – oh, I don't know about that.

30 MR PEDEN: Well - - -

35 HIS HONOUR: See there are a number of situations. For example, you could have an appeal costs fund. You could have funds that are - what I'll describe as estate funds that fall into different buckets.

MR PEDEN: Can I just put that in context. Seven twenty-four's within part two of this division.

40 HIS HONOUR: Yes.

MR PEDEN: Which is the – which is the part that deals with costs in a proceedings, that is, where there is a piece of litigation on foot.

45 HIS HONOUR: Yes.

MR PEDEN: And 724 sits within that part as to the rights of parties where there is – where there are proceedings on foot and in my submission a fund is created in those

proceedings one way or another. So, for example, there might be an estate fund or something that's in a particular proceeding. Now, part 2 generally, by virtue of rule 678, is excluded for Legal Profession Act assessments.

5 HIS HONOUR: Part 2 of chapter 17A.

MR PEDEN: Part 2 is excluded. That's rule 678 subsection (2) subsection (b).

HIS HONOUR: And why am I concerned with part 2?

10

MR PEDEN: Well, because – sorry, it's part 3.

HIS HONOUR: Six-seven-eight. Sorry.

15 MR PEDEN: Yes. Part 3. So it's 726 in part 3. And that generally is excluded under 678 sub (2) sub (3) – sorry, sub (b).

HIS HONOUR: So part 3 doesn't apply to any costs assessed under the Legal Profession Act.

20

MR PEDEN: Generally. But then one has to go to 743I which then brings 720 and a number of the other sections back in.

HIS HONOUR: Seven - - -

25

MR PEDEN: Seven-four-three-I.

HIS HONOUR: So 720 is brought back in.

30 MR PEDEN: So 720 is brought back in.

HIS HONOUR: So then aren't we trying to ask the simple question as to whether within the meaning of 720 the facts are where there's a costs assessor who's appointed as between whom?

35

MR PEDEN: Well, it would have to be 710.

HIS HONOUR: So they both start with costs - the costs statements start with orders, don't they?

40

MR PEDEN: Quite. And - - -

HIS HONOUR: So is 720 applicable?

45 MR PEDEN: No. That's our point.

HIS HONOUR: Because it's only dealing within costs under an order. All right.

MR PEDEN: In a proceeding. Quite.

HIS HONOUR: All right. So what are the costs in relation to 7211 of 2015?

5 MR PEDEN: Those costs are in the – or summarised in the invoices set out in Mr Sean Russell's affidavit which is court document number 2.

HIS HONOUR: Sorry, court document number 2.

10 MR PEDEN: Court document number 2 in – sorry, we did ask the registry if they could send up the other file - - -

HIS HONOUR: All right. Sorry.

15 MR PEDEN: - - - which is the costs assessment file.

HIS HONOUR: All right.

20 MR PEDEN: And Mr Sean Russell's sworn an affidavit in those proceedings: court document number 2 which exhibit the invoices.

HIS HONOUR: Well, none of these are costs under an order.

25 MR PEDEN: Some of them may be the subject of orders but that's part of the assessment process is to work out which ones fall in the various categories.

HIS HONOUR: Yes. All right. But as bills between a solicitor and a client they're not - - -

30 MR PEDEN: And actually - - -

HIS HONOUR: So the – for present purposes – and this is what I think should be uncontroversial – we are not talking about the assessment of bills that have been sent as the costs payable under an order.

35 MR PEDEN: Well, there may be costs in those bills but - - -

HIS HONOUR: That's not the same question.

40 MR PEDEN: Sorry. Yes.

HIS HONOUR: When you get an order then there may well be costs between solicitor and client that as between the client and another party of the litigation are made the subject of the order. There may also be under an order some costs which
45 are ordered to be paid out directly out of a fund.

MR PEDEN: Yes.

HIS HONOUR: So they're the two categories. So far as we're talking about costs as between parties we're not talking about bills of that kind.

MR PEDEN: No.

5

HIS HONOUR: And so far as we're talking about costs out of an order out of a fund there's at least probably some of that kind. I think there was one of Justice Dalton's in relation to - - -

10 MR PEDEN: And it may well be caught up in that. But that's - - -

HIS HONOUR: Some of that might be caught up in that.

MR PEDEN: Yes.

15

HIS HONOUR: But that would be to that extent of costs. There would still have to be a formulation of what the costs are in accordance with that order.

20 MR PEDEN: Yes. I mean – and that's the purpose of the assessment is to say, well, okay. Here's the total. It's – this amount is fair and reasonable. And these fall into these categories. And then once we get to the category that is separately claimable against the FMIF then that's – that'll be the subject of the claim for indemnity. At that stage Mr Whyte then is able to raise his issues.

25 HIS HONOUR: So let me just ask you this question, though, to make sure I understand the mechanics of what's being discussed: so let's take Justice Dalton's order where there's a proportion of your costs of the proceeding before her Honour that are to be paid out of the fund. Then – I think she made that order at the end of 2013. Then what would happen is for that purpose either a bill - or however things
30 are done these days – would be given by your client to whoever is responsible on behalf of the fund. And then that matter would be assessed. It would be the person who's in charge of the fund under rule 720.

MR PEDEN: Quite.

35

HIS HONOUR: All right.

MR PEDEN: That's a sub category.

40 HIS HONOUR: So you say – all right. I understand. What do you then – so I understand the first bit about section 301. What order do you say I should make about rule 720, if any?

45 MR PEDEN: Well, no order. That is no direction that is – that is sought. There's just no call to make any such order – any such direction.

HIS HONOUR: Well, what about the reference to the consent orders to the registrar dated 29 July? That's the orders for assessment as between your client and the responsible entity and your client the liquidators as against your client - - -

5 MR PEDEN: Yeah.

HIS HONOUR: - - - the solicitors.

10 MR PEDEN: Yes. So 720 is just not applicable to – because there's no order which enlivens 720.

HIS HONOUR: All right. Now, is there any affidavit by Mr Park or Ms Muller about this?

15 MR PEDEN: No. There's only - - -

HIS HONOUR: As to what the reasoning is for the assessments.

20 MR PEDEN: There's Mr – when you say the reason for the assessments - - -

HIS HONOUR: Yes.

MR PEDEN: Mr Stephen Russell's affidavit - - -

25 HIS HONOUR: Yes. But he's, unfortunately, part of Russells. He's one of the parties. Is there any separate statement about their position by them as to what they think?

30 MR PEDEN: Well, I've just extracted this because I can't direct your Honour to any separate affidavit from Mr Park or Ms Muller.

HIS HONOUR: But does Mr Russell say something about what their instructions are and why?

35 MR PEDEN: Yes. What he said was that in his affidavit - - -

HIS HONOUR: So this is the one by leave this morning? I haven't read it yet.

40 MR PEDEN: This is the one by leave today. Paragraph 6 and then following onto that, paragraph 7.

HIS HONOUR: Yes. I understand. Okay. Yes. I'll read the outlines. Thanks, Mr Peden.

45 MR DE JERSEY: Can I just reply in relation to the 720.

HIS HONOUR: I was going to read the outlines - - -

MR DE JERSEY: Sorry, your Honour.

HIS HONOUR: - - - before I asked you about whether there was anything you wanted to say in reply about that as well. Just let me do that. Yes, Mr de Jersey.

5

MR DE JERSEY: Your Honour, just about 720 – rule 720.

HIS HONOUR: Yes.

10 MR DE JERSEY: The submission was made that that's limited by rule 710 subrule (1) I think. I submit that that's not the effect of that subrule because it says:

This rule applies to a party who has served a costs statement or on whom a costs statement has been served.

15

It doesn't say this part – being part 3.

HIS HONOUR: No. The rule it said that was another one. Wasn't it later 724 from memory? I'll just check.

20

MR DE JERSEY: Seven-four-three-I was the one that says that - - -

HIS HONOUR: Seven-four-three-I is the one that brings it back in.

25 MR DE JERSEY: Yes.

HIS HONOUR: But there was another one that took it out because it was a part 3, wasn't it?

30 MR DE JERSEY: Yeah. That's so, your Honour. But that was overtaken by 743I that brings it back in.

HIS HONOUR: I understand that. Yes. So what's the problem?

35 MR DE JERSEY: Well, I understood that the submission that was made to your Honour when your Honour asked whether that's – this is a independent statutory power to enable Mr Whyte to make submissions and receive material, the submission was made that no it's not because of 710(1) which limits the application of 720 to cases where a costs statement has been served. In my submission it's – the 710(1)
40 doesn't have that effect because 743I generally applies to – it generally applies to rule 720 to costs assessed under Legal Profession Act of which these are costs.

HIS HONOUR: But isn't - - -

45 MR DE JERSEY: So it is an independent - - -

HIS HONOUR: There was – what’s the third rule Mr Peden took me to? I’m sorry. It’ll be in his outline but I – which is the one that says part 3 is excluded.

MR DE JERSEY: Six-seven-eight, your Honour.

5

HIS HONOUR: Yes. Now, 743I says that rules apply to costs assessed under the – under rules under the Legal Profession Act. So rule 720 applies. So is your proposition that the way this now works is that 710 has been bypassed?

10 MR DE JERSEY: Yes, your Honour. And 720 applies independently. Seven-one-0 in my submission doesn’t need to be bypassed because it only applied – it only says this rule applies to a party that - - -

15 HIS HONOUR: I’m sorry, but the requirement under 720 is the procedure to be followed on the assessment. The assessment is the one that is created by part 2 and part 3 of chapter 17A, isn’t it?

MR DE JERSEY: I accept that, your Honour.

20 HIS HONOUR: Well, that assessment is one that is engaged if under rule 710(1)A the costs statement has been served. And the costs statement is one under 705.

25 MR DE JERSEY: I – my submission, your Honour, is that that reasoning would follow if 710(1) said this chapter applies to a party rather than that this rule applies to a party. That’s the difference.

30 HIS HONOUR: But 720 is not talking about – I mean, what you want me to do is to read 720 as though it’s stand alone and to the extent that it – and can operate in a way that is, in some respects, potentially inconsistent with the rights that are given under section 301. That’d be wrong.

MR DE JERSEY: That’s – well - - -

35 HIS HONOUR: I mean, why wouldn’t rule 720 be one that applies to an assessment which is made in accordance with chapter 17A?

40 MR DE JERSEY: Because for whatever reason 710(1) doesn’t say this chapter applies to a party. It says this rule. I accept, your Honour, that the chapter is all about assessments that are conducted by an assessor who is appointed after a costs statement has been prepared – has been served. And that given that, you know, the natural inclination is to think that seven-one - 720 is only applicable in those circumstances. The difficulty with that, however, is that 743I brings it back in specifically and seems to have – give it general application to costs assessed under the Legal Profession Act 2007 without limitation. I should add, your Honour, that
45 I’ve looked for cases on 720(3) and the meaning of what a fund is. I can’t find anything nor can my instructors, nor, I think, can my learned friend.

HIS HONOUR: But there must be, for the purposes of rule 720, a costs statement, mustn't there? For example, 3(a)(ii), the notice has to specifically say things about the costs statement. How can that be complied with if there is no costs statement?

5 MR DE JERSEY: Yeah. It couldn't be, your Honour.

HIS HONOUR: So I'm – what I'm trying to work out is what – I mean, there may well be overlapping cases. I haven't thought it through. But I can't see how 720 can apply outside the realm of a process that's started by a costs statement under rule
10 705.

MR DE JERSEY: Your Honour's heard my submissions. I accept that 720(3)(a)(ii) is inconsistent with what I've submitted because it would be impossible to comply with that. But the problem remains that 743I does bring this section in without
15 limitation to costs assessed under Legal Profession Act.

HIS HONOUR: So let's try and engraft it on to the usual situation. A bill is given in accordance with the Legal Profession Act. And the client requires it to be assessed. What's the requirement for the statement of the bill under the Legal
20 Profession Act?

MR DE JERSEY: Sorry, what's the requirement - - -

HIS HONOUR: What's the requirement for the statement of the bill under the Legal
25 Profession Act?

MR DE JERSEY: I'd have to look at the Act. I'd – yeah.

HIS HONOUR: I mean, if your submission is right then every bill between a
30 solicitor and client which is capable of being sent to assessment under the Legal Profession Act must comply with - where it's involving a cost payable out of a fund – must comply with the requirement that there be a costs statement.

MR DE JERSEY: Yes, your Honour.
35

HIS HONOUR: Even though the costs statement language is by rule 705, one that is engaged when a party within the meaning of the rules is entitled to be paid costs. Even for non-contentious work.

40 MR DE JERSEY: Yes. I'll accept that.

HIS HONOUR: Well, that's a startling change to what I understand – I've always thought was the way in which things worked. Is there any evidence about how it

45

MR DE JERSEY: Any evidence - - -

HIS HONOUR: Any evidence about that being the way in which costs assessments are usually done?

MR DE JERSEY: No. There isn't in this case.

HIS HONOUR: All right.

MR PEDEN: Your Honour, at the risk of - - -

10 HIS HONOUR: Just let me make a note before I go any further. Yes. All right.

MR PEDEN: Your Honour - - -

HIS HONOUR: Yes, Mr Peden.

15 MR PEDEN: I was just going to refer – there is an entire chapter in the latest edition of [indistinct] on costs out of a fund. I haven't got copies of it but the opening paragraph – the opening sentence is paragraph 10.1:

20 *Aside from an agreement between the parties, costs are payable out of a fund only pursuant to a court order.*

And then it deals with the various ways in which costs out of a – costs out of a fund then may be ordered and - - -

25 HIS HONOUR: Well, costs commonly made – an order is commonly made for costs to be paid out of a fund. But the words besides agreement between the parties cover a lot of cases.

30 MR PEDEN: Yes. Yes.

HIS HONOUR: In other words they don't actually – it doesn't require actual agreement about the particular set of costs. There are a lot of relationships which would fit within that category.

35 MR PEDEN: That's all I was going to say that there is [indistinct] with those issues.

HIS HONOUR: Does anybody know how 743I came into the rules? It's a 2013 amendment. I'm not – wasn't aware of I must say. All right. Yes.

40 MR PEDEN: I can tell your Honour it was inserted in 2007.

HIS HONOUR: Sorry.

45 MR PEDEN: It was inserted in 2007 but amended - - -

HIS HONOUR: Seven-four-three-I.

MR PEDEN: And then amended in 2013.

HIS HONOUR: Sorry. I didn't know why it was brought in 2007 either. I wasn't talking about any amendment made in 2013. All right. Mr Peden, I wanted to ask
5 you one other question. I'm going to reserve this because it seems like there are a series of questions of construction of the section as well as propositions of law that underlie some of the submissions that are made that aren't obvious. You say the right of indemnity is contingent on a demand being made in your submission. I'm not sure that's right. I wanted to know what the analysis is that supports that
10 conclusion.

MR PEDEN: Well, for example, there might be costs which are claimable by Russells against LMIM which are the subject of these assessments but they are not going to be claimed against the FMIF. For example - - -
15

HIS HONOUR: I quite well understand. I quite well understand that LMIM might have lots of other reasons to incur legal fees that haven't anything to do with the FMIF. I don't know whether that's the fact or not. But in principle there's absolutely no reason why that wouldn't be true. But the question when you look at
20 indemnity is, is there a condition precedent of demand before the right to indemnity is raised? And the reason why I caution – and you say, well, there's – we've got to make it known first before the problems arise – because there won't be any liable until we demand - but the reason why I hesitate of that is if the right of indemnity is one - if you take a simpler set of circumstances than this case – that a trustee
25 ordinarily has by way of the equities of exoneration or recoupment on properly incurring expenditure, there isn't ever a demand.

The right arises because of the nature of the obligation. There may subsequently be a fight about whether it was proper. And in equity the limit of the extent of the right is
30 qualified by that adjective. But in most cases there isn't a dispute. And the point that seems to me to be important here is that the right is supported by a lien. And I won't get into the nature of the particular lien. If a demand were a condition precedent to the right the lien wouldn't necessarily arise until the demand had been made. And in the world of insolvency the obligations and rights of the parties would
35 play out differently. So I wonder whether it's right to say that a – though in the practical world a demand would be most likely made in circumstances like this where you've got a former trustee - still, whether it's right in principle to say the obligation upon the indemnity depends on a demand because it would destroy the lien in the usual model of analysis.
40

MR PEDEN: Your Honour uses the word demand.

HIS HONOUR: Oh, I didn't use it. It's in your submission.

MR PEDEN: Yes. All right. I'm hung by that then, aren't I. It's really the claim
45 though because the trustee may incur all sorts of expenses. And then, for example, a bill comes in to the trustee for work done of which some of it might not be able to be

claimed as a – for an indemnity out of the trust fund. In which case the trustee would say well, I’m only going to take out of the trust fund 50 per cent or 90 per cent of the bill because the other 10 per cent is, for example, improperly incurred or something. So – but nevertheless, there is a claim against the trust fund which is made by the trustee. Now, your Honour’s right. In many circumstances it’s simply the trustee drawing a cheque to him – either himself or herself or drawing a cheque payable directly to the creditor. But there nevertheless must be some form of act of claim against the trust fund by a trustee. Now, it wouldn’t have to be a formal demand. It could just simply, as I say, be a cheque that’s drawn or an internet transaction that’s commenced.

HIS HONOUR: But if you’ve got a lien, until you satisfy the right of indemnity - whether it be a way of exoneration or recoupment or when you removed by payment from the new trustee – it seems to me the obligation exists before you make any claim.

MR PEDEN: Yes. The - - -

HIS HONOUR: And the reason why I use that form of language is under section 301 subsection (4) the third party payer’s position is one that is a legal obligation which cannot arise otherwise than by contract or legislation. And if an equitable obligation of indemnity doesn’t depend on a demand in the first place then the demand step or the claim step seems to me to be potentially a false step. I appreciate you’ve still got another argument that says – and this is one of the reasons why I’m going to reserve my decision – well, it has to be a legal claim not an equitable claim otherwise – which is what that New South Wales case says. And that – I’m - to be blunt about it – I’m a bit uncomfortable about that as a broad statement. I’m not sure the statute - I can’t see why the statute as a remedial provision was intended to exclude equitable obligations and limit the obligations of an indemnity kind to those in debtor law. I just can’t see a logical reason why that would be the purpose. But I’ll look at the case more closely and think about that.

But my step here is it doesn’t seem to me to be a precondition to the obligation which be a qualifying obligation under subsection (4) that yet there be a demand or a claim as such in terms of any step. The other thing that – so that’s as I see potentially in answer to your articulation of the – in a sense the prematurity because there’s a demand step that hasn’t happened yet. The problem for your opponent is the statute does require the fact of the obligation which means that if there are bills where there’s a dispute about whether the obligation exists from his side – it seems an odd thing to be saying – they’re entitled to the classification as a non-associated third party payer when that point, which is a factual step and legal conclusion, has to be ascertained for the right to exist.

MR PEDEN: Quite.

HIS HONOUR: So that there – on each side there seems to me to be in a sense a problem about this. All right.

MR PEDEN: I suppose my immediate answer is to recall what Justice McMurdo said in Wright and the Legal Services Commission about his strict view of the legal obligation. This is at the bottom of page 370.

5 HIS HONOUR: Yes.

MR PEDEN: From line 45 where it starts "unambiguously". Well, actually I suppose – actually, all of paragraph 27 applies because the argument there was the question whether liable to pay should be equated to legal obligation. And then over
10 at paragraph 28.

HIS HONOUR: In Equuscorp the beneficiary of the trust who is not personally liable to pay - - -

15 MR PEDEN: I think that's right.

HIS HONOUR: - - - was the party who sought to become involved.

MR PEDEN: Although it - - -
20

HIS HONOUR: Because there are three classes, aren't there? There's the class where – or maybe there aren't. Maybe I'm wrong about this. But my memory is that there are three classes. One is where it's the liability of the trust – trustee, I'm sorry – which can be executed against the trust assets to the extent of the exhaustion of
25 those assets. But otherwise it's the personal liability of the trustee. The second is the case where the beneficiaries can be sued and there are – this is where you get into the – some of the subtlety of Octavo. Are you talking about a liability to contribute to the assets in order to discharge the trustee's obligation to the third party or are you talking about a liability that can be direct to the third party? And there are some
30 cases that say different things about that.

MR PEDEN: Well, Justice McPherson deals with those three categories at paragraph 22.

35 HIS HONOUR: I must say I haven't read the case. So if I'm – if I've got the categories right it's by chance. Page 582.

MR PEDEN: Page 584.

40 HIS HONOUR: Four.

MR PEDEN: Paragraph 22. And that was three – well, in more specific questions the three classes of persons who had the right to apply to the cost of taxation. But it comes down to the same breakup in terms of liable to pay automatically means
45 therefore is there a legal obligation. And the words liable to pay went. And that led to the conclusion in paragraph 24.

HIS HONOUR: That the beneficiary was out.

MR PEDEN: Yes. So - - -

5 HIS HONOUR: All right.

MR PEDEN: They relied on the argument that because there was a right to levy therefore they were liable to pay and therefore they were under legal obligation. And Justice McPherson said [indistinct]

10

HIS HONOUR: All right. I understand.

MR PEDEN: Thank you. Sorry, your Honour, could I just mention as well Mr Russell – Mr Stephen Russell’s affidavit deposes to the current status of the assessment to process.

15

HIS HONOUR: It’s – I gather it needs to be resolved relatively quickly because, of course, there’s a time limit which is a secondary - - -

20 MR PEDEN: Well, all I was going to say that the process is actually well underway. It’s due to be completed within about a week. Now, I’m certainly not saying to your Honour that your Honour has to expedite the decision on that basis, but I would appreciate the opportunity to take some instructions about the time limits to see whether – what impact that does have.

25

HIS HONOUR: Yes. My problem is there’s a long list today. That’s part of the reason why I don’t want to try and do this extemporaneously. Though there are, I think, two or three points which need to be – I need to look a bit more closely at some of the things that are said before I endorse the language that you’re urging on me. The problem that generates is that I doubt that I can get it done in the next couple of days. So I would appreciate to know how long I can get.

30

MR PEDEN: Would your Honour just bear with me. I’ll get some instructions about what the time limits are. Your Honour, just looking at the Act, again, triggers have actually occurred in terms of any timeframe. So there shouldn’t be any imperative other than the usual one that pays your Honour to get on with things.

35

HIS HONOUR: Things need to be done promptly. As I said to you last week, I’m proposing to hand down the question of – on your indemnity application later in the week. And I’ll see if I can do this at the same time.

40

MR PEDEN: I can mention this as well, your Honour, the separate task which has to be undertaken in relation to paragraph 79 – or consequent upon paragraph 79 of the reasons, that is - - -

45

HIS HONOUR: I’m not suggesting that has to be done straight away.

MR PEDEN: No. But the parties are, obviously, going to start liaising about that anyway.

HIS HONOUR: Yes.

5

MR PEDEN: And from our point of view we were going to continue with that and not let your Honour's consideration of this issue hold that up.

HIS HONOUR: Yes.

10

MR PEDEN: Yes.

HIS HONOUR: All right. I'll reserve my decision. Thanks.

15

ADJOURNED

[11.43 am]

Jayleigh Sargent

From: John Somerville [John.Somerville@bdo.com.au]
Sent: Thursday, 21 April 2016 2:06 PM
To: David Whyte
Subject: FW: LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) (the Fund)

fyi

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 Before you print think about the environment

From: Britta Green [mailto:britta.green@ajg.com.au]
Sent: 21 April 2016 12:05 PM
To: Nicola Kennedy
Cc: John Somerville
Subject: RE: LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) (the Fund)

Hi Nicola

Yes, that is correct given that any inclusion in legal action for the "trade on" exposure would be picked up by the McGrath Nicol policies on which he is named and in particular, the PI policy. Any other exposure against David, would be in his professional capacity as a Receiver which is covered by the firm's policy.

Regards,

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From: Nicola Kennedy [mailto:Nicola.Kennedy@bdo.com.au]
Sent: Thursday, 21 April 2016 11:56 AM
To: Britta Green <britta.green@ajg.com.au>
Cc: John Somerville <John.Somerville@bdo.com.au>
Subject: LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) (the Fund)

Hi Britta

I refer to our telephone conversation in February this year in relation to insurance requirements for David Whyte's role as the Court appointed Receiver of the Fund. I note that the retirement villages David Whyte and Andrew Fielding are appointed Controllers over were sold last year and no policies are currently in place.

During our discussion, you confirmed the following:

- David should be noted as Receiver of the Fund on the policies of McGrathNicol, who are the Receivers and Managers of the Fund (note this has been done).
- Given that David was not trading the St Crispins (Port Douglas) property, he had no exposure to claims and, as such, did not require a policy.
- Any claims against David in a professional capacity would be covered by the BDO PI policy and, therefore, no cover in this respect is required at Fund level.

Would you please confirm by return email that the above is correct, particularly in relation to PI cover not being required for David as the Court Appointed Receiver of the Fund, as any claims in a professional capacity would be covered by BDO's PI policy?

Please let me know if you have any questions.

Thank you and kind regards

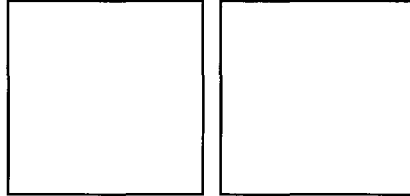
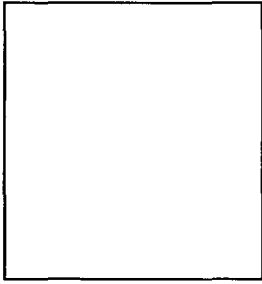
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3 June 2016

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady and Mr Sean Russell
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Dear Colleagues

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

We refer to the orders made by Jackson J on 17 December 2015 ("the Orders").

Pursuant to the Orders, the parties' costs of and incidental to the application, including costs reserved by the Orders made on 7 May 2015, are to be paid out of the assets of the FMIF on the indemnity basis.

By your letter of 3 February 2016, you demanded payment of the amount of \$251,345.70 as your clients' costs payable from the assets of the FMIF under the Orders. We requested information from you, by our email of 4 February 2016 and our letter to you of 9 February 2016, and you provided certain documents with your email of 4 May 2016, including the Professional Services Agreement which is said to govern your retainer with your clients in relation to this matter.

Your correspondence of 3 February 2016 provided to us seven invoices, said to relate to the 'residual powers' proceeding. More fulsome versions of those same invoices were provided with your email of 4 May 2016. Those invoices sought payment with respect to the legal costs incurred by your clients, totalling an amount of \$251,345.70; this sum included an amount with respect to Goods and Services Tax ("GST").

You have invited us to inform you of any relevant authority in relation to the issue of whether the amount payable to your clients from the property of the FMIF is the GST-exclusive amount of the costs assessed (or agreed) on the indemnity basis.

GST position of your clients

The Professional Services Agreement received from you with the email from Mr Sean Russell of 4 May 2016, is an agreement between your firm and "John Park & Ginette Muller, LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ACN 077 208 461".

That Agreement is dated August 2013. Although it is dated well prior to this proceeding having been commenced, it was produced in response to our request for the Costs Agreement governing your retainer, pursuant to which your clients claim costs under the Order of Justice Jackson. We therefore presume that it is the costs agreement governing your retainer in relation to the 'residual powers' application.

With the exception of invoice number B22425 dated 31 July 2015, each of the invoices constituting your clients' claim for costs under the Orders is addressed to LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) (Receivers Appointed), c/- FTI Consulting. The remaining invoice, invoice number B22425, is addressed to "FTI Consulting (Australia) Pty Ltd, LM Investment Management Limited (In Liquidation)".

Your client, LMIM, is registered for GST in its own right. Were FTI Consulting (Australia) Pty Ltd to be your client, it too is registered for GST in its own right. As we understand it, your client, LMIM (in its own right), is entitled to claim input tax credits with respect to the GST component of your legal costs, and has in fact been claiming those input tax credits.

For the sake of completeness, we note that Mr Sean Russell referred to your clients' claim for costs out of the FMIF pursuant to the Orders, as costs payable under an order of the Court *inter partes*, rather than (and to be treated separately from) any claim under the indemnity regime established by the Orders. We respectfully agree with Mr Russell's characterisation of the claim for costs under the Orders.

GST and indemnity costs orders

As you have invited us to do, we respectfully refer you to the following authority regarding GST on costs payable on the indemnity basis pursuant to a court order.

In *Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd*¹, McGill DCJ at paragraph 127 stated that:-

Broadly speaking, whenever goods or services, including legal services, are provided for consideration, there is a taxable supply, and the supplier has to pay GST of one-eleventh of the amount paid. However, when the supply is to a business which is itself registered for the purposes of GST, and when the supply is of an input for the purposes of that business, it is entitled to an input credit in respect of that input representing the amount paid by way of GST, which can be set off against its own GST obligations. In effect, although it pays GST on the bill to the solicitor, it obtains credit for the amount so paid. This will not apply if the client is not registered as a business for GST purposes, for example, where the client is an individual who is not in business, as will normally be the case with the plaintiff in an action for damages for personal injury.

Martin J in *The Beach Retreat Pty Ltd v Mooloolaba Yacht Club Marina Ltd and Ors*² approved the above statement of the general position by McGill DCJ, and went on to decide, with respect to the treatment of GST under an order of indemnity costs that:-

As each of the defendants was entitled to an input tax credit for the GST each of them paid, it is appropriate to ignore GST on indemnity costs as it is an amount for which they are no longer liable, that is, it is not an "out of pocket" expense. In doing this, one is not concerned with scale costs and any amount they include to represent GST. To add to the indemnity costs already assessed a further 10% would be to change the experts' opinion as to the extent of the "costs reasonably incurred and of a reasonable amount" [emphasis added].

This position is consistent with that adopted by the courts in New South Wales. In *Penson v Titan National Pty Limited (No 3)*³, JC Campbell AJA stated that:-

¹ [2007] QDC 057 at [127]

² [2009] QSC 84 at [114]

³ [2015] NSWCA 121 at [25]

If a lawyer's memorandum of costs and disbursements includes an item for GST, and the client is entitled to an input tax credit for the amount of any GST paid, and if a costs order requires the opposite party to that client in litigation to pay the amount of the client's costs, the amount payable under the costs order does not include GST.

The position adopted in these authorities is consistent with that adopted by the Australian Taxation Office in its GST Ruling 2001/4⁴ and it is also consistent with the position adopted by the ATO in its Practice Statement PS LA 2009/9.⁵

In the circumstances, we think it is tolerably clear that the amount payable in respect of your clients' costs from the assets of the FMIF pursuant to the Orders, is the GST-exclusive amount of costs determined on the indemnity basis.

Conclusion

In the event that your clients continue to maintain that the amounts payable to them from the property of the FMIF should include the GST component of your legal costs, we ask that you explain that contention in detail. Otherwise, we look forward to receiving your confirmation that your clients no longer contend that the amount payable out of the property of the FMIF to them is the GST-inclusive amount of your legal costs that are the subject of the claim.

Our client naturally reserves his rights with respect to the costs claimed by your clients.

Yours faithfully



David Schwarz
Tucker & Cowen

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

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

⁴ See paragraphs 145 to 155

⁵ in particular, at paragraphs 7 and 9 of Annexure I



ThomsonsLawyers[®]

MANAGEMENT SERVICES AGREEMENT

between

The Trust Company (PTAL) Limited
ACN 008 412 913
(Mortgagee)

and

LM Investment Management Limited
ACN 077 208 461
(Responsible Entity)

and

LM Administration Pty Ltd
ACN 055 691 426
(Manager)

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between **The Trust Company (PTAL) Limited** ACN 008 412 913 of c/- Level 4,
 9 Beach Road, Surfers Paradise QLD 4217 (**Mortgagee**)

and **LM Investment Management Limited** ACN 077 208 461 of c/- Level 4,
 9 Beach Road, Surfers Paradise QLD 4217 (**Responsible Entity**)

and **LM Administration Pty Ltd** ACN of c/- Level 4, 9 Beach Road, Surfers
 Paradise QLD 4217 (**Manager**)

RECITALS

- A. The Mortgages have provided the Mortgages in support of a loan that has been provided by the Mortgagee to the Borrower.
- B. The Borrower is indebted to the Mortgagee.
- C. The Responsible Entity of the Fund has entered into a custody agreement dated 4 February 1999 with the Mortgagee.
- D. The Mortgagee holds the Security to secure the payment to the Mortgagee of the monies by the Borrower and the Mortgages to the Mortgagee.
- E. Events have occurred which have led to the Security becoming enforceable.
- F. By virtue of the powers in the Security, the Mortgagee is entitled to exercise extensive rights in relation to the Secured Property including taking possession and control of the Secured Property, and managing and otherwise dealing with the Secured Property.
- G. The Mortgagee has requested that the Manager provide certain management services commencing on the Commencement Date to assist the Mortgagee in exercising its rights pursuant to the Security.
- H. The Manager has agreed to provide the Services to the Mortgagee commencing on the Commencement Date on the terms set out in this agreement.

THE PARTIES AGREE AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following definitions apply in this agreement (including the recitals) unless contrary to or inconsistent with the context:

Act means legislation or statutory instrument of the Parliament or a State or Territory or the Commonwealth of Australia;

Borrower means the party described in Schedule 1;

Commencement Date means the date listed in Schedule 1;

Confidential Information means any information provided by the Mortgagee, Responsible Entity or any of its Representatives to the Manager or any of its Representatives, or otherwise obtained by the Manager or any of its Representatives, whether obtained before or after execution of this agreement, in connection with the Mortgagee, the Responsible Entity, the Services or this agreement. It includes all of the following:

- (a) all confidential business information, documents, records, financial information, reports, technical information and forecasts which relate to the Mortgagee or the Responsible Entity or each of their businesses;
- (b) the Mortgagee's or the Responsible Entity's intellectual property;
- (c) the terms and conditions of this agreement;
- (d) any information created under or arising out of the provision of Services under this agreement,

it does not include either of the following:

- (a) information which is in or becomes part of the public domain, other than through a breach of this agreement or an obligation of confidence owed to the Mortgagee, the Responsible Entity or any of their Representatives;
- (b) which the Manager can prove by contemporaneous written documentation was independently acquired or developed without breaching any of the obligations set out in this agreement;

Corporations Act means the *Corporations Act 2001* (Cth) and any regulations made under it;

Fund means the LM First Mortgage Income Fund ARSN 089 343 288;

Insolvency Event in relation to a person means anything that reasonably indicates that there is a significant risk that that person is or will become unable to pay its debts as they fall due. This includes any of the following:

- (c) a meeting of the person's creditors being called or held;
- (d) a step being taken to make the person bankrupt or to wind the person up;
- (e) the appointment of a controller or administrator as defined in section 9 of the Corporations Act;
- (f) the person entering into any type of agreement, composition or arrangement with, or assignment for, the benefit of all or any of its creditors;
- (g) the person being made subject to a deed of company arrangement;
- (h) a step being taken to have a receiver, receiver and manager, liquidator or provisional liquidator appointed to the person or any of its assets;

Loss means any loss including any liability, cost, expense (including legal costs on a full indemnity basis), claim, proceeding, action, demand or damage;

Mortgagee means The Trust Company (PTAL) Limited ACN 008 412 913;

Mortgagor means the party named in Schedule 1;

Powers means any right, power, authority, discretion, duty or remedy conferred on the Mortgagee by the Security, any Act, or any other document or applicable law or equity;

Related Entity has the same meaning as under the Corporations Act;

Representative means any director, officer, employee, agent, contractor, financier, professional adviser or Related Entity of a party;

Responsible Entity means LM Investment Management Limited ACN 077 208 461;

Secured Property means the property that is described in Schedule 1;

Security means the security that is described in Schedule 1;

Services means the services listed in Schedule 2;

1.2 Interpretation

The following rules also apply in interpreting this agreement, except where the rules are contrary to or inconsistent with the context:

- (a) Headings are inserted for convenience only, and do not affect the interpretation of this agreement.
- (b) A reference in this agreement to:
 - (i) dollars or \$ means Australian dollars and all amounts payable under this agreement are payable in Australian dollars;
 - (ii) legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation or regulations issued under it;
 - (iii) a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (iv) a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this agreement;
 - (v) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
 - (vi) anything (including a right, obligation or concept) includes each part of it.
- (c) A singular word includes the plural, and vice versa.
- (d) A word which suggests one gender includes the other genders.
- (e) If a word is defined, another part of speech or other grammatical form in respect of that word has a corresponding meaning.
- (f) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.

- (g) The word **agreement** includes an undertaking or other binding arrangement or understanding, whether or not in writing.

2. APPOINTMENT TO PROVIDE THE SERVICES

2.1 Appointment

The Mortgagee appoints the Manager to provide the Services in accordance with the terms of this agreement.

2.2 Non-exclusive appointment

The appointment of the Manager under this agreement is non-exclusive. It does not restrict the Mortgagee's right to contract with other persons for the performance of services similar to the Services.

3. TERM

3.1 Term

This agreement starts on the Commencement Date and will remain in force until terminated by either party in accordance with this agreement.

4. THE SERVICES

4.1 Provision of Services

- (a) The Manager must provide the Services in accordance with this agreement.
- (b) At all times during the term of this agreement, the Manager must provide the Services in all the following ways:
 - (i) promptly, carefully and to the highest possible standards;
 - (ii) exercising all due care, skill and judgement, in an efficient, professional and cost effective manner and in accordance with accepted professional and business practices;
 - (iii) in accordance with the reasonable instructions or directions given by the Mortgagee.

4.2 Compliance with laws, policies and directions

At all times during the term of this agreement, the Manager must do all of the following:

- (a) hold all authorisations, permits and licences required under any law to perform the Services;
- (b) comply with the requirements of all laws of any kind applying to the performance of the Services;
- (c) comply with the Mortgagee's standards, operating principles, policies and procedures, subject to clause 4.2(b).

4.3 Periodic reviews

- (a) The Mortgagee may conduct periodic reviews of the provision of the Services to assess the Manager's performance, to seek improvements in the provision of the Services and to resolve any issues that may arise.
- (b) The Manager must cooperate in the review process, supply the Mortgagee with any documents reasonably required by the Mortgagee and comply with all recommendations that result from the review.

4.4 Conflicts of interest

- (a) The Manager must not undertake any work or perform any services for other persons which may conflict with his obligations under this agreement. The Manager warrants that at the date of this agreement no conflict of interest exists or is reasonably foreseeable in relation to the performance of his obligations under this agreement.
- (b) The Manager must immediately notify the Mortgagee of any matter which may give rise to an actual or potential conflict of interest at any time. If a conflict of interest arises during the term of this agreement, or any matter may give rise to an actual or potential conflict of interest, the Manager must do both of the following:
 - (i) notify the Mortgagee immediately of the conflict or matter and its plan for resolving or avoiding the conflict;
 - (ii) take such action as may be necessary to resolve or avoid the conflict of interest, including any action that the Mortgagee may specify to ensure that the conflict is resolved or avoided in a manner satisfactory to the Mortgagee (acting reasonably).

5. MORTGAGEE'S AGENT

5.1 Mortgagee's agent

The Manager will be the agent of the Mortgagee in exercising those powers of the Mortgagee which form part of the Services and which may properly be delegated by the Mortgagee to an agent under the Security and at law.

5.2 Mortgagee in possession

Nothing in this agreement constitutes a liability on the part of the Manager to account to the Mortgagor as mortgagee in possession.

6. REPORTS, INFORMATION AND RECORDS

6.1 Reports

- (a) The Manager must deliver reports to the Mortgagee in relation to the Services within a reasonable time after the Mortgagee so requests. The reports must include all information the Mortgagee may reasonably require to be included from time to time.

- (b) All reports generated by the Manager will be the property of the Mortgagee. The Manager may retain a copy of the reports for internal record keeping purposes only.

6.2 Information

In addition to the reports to be delivered under clause 6.1(a), the Mortgagee may require the Manager to provide it with information concerning any aspect of the Services which the Mortgagee may require. The Manager must provide the information within 5 business days of receiving a request to do so.

6.3 Records

The Manager must keep full records and documentation in relation to the Services in hard copy form. The Manager must do so during the term of this agreement and for 7 years after the agreement set out in this agreement ends. On request by the Mortgagee, the Manager must make all documents and records relating to the Services available to the Mortgagee for inspection.

7. SERVICE FEES AND EXPENSES

7.1 Service fees

In consideration for the Manager providing the Services, the Mortgagee shall pay the Manager the service fees set out in Schedule 1 in accordance with the terms set out in Schedule 1.

7.2 Expenses

In addition to paying the service fees referred to in clause 7.1, the Mortgagee shall pay the Manager's reasonable out-of-pocket expenses incurred in performing the Services. The Manager must provide appropriate tax invoices for those expenses prior to being reimbursed by the Mortgagee.

8. CONFIDENTIALITY

8.1 Obligations of confidence

Where the Manager receives Confidential Information from the Mortgagee and/or the Responsible Entity under this agreement or otherwise in connection with the Services, the Manager must do all of the following:

- (a) keep the Confidential Information confidential;
- (b) not use, disclose or reproduce the Confidential Information for any purpose other than the purposes of this agreement;
- (c) not, without the Mortgagee's or Responsible Entity's prior written consent, disclose Confidential Information to any person other than his employees, subcontractors, agents and Representatives who need the information for the purposes of this agreement;
- (d) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access, use, copying or disclosure.

8.2 Further permitted use and disclosure

Notwithstanding clause 8.1, the Manager may use or disclose Confidential Information to the extent necessary to fulfil any of the following:

- (a) comply with any law, binding directive of a regulator or a court order;
- (b) comply with the listing rules of any stock exchange on which its securities are listed;
- (c) obtain professional advice in relation to matters arising under or in connection with this agreement.

8.3 Exclusions

Clause 8.1 does not apply to Confidential Information for which any of the following applies:

- (a) information which is in or becomes part of the public domain otherwise than through breach of an obligation of confidence;
- (b) information which was known to the Manager at the time of disclosure, unless such knowledge arose through breach of an obligation of confidence;
- (c) information which the Manager acquires from a third party where that third party was entitled to disclose it.

8.4 Responsibility for Representatives

The Manager must ensure that his employees, subcontractors, agents and Representatives do not do, or omit to do anything, which if done or omitted to be done by the Manager, would breach this clause.

8.5 Undertakings from Representatives

The Mortgagee may at any time require any employees, subcontractors, agents or Representatives of the Manager engaged in the performance of obligations under this agreement to give written undertakings in a form prepared by the Mortgagee relating to the non-disclosure of the Confidential Information and the Manager must promptly arrange for all such undertakings to be given.

8.6 Notification of unauthorised use etc.

The Manager must immediately notify the Mortgagee of any potential, suspected or actual unauthorised use, copying or disclosure of the Confidential Information.

8.7 Return of Confidential Information

The Manager must immediately on demand, or on completion or termination of this agreement, return to the Mortgagee and/or the Responsible Entity any documents in its possession, power or control containing Confidential Information. The Manager may retain a copy of any Confidential Information to the extent required to comply with any legal requirements on the Manager.

8.8 Equitable remedies

The Manager acknowledges that a breach of the confidentiality obligations set out in this agreement by him may cause the Mortgagee and/or the Responsible Entity

irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to a claim for damages and any other remedies available at law or in equity, the Mortgagee and the Responsible Entity may seek specific performance or injunctive relief (as appropriate) against any breach or threatened breach by the Manager, or the employees, subcontractors, agents or Representatives of the Manager.

8.9 Obligations to continue after agreement ends

All obligations of confidence set out in this agreement continue in full force and effect after this agreement ends.

9. MANAGER WARRANTIES

9.1 Performance of Services

The Manager represents and warrants to the Mortgagee and the Responsible Entity on a continuing basis that that it and its Representatives, employees, and agents have the necessary skills, experience and qualifications to perform the Services and agrees to do all things necessary to maintain the competencies and qualifications for which it is appointed.

10. LIABILITY AND INDEMNITY

10.1 Liability and indemnity

The Manager will be liable for and continually indemnifies the Mortgagee, the Related Entity and their officers, employees, Representatives and agents against all Loss suffered or incurred by any of those indemnified as a result of a breach of this agreement by the Manager. Without limiting the above, this includes any Loss caused by any of the following:

- (a) any infringement by the Manager or his employees, agents or subcontractors of the intellectual property rights of the Mortgagee, Responsible Entity, or a third party;
- (b) a breach of the obligations of confidence set out in clause 8;
- (c) a breach of any of the representations and warranties in clause 9;
- (d) any negligent or wrongful acts or intentional misconduct of the Manager or its employees, agents or subcontractors.

11. SUSPENSION OF PAYMENTS

11.1 Default by Provider

If the Manager defaults in the performance of its obligations under this agreement, the Mortgagee may give notice to him to remedy the default specifying details of the default.

11.2 Failure to remedy default

- (a) If the Manager fails to remedy the default specified in a notice under clause 11.1 within 5 business days after receipt of the notice, the Mortgagee may suspend payment under this agreement until the default has been rectified.
- (b) Suspension of payment will not in any way affect the continuing obligations of the Manager under this agreement and will be without prejudice to any other rights that the Mortgagee may have against the Manager as a result of the default.

12. TERMINATION

12.1 Termination by notice

- (a) The Mortgagee may terminate this agreement at any time by 7 days written notice to the Manager.
- (b) The Manager may terminate this agreement at any time by 2 calendar months written notice to the Mortgagee.

12.2 Termination by the Mortgagee

The Mortgagee may immediately terminate this agreement by written notice to the Manager if any of the following occurs:

- (a) The Manager is in breach of his obligations under this agreement and does not remedy the breach (to the extent that it can be remedied) for 5 days after receiving a written notice from the Mortgagee specifying the breach and requiring it to be remedied;
- (b) The Manager is in breach of an essential term of this agreement or the Manager commits a breach of this agreement which cannot be remedied. The essential terms of this agreement include clauses 4.2, 4.4(b), 8 and 9;
- (c) The Manager is the subject of an Insolvency Event;
- (d) a crime is committed by the Manager or its, employees, agents or subcontractors which the Mortgagee reasonably considers may have the potential to adversely affect the Mortgagee's or the Responsible Entity's reputation.

12.3 Termination by the Manager

The Manager may immediately terminate this agreement by written notice to the Mortgagee if any of the following occurs:

- (a) the Mortgagee is in breach of its obligations under this agreement and does not remedy the breach (to the extent that it can be remedied) for 14 days after receiving a written notice from the Manager specifying the breach and requiring it to be remedied;
- (b) the Mortgagee is the subject of an Insolvency Event.

13. OBLIGATIONS AT END OF AGREEMENT

13.1 Return of property

When this agreement ends, whether by expiration of the term of this agreement or on earlier termination, the Manager must immediately return all of the Mortgagee's and/or Responsible Entity's equipment, information, documents, records and other property used in the provision of the Services or otherwise in the Manager's possession or control.

13.2 Consequences of termination

If this agreement is terminated for any reason:

- (a) each party retains its rights under this agreement and at law in respect of any breach of this agreement by the other party;
- (b) the Mortgagee must make payment to the Manager for Services performed before the date of termination, but the Manager will not be entitled to any other payment or any compensation as a result of termination;
- (c) the Mortgagee may employ other persons to perform the Services.

13.3 Clauses survive expiration or termination of agreement

The following clauses will survive the expiration or termination (for whatever reason) of this agreement:

- (a) clause 6.3 (Records)
- (b) clause 8 (Confidentiality)
- (c) clause 10.1 (Liability and indemnity)
- (d) clause 13.2 (Consequences of termination)
- (e) any other clauses that make provision for continued operation.

14. INSURANCE

The Manager will maintain all appropriate insurance policies in relation to providing the Services including any specific policies required by the Mortgagee.

15. GOODS AND SERVICES TAX

15.1 Recovery of GST on supplies and adjustments under this agreement

- (a) All consideration provided under this agreement is exclusive of GST, unless it is expressed to be GST-inclusive.
- (b) Where a party (**Supplier**) makes a taxable supply to another party (**Recipient**) under or in connection with this agreement, the Recipient must pay to the Supplier an additional amount equal to the GST payable on the supply (unless the consideration for that taxable supply is expressed to include GST). The additional amount must be paid by the Recipient at the later of the following:

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Reference: RXC

Deed of Appointment of Receivers and Managers

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- (i) the date when any consideration for the taxable supply is first paid or provided;
- (ii) the date when the Supplier issues a tax invoice to the Recipient;
- (iii) if, under or in connection with this agreement, the Supplier has an adjustment for a supply under the GST law which varies the amount of GST payable by the Supplier, the Supplier will adjust the amount payable by the Recipient to take account of the varied GST amount. The Supplier must issue an adjustment note to the Recipient within 28 days of becoming aware of the adjustment.

15.2 Other GST matters

- (a) If a party is entitled to be reimbursed or indemnified under this agreement, the amount to be reimbursed or indemnified is reduced by the amount of GST for which there is an entitlement to claim an input tax credit on an acquisition associated with the reimbursement or indemnity. The reduction is to be made before any increase under clause 15.1(b). An entity is assumed to be entitled to a full input tax credit on an acquisition associated with the reimbursement or indemnity unless it demonstrates otherwise before the date the reimbursement or indemnity is made.
- (b) This clause will not merge on completion and will survive the termination of this agreement by any party.
- (c) Terms used in this clause that are not otherwise defined in this agreement have the meanings given to them in the GST Act.

16. THE TRUST COMPANY (PTAL) LIMITED'S LIMITATION OF LIABILITY

- 16.1 The Mortgagee enters into this agreement only in its capacity as custodian of the Fund, pursuant to a custody agreement between the Mortgagee and the Responsible Entity dated 4 February 1999 (**Custody Agreement**) and in no other capacity.
- 16.2 A liability arising under on in connection with this agreement is limited to and can be enforced against the Mortgagee only to the extent to which it can be satisfied out of property of the Fund out of which the Mortgagee is actually indemnified for the liability. This limitation of the Mortgagee's liability applies despite any other provision of this agreement and extends to all liabilities and obligations of the Mortgagee in any way connected with any representation, warranty, conduct, omission, deed or transaction related to this agreement.
- 16.3 A person other than the Mortgagee may not sue the Mortgagee personally or seek the appointment of a liquidator, administrator, receiver or similar person to the Mortgagee or prove in any liquidation, administration or arrangement of or affecting the Mortgagee.
- 16.4 The provisions of this clause 8 do not apply to any obligation or liability of the Mortgagee to the extent that it is not satisfied because under the Fund's trust deed, the Custody Agreement, or by operation of law there is a reduction in the extent of the Mortgagee's indemnification out of the assets of that Fund, as a result of the Mortgagee's fraud, negligence or wilful default.
- 16.5 Despite any other provision in this agreement, if any obligation otherwise imposed upon the Mortgagee under this agreement is, in the Mortgagee's opinion, inconsistent

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Reference: RXC

with, or beyond the scope of the Mortgagee's obligation or powers under the Custody Agreement, that obligation, to the extent of that inconsistency or to the extent that it is beyond the scope of the Mortgagee's obligations or powers under the Custody Agreement, must be performed by the Fund and not by the Mortgagee.

- 16.6 Any failure by the Mortgagee to perform an obligation which it determines is either inconsistent with or beyond its powers and obligations under the Custody Agreement will not amount to a breach of or default under this agreement.
- 16.7 The Mortgagee's determination as to whether an obligation otherwise imposed upon it under this agreement is inconsistent with or beyond the scope of its obligations and powers under the Custody Agreement is final and binding on all parties.
- 16.8 No attorney or agent appointed in accordance with this agreement or otherwise has authority to act on behalf of the Mortgagee in a way which exposes the Mortgagee to any personal liability and no act or omission of any such person will be considered fraud, negligence or wilful default of the Mortgagee for the purpose of clause 16.4.
- 16.9 A failure by the Mortgagee to comply with, or a breach by the Mortgagee of any of its obligations under this agreement will not be considered to be fraud, negligence or wilful default by the Mortgagee if the relevant failure or breach:
- (a) arose as a result of a breach by a person other than the Mortgagee where the performance of the action (the non-performance of which gave rise to such breach) is a precondition to the Mortgagee performing the said obligation; or
 - (b) was in accordance with a lawful court order or direction or otherwise required by law.
- 16.10 All of the terms, clauses and conditions of this agreement are subject to this clause 8.
- 16.11 The Responsible Entity shall on behalf of the Mortgagee exercise all of the rights, powers, consents, controls and approvals pursuant to or under this agreement and all actions taken by the Responsible Entity shall be deemed to have been authorised by the Mortgagee without any other person dealing with the Responsible Entity being concerned to enquire as to the authority of the Responsible Entity to act on behalf of the Mortgagee in respect of this agreement or any matter or thing arising in relation thereto.

17. RESPONSIBLE ENTITY TO ACT FOR MORTGAGEE

- 17.1 The Manager hereby acknowledges that the Responsible Entity shall on behalf of the Mortgagee exercise all of the rights, powers, consents, controls and approvals pursuant to or under this agreement and all actions taken by the Responsible Entity shall be deemed to have been authorised by the Mortgagee without the Manager or any other person dealing with the Responsible Entity being concerned to enquire as to the authority of the Responsible Entity to act on behalf of the Mortgagee in respect of this agreement of any matter or thing arising in relation thereto.
- 17.2 For the purpose of this agreement:
- (a) all demands upon the Manager shall be made by the Responsible Entity;
 - (b) all documents, notices, consents or approvals to be given to or by the Manager under this agreement shall be given to or by the Responsible Entity;

- (c) all rights conferred upon the Mortgagee under this agreement shall be exercisable by the Responsible Entity; and
- (d) all communications in relation to this agreement or any transaction contemplated by this agreement shall be directed by the Manager to the Responsible Entity.

18. THE RESPONSIBLE ENTITY'S LIMITATION OF LIABILITY

- 18.1 The Responsible Entity enters into this agreement and the other parties to this agreement acknowledge that they are aware that the Responsible Entity enters into this agreement, in its capacity as the Responsible Entity of the Fund, pursuant to the Constitution of the Fund (**the Constitution**) and the other parties to this agreement are aware of the limited scope of the Responsible Entity's obligations and powers under such Fund.
- 18.2 A liability arising under or in connection with this agreement is limited to and can be enforced against the Responsible Entity only to the extent to which it can be satisfied out of the property of the Fund out of which the Responsible Entity is actually indemnified for the particular liability. This limitation of the Responsible Entity's liability applies despite any other provision of this agreement and extends to all liabilities and obligations of the Responsible Entity in any way connected with any representation, warranty, conduct, omission, deed or transaction related to this agreement.
- 18.3 The parties to this agreement other than the Responsible Entity may not sue the Responsible Entity personally or seek the appointment of a liquidator, administrator, Receiver or similar person to the Responsible Entity or prove in any liquidation, administration or arrangement of, or affecting, the Responsible Entity.
- 18.4 The provisions of this clause 18 do not apply to any obligation or liability of the Responsible Entity to the extent that it is not satisfied because under the Fund's Constitution or other constituent documents, or by operation of law, there is a reduction in the extent of the Responsible Entity's indemnification out of the assets of the Fund, as a result of the Responsible Entity's fraud, negligence or wilful default.
- 18.5 Any failure by the Responsible Entity to perform an obligation which it determines is either inconsistent with or beyond its powers and obligations under the Constitution will not amount to a breach of or a default under this agreement. The Responsible Entity's determination as to whether an obligation otherwise imposed upon it under this agreement is inconsistent with or beyond the scope of its obligations and powers under the Constitution is final and binding on all parties.
- 18.6 No attorney, agent, Receiver or receiver and manager appointed in accordance with this agreement and each other deed (if any) or otherwise has authority to act on behalf of the Responsible Entity in a way which exposes the Responsible Entity to any personal liability and no act or omission of any such person will be considered fraud, negligence or wilful default of the Responsible Entity for the purpose of clause 18.4.
- 18.7 A failure by the Responsible Entity to comply with, or a breach by the Responsible Entity of any of its obligations under this agreement and each other deed (if any) will not be considered to be fraud, negligence or wilful default by the Responsible Entity if the relevant failure or breach:

- (a) arose as a result of a breach by a person other than the Responsible Entity where the performance of the action (the non-performance of which gave rise to such breach) is a precondition to the Responsible Entity performing the said obligation; or
- (b) was in accordance with a lawful court order or direction or otherwise required by law.

18.8 All of the terms, clauses and conditions of this agreement are subject to this clause 18.

19. NOTICES

19.1 Notices etc only by authorised signatories

Any notice or communication that must or may be given by a party to this agreement is only given if it is executed by that party or signed by an authorised signatory of that party. A person is an authorised signatory if he or she is a solicitor, director or company secretary of the relevant party, or if he or she is authorised in writing by that party.

19.2 Giving notices

Any notice or communication given to a party under this agreement is only given if it is in writing and sent in one of the following ways:

- (a) delivered or posted to that party at its address and marked for the attention of the relevant department or officer (if any) set out below;
- (b) faxed to that party at its fax number and marked for the attention of the relevant department or officer (if any) set out below.

The Mortgagee

Name:

Address:

Fax number:

Attention:

The Responsible Entity

Address:

Fax number:

Attention:

The Manager

Address:

Fax number:

Attention:

19.3 Change of address or fax number

If a party gives the other party three business days' notice of a change of its address or fax number, any notice or communication is only given by that other party if it is delivered, posted or faxed to the latest address or fax number.

19.4 Time notice is given

Any notice or communication is to be treated as given at the following time:

- (a) if it is delivered, when it is left at the relevant address;
- (b) if it is sent by post, two (or, in the case of a notice or communication posted to another country, nine) business days after it is posted;
- (c) if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number;
- (d) however, if any notice or communication is given, on a day that is not a business day or after 5pm on a business day, in the place of the party to whom it is sent it is to be treated as having been given at the beginning of the next business day.

20. GENERAL

20.1 Assignment

A party may not assign any of its rights or obligations under this agreement without the prior written consent of the other parties.

20.2 Governing law

- (a) This document is governed by the law in force in Queensland.
- (b) Each party submits to the non-exclusive jurisdiction of the courts of Queensland at Brisbane, and any court that may hear appeals from any of those courts, for any proceedings in connection with this document, and waives any right it might have to claim that those courts are an inconvenient forum or to object to the exercise of jurisdiction by those courts on any basis.

20.3 Giving effect to this agreement

Each party must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this agreement.

20.4 Operation of this agreement

- (a) This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this agreement and has no further effect.
- (b) Any provision of this agreement which is illegal, unenforceable or invalid, or partly illegal, unenforceable or invalid is, where possible, to be severed to the extent necessary to make the provision and this agreement legal, enforceable

and valid, unless this would materially change the intended effect of the provision or this agreement.

20.5 Variation

No variation of this agreement will be of any force or effect unless it is in writing and signed by the parties to this agreement.

20.6 Inconsistency with other documents

If this agreement is inconsistent with any other document or agreement between the parties, this agreement prevails to the extent of the inconsistency.

20.7 Counterparts

This agreement may be executed in counterparts and an exchange of electronic or facsimile counterparts will be deemed to be an exchange of the original. Each counterpart taken together will constitute one and the same instrument.

20.8 Attorneys

Each person who executes this agreement on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

Schedule 1

General Information

Commencement Date: 1 July 2011

Borrower: Cameo Estates Lifestyle Villages (Launceston) Pty Ltd ACN 098 955 296

Mortgagor: Cameo Estates Lifestyle Villages (Launceston) Pty Ltd ACN 098 955 296

Mortgagor: Retirement Housing Services (Launceston) Pty Ltd ACN 124 149 079

Security and Secured Property

(a) Real property mortgage granted by the Mortgagors to the Mortgagee:

(i) Mortgagor's name

Cameo Estates Lifestyle Villages (Launceston) Pty Ltd ACN 098 955 296

• Date

16 December 2005

• Property address

30 Janefield Street, Mowbray, Launceston Tas 7249

• Property description

Volume 43058 Folio 1

• Registered number

C686753

(b) Fixed and floating charge granted by the Mortgagors to the Mortgagee:

(i) Mortgagor's name

Cameo Estates Lifestyle Villages (Launceston) Pty Ltd ACN 098 955 296

• Date

16 December 2005

• Property description

The property as described in the instrument including the undertaking of the company and all of its property, rights and other assets, whether owned at present or acquired in the future.

- Registered number
1251021
- (ii) Mortgagor's name
Retirement Housing Services (Launceston) Pty Ltd ACN 124 149 079
- Date
17 April 2007
- Property description
The property as described in the instrument including the undertaking of the company and all of its property, rights and other assets, whether owned at present or acquired in the future.
- Registered number
1454968

Service fee (clause 7.1)

1. General Administration:

General Administration fees will be charged on an hourly rate basis (exclusive of GST) as follows:

Director	\$450
Senior Executive	\$350
Senior Consultant	\$350
Fund Manager	\$315
Development / Project Manager	\$315
Loan Manager / Procurement	\$315
Sales and Marketing manager	\$315
Asset manager / development assistant	\$315
Senior accountant – loan recovery	\$285
Senior asset manager / analyst	\$315
Administration Assistant	\$180
Senior paralegal	\$315
Property Services Manager	\$ 70
Maintenance officer	\$ 60
Maintenance officer	\$ 60

2. Development Management Services

Not applicable

3. Marketing and Sales Management

Marketing and Sales Management Fees will be charged at the rate of 2% of gross sales proceeds (inclusive of GST) where the Manager undertakes the sale of assets directly on

behalf of the Mortgagee/ Responsible Entity. In the event the Mortgagee/ Responsible Entity elects to appoint an external real estate agent, the manager would reduce its sales management fee to 1.00% of gross sales proceeds (inclusive of GST) to co-ordinate and oversee the sales and marketing program.

Terms of payment (clause 7.1 and clause 7.2)

The Manager will provide the Mortgagee with a tax invoice at the end of each month for the Services plus any expenses referred to in clause 7.2.

Subject to the terms of this agreement, the Mortgagee will pay the Manager's tax invoices within 7 days of receipt of those tax invoices.

Schedule 2

Services

The Manager will perform all services requested by the Mortgagee related to the Mortgagee's exercise of its powers under the Security including (without limitation):

1. General Administration:

All administrative functions resulting from exercise of the mortgagee's rights to recover the debt (including in its capacity as Mortgagee in Possession) which include but are not limited to:

- Taking possession and control of the secured property;
- Carrying on any business or activity of the mortgagor;
- Meeting all reporting requirements under the Corporations Act as Controller or otherwise;
- Opening separate controller bank accounts, as required, to record controller transactions for each loan;
- Maintaining separate accounting records for each loan to reflect transactions of mortgagee;
- Managing all operational issues (including employment of staff) where the Mortgagee is acting as Managing Controller;
- Arranging for further loan advances (as required) from the mortgagee to meet the costs arising from the recovery action as determined by the mortgagee;
- Recording and payment of all costs associated with holding and dealing with the security property;
- Arranging for adequate insurance of security property;
- Accounting for and reporting on all taxation obligations (including GST, PAYG);
- Receiving and recording all proceeds from realization of security property;
- Accounting to the mortgagee for debt reduction;
- Accounting to the borrower on status of loan recovery;
- Liaising with development & marketing managers as required.

2. Development Management Services

All development management services as may be required to be undertaken in the exercise of the mortgagee's rights to recover the debt owing. Such services may range from conception through to completion of any development including, but not limited to, the following:

- Commercial analysis, risk assessment, market research and developing work-out strategies;
- Prepare feasibility studies and establish a development programme;
- Assemble, co-coordinate and direct project consultant teams;
- Design development to maximise realization and saleability, and ensure efficient delivery;
- Obtain all statutory and town planning approvals, and ensure all development conditions imposed by relevant authorities are complied with;
- Arrange project finance and monitor mechanisms that lead to the repayment of the loan facility;
- Tender, Negotiate and Document Contracts;
- Construction Management (including commissioning, and managing defects works post construction); Regular reporting on actual against budget forecasts, project progress against the critical path and time or cost related implications, monthly progress claims, variations and contractual claims etc.

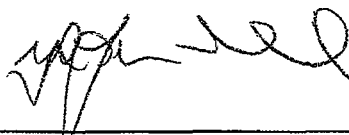
3. Marketing and Sales Management

All Marketing and Sales Management Services as may be required to be undertaken to oversee the marketing and sell-down of any security property as part of the exercise of the mortgagee's rights to recover the debt owing. Such services include, but are not limited to, the following:

- Inspection of properties and arrange for maintenance or other work preparatory to sale;
- Negotiate with tenants where required;
- Obtain quotes for necessary work; assess and appoint contractors; liaise with contractor and assess adequacy of work provided;
- Approve payment of invoices for services provided;
- Obtain quote from valuer and liaise with appointed valuer to provide valuation report; assess adequacy of valuation;
- Obtain submissions from marketing & sales consultants; assess and appoint consultant;
- Approve and finalise marketing material; timetable & targets;
- Monitor results of campaign and report to directors;
- Liaise with the Development team as required on the timing and handover of new product for sale and presales campaigns; and
- Liaise with the legal team on the preparation of sale documentation; consultants contracts; settlement of sales etc.

EXECUTED as an agreement

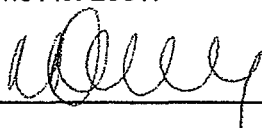
The Trust Company (PTAL) Limited ACN 008 412 913, by its Attorney who states that he/she has had no notice of revocation of the Power of Attorney dated 12 July 2010:



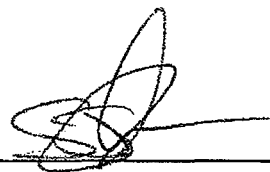
Geoffrey Funnell

State Manager – Corporate and Legal Services (Qld)

LM INVESTMENT MANAGEMENT LIMITED
in accordance with Section 127 of the *Corporations Act 2001*:

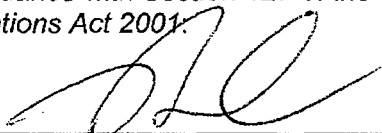


Signature
Lisa Maree Darcy
Director



Signature
Simon Jeremy Ticker
Director

LM ADMINISTRATION PTY LIMITED
in accordance with Section 127 of the *Corporations Act 2001*:



Peter Charles Drake
Sole Director