

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

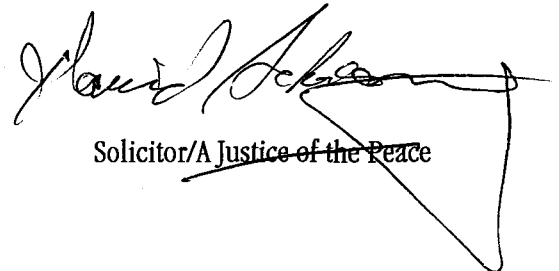
Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE  
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089  
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT  
2001

CERTIFICATE OF EXHIBIT  
Volume 4 of 4

Bound and marked "DW-63" to "DW-73" is a bundle of exhibits to the Affidavit of DAVID WHYTE sworn  
this 29<sup>th</sup> day of May 2017



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:  
Form 47, R.435

Filed on behalf of the Respondent,  
Mr-David Whyte

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TUCKER & COWEN  
Solicitors  
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SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
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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  
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INDEX OF EXHIBITS TO VOLUME 4 OF 4

Exhibit	Description	Date	Page No.
DW-63	Claim and Statement of Claim Supreme Court proceeding no.: 13534/16	23.12.2016	656 – 672
DW-64	Third Further Amended Statement of Claim in proceeding no.: 8032/14	19.04.2016	673 – 712
DW-65	Third Further Amended Statement of Claim in proceeding no.: 8034/14	19.04.2016	713 – 746
DW-66	Claim and Statement of Claim in proceeding no.: 12716/15	16.12.2015	747 – 800
DW-67	Email from Glenn O’Kearney of FTI Consulting to Murray Daniel	23.07.2015	801 – 804
DW-68	Email from Glenn O’Kearney of FTI Consulting to Murray Daniel	14.01.2016	805 – 810
DW-69	Email from Glenn O’Kearney of FTI Consulting to David Whyte	27.05.2016	811 – 815

DW-70	List of Fund Creditors (page 534 of exhibit JRP-1) and a Creditor Listing (pages 536 to 545 of exhibit JRP-1)	31.07.2013	816 – 826
DW-71	Summary of costs incurred by the Applicants in the period since the appointment of administrators to LMIM	Undated	827
DW-72	Letter from Tucker & Cowen to Russells Lawyers	05.04.2017	828 – 829
DW-73	Email from Ashley Tiplady of Russells to David Schwarz of Tucker & Cowen	07.04.2017	830 – 831

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER:

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

AND

First Defendant: **LM INVESTMENTS MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED)**

AND

Second Defendant: **TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383 679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE FIRST MORTGAGE INCOME FUND ARSN 099 857 511**

AND

Third Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED)**

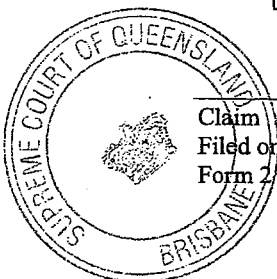
AND

Fourth Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461**

**CLAIM**

The plaintiff claims:

1. A declaration that the Plaintiff is entitled to withhold from distributions or payments otherwise payable to the Defendants as Class B unitholders in the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) (FMIF) the sum of \$55,059,318.12 plus interest.



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Tel No.: 07 3231 1666  
Fax No: 07 3229 5850  
SCZ:JSO:201413563

2. In the alternative to paragraph 1, declarations that the Plaintiff:
  - (a) is entitled to withhold from distributions or payments otherwise payable to the First Defendant as a Class B unitholder in the FMIF the sum of \$40,583,109.06, plus interest;
  - (b) is entitled to withhold from distributions or payments otherwise payable to the Second Defendant as a Class B unitholder in the FMIF the sum of \$9,432,090.76, plus interest; and
  - (c) is entitled to withhold from distributions or payments otherwise payable to the Third Defendant as a Class B unitholder in the FMIF the sum of \$5,044,118.30, plus interest.
3. Further and in the alternative, declarations that:
  - (a) the Fourth Defendant is liable to compensate the Plaintiff for loss and damage in the amount of \$55,059,318.12 plus interest; and
  - (b) the Plaintiff is entitled to exercise or be subrogated to the Fourth Defendant's right to an indemnity from the assets of each of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (**CPAIF**), the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (**WFMIF**) and the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (**ICPAIF**) in satisfaction of that liability, in the following proportions:
    - (i) from the assets of the CPAIF, \$40,583,109.06 plus interest;
    - (ii) from the assets of the WFMIF, \$9,432,090.76 plus interest; and
    - (iii) from the assets of the ICPAIF, \$5,044,118.30 plus interest.
4. A declaration that each cancellation of Class B units referred to in paragraph 34(c) of the Statement of Claim is void ab initio.
5. Interest.
6. Costs.
7. Such further or other order as this Honourable Court sees fit.

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on 23 December 2016:

Registrar:



To the defendants:

TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: 415 George Street, Brisbane Qld 4000

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

If you object that these proceedings have not been commenced in the correct district of the Court, that objection must be included in your Notice of Intention to Defend.

PARTICULARS OF THE PLAINTIFF:

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

Plaintiff's residential  
or business address: c/- David Whyte, BDO  
Level 10  
12 Creek Street  
BRISBANE QLD 4000

Plaintiff's solicitors name:  
and firm name: Scott Couper  
Gadens Lawyers

Solicitor's business address: Level 11  
111 Eagle Street  
BRISBANE QLD 4000

Address for service: Level 11  
111 Eagle Street  
BRISBANE QLD 4000

Telephone: 07 3231 1666  
Fax: 07 3229 5850

Signed:



Description:

Solicitor for the plaintiff

Dated:

23 December 2016

Claim is to be served on:

The First Defendant, Second Defendant, Third  
Defendant and Fourth Defendant

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER:

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

First Defendant: **LM INVESTMENT MANAGEMENT LIMITED  
(RECEIVERS AND MANAGERS APPOINTED) (IN  
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE  
ENTITY OF THE LM CURRENCY PROTECTED  
AUSTRALIAN INCOME FUND ARSN 110 247 875  
(RECEIVER APPOINTED)**  
AND

Second Defendant: **TRILOGY FUNDS MANAGEMENT LIMITED ACN 080  
383 679 AS RESPONSIBLE ENTITY OF THE LM  
WHOLESALE FIRST MORTGAGE INCOME FUND  
ARSN 099 857 511**  
AND

Third Defendant: **LM INVESTMENT MANAGEMENT LIMITED  
(RECEIVERS AND MANAGERS APPOINTED) (IN  
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE  
ENTITY OF THE LM INSTITUTIONAL CURRENCY  
PROTECTED AUSTRALIAN INCOME FUND ARSN 122  
052 868 (RECEIVER APPOINTED)**  
AND

Fourth Defendant: **LM INVESTMENT MANAGEMENT LIMITED  
(RECEIVERS AND MANAGERS APPOINTED) (IN  
LIQUIDATION) ACN 077 208 461**

**STATEMENT OF CLAIM**

This claim in this proceeding is made in reliance on the following facts:

**Parties**

1. **LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ACN 077 208 461 ("LMIM"):**

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STATEMENT OF CLAIM  
Filed on Behalf of the Plaintiff  
Form 16, Version 2  
Uniform Civil Procedure Rules 1999  
Rules 22, 146

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BRISBANE QLD 4000  
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SZC/ISO:201619858

- (a) is and was at all material times a company duly incorporated according to law;
  - (b) is and was at all material times the responsible entity ("**RE**") of the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) ("**FMIF**"), a registered managed investment scheme under the *Corporations Act* 2001 ("**the Act**");
  - (c) was placed into voluntary administration on 19 March 2013; and
  - (d) was placed into liquidation on 1 August 2013, and John Richard Park and Ginette Dawn Muller of FTI Consulting were appointed as its joint and several liquidators.
2. Pursuant to Orders of Dalton J dated 21 August 2013 ("**the Orders**"), LMIM was directed to wind up the FMIF, subject to, inter alia, the appointment of Mr David Whyte referred in paragraph 3 below.
3. Pursuant to the Orders, Mr David Whyte:
- (a) was appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
  - (b) was appointed pursuant to s 601NF(2) of the Act as receiver of the property of the FMIF;
  - (c) has, in relation to the property of the FMIF, the powers set out in s 420 of the Act;
  - (d) is authorised to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of its Constitution; and
  - (e) is entitled to bring and brings these proceedings in the name of LMIM as RE of the FMIF.

#### The Defendants

4. LMIM:
- (a) is and was at all material times the RE of the LM Currency Protected Australian Income Fund ARSN 110 247 875 ("**CPAIF**");
  - (b) was at all material times until 16 November 2012 the RE of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("**WFMIF**"); and
  - (c) is and was at all material times the RE of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("**ICPAIF**"),
- (together, known as the "**Feeder Funds**").
5. At all material times each of the funds constituting the Feeder Funds was a registered managed investment scheme under the Act.



6. On 16 November 2012, the RE of the WFMIF changed from LMIM to Trilogy Funds Management Limited (**Trilogy**), and thereby and pursuant to s.601FS of the Act the rights, obligations and liabilities of LMIM in relation to the WFMIF become rights, obligations and liabilities of Trilogy, except for:
  - (a) any right of LMIM to be paid fees for the performance of its functions before it ceased to be the RE of the WFMIF; and
  - (b) any right of LMIM to be indemnified for expenses it incurred before it ceased to be the RE of the WFMIF; and
  - (c) any right, obligation or liability that LMIM had as a member of the WFMIF; and
  - (d) any liability for which LMIM could not have been indemnified out of the property of the WFMIF if it had remained the RE of the WFMIF.
7. At all material times from 16 November 2012, the RE of the WFMIF was Trilogy.
8. On 18 October 2013, LMIM determined to wind up the CPAIF under s.601NC of the Act.
9. On 18 October 2013, LMIM determined to wind up the ICPAIF under s.601NC of the Act.
10. On 16 November 2015, Gayle Dickerson and Said Jahani of Grant Thornton were appointed by Custom House Currency Exchange (Australia) Pty Ltd ("**Custom House**") as joint and several receivers and managers of LMIM in its capacity as RE of the CPAIF and the ICPAIF pursuant to security interests registered on the Personal Property Securities Register in favour of Custom House.

#### **Governance of the FMIF**

11. At all material times, pursuant to section 601FC(2) of the Act, LMIM held the property of the FMIF on trust for its members.

#### **Particulars.**

- (a) LMIM held assets as trustee for the members of the FMIF;
  - (b) LMIM, by its agent, held assets as trustee for the members of the FMIF;
  - (c) LMIM held rights and interests in the property of the FMIF as trustee for the members of the FMIF.
12. The terms of the trust on which LMIM held the assets of the FMIF were those contained in, *inter alia*:
  - (a) the Product Disclosure Statement for the FMIF as it was from time to time;
  - (b) the Constitution of the FMIF;

- (c) the Act, to the extent to which it applied the obligations of an RE of a managed investment fund, including the obligations set out in paragraphs 15 and 25 below.
13. At all material times, and pursuant to section 601FB(1) of the Act, the FMIF was governed by a Constitution (hereinafter, the “**Constitution**”), which relevantly provided to the following effect:
- (a) by clause 1.1:
    - (i) the “Responsible Entity”, or “RE” means the company named in ASIC’s records as the responsible entity of the Scheme and referred to in this document as the RE who is also the Trustee of the Scheme;
    - (ii) the “Scheme” means the FMIF;
    - (iii) “Scheme Property” means assets of the Scheme;
  - (b) by clauses 2.1 and 2.2, the RE is trustee of the Scheme and holds the property of the Scheme on trust for members of the Scheme;
  - (c) by clause 2.3, the RE has appointed The Trust Company (PTAL) Limited ACN 008 412 913 (formerly Permanent Trustee Australia Limited) (“**PTAL**”) as agent to hold the Scheme Property on behalf of the RE;
  - (d) by clause 3.1, the beneficial interest in the Scheme Property is divided into Units and, unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Members under the Constitution;
  - (e) by clause 3.2, different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion and, if the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units.
14. PTAL was at all material times the custodian of the assets of the FMIF, pursuant to the terms of a Custody Agreement between PTAL and LMIM dated 4 February 1999 (as amended from time to time) (“**Custody Agreement**”).
15. At all material times, LMIM was obliged as RE and as trustee of the FMIF:
- (a) to act in the best interests of the members and, if there is a conflict between the members’ interests and its own interests, give priority to the members’ interests;
  - (b) to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly;

- (c) to ensure that all payments out of the property of the FMIF are made in accordance with its Constitution and the Act.

**Particulars**

- (i) LMIM was so obliged pursuant to section 601FC(1)(c), (d) and (k) of the Act, and pursuant to the general law of trusts.

Obligations of the RE of the FMIF upon the winding up of the FMIF

- 16. By section 601NE of the Act, and in the premises of paragraph 2 above, LMIM as RE of the FMIF is obliged to ensure that the FMIF is wound up in accordance with the Constitution and the Orders.
- 17. At all material times, the Constitution relevantly provided by clause 16.7 to the effect that, "[s]ubject to the provisions of this clause 16 upon winding up of the Scheme the RE must:
  - (a) realise the assets of the Scheme Property;
  - (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
  - (c) subject to any special right or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4; ..."

**Particulars.**

- (i) At all material times, the above terms were contained in the Replacement Constitution of the FMIF dated 10 April 2008.
- 18. Further, the Constitution also included the following terms expressly by reference, or by necessary implication:
    - (a) that the administration of the FMIF, including its winding up, is to be carried out pursuant to the principles of the law of trusts, except where those principles are inconsistent with the provisions of the Act concerning the obligations of an RE of a managed investment fund or the express terms of the Constitution;
    - (b) that LMIM, by reference to those principles, may not assert any beneficial interest in the property of the FMIF as a holder of Class B Units in the FMIF until it has satisfied its obligation as RE and trustee of the FMIF to make good to the FMIF any breaches of trust for which it is responsible;
    - (c) that, by reference to those principles, and in relation to any Unitholder who is liable to the FMIF:
      - (i) that Unitholder cannot share in the FMIF without first contributing to the FMIF by satisfying its liability to the FMIF; and

- (ii) that Unitholder's obligation to contribute to the FMIF is treated as being in satisfaction of its right to share in the income or assets of the FMIF to the extent of the Unitholder's obligation;
- (d) that, by reference to those principles, where LMIM as RE of the FMIF has made an overpayment or wrong payment to any Unitholder, LMIM is entitled to recoup any such overpayment or wrong payment from any capital or income remaining in, or coming into LMIM's hands, to which the overpaid or wrongly paid Unitholder would otherwise be entitled.

#### **Particulars**

- (i) The pleaded terms are incorporated into the Constitution expressly by the recognition in clause 2 of the Constitution that LMIM was the trustee of the FMIF for the members of the FMIF.
  - (ii) In the alternative, the pleaded terms are to be implied in fact as being clear, obvious (in light of the law of trusts), reasonable and equitable, necessary to give business efficacy to the Constitution, and not inconsistent with any express term of the Constitution.
19. Further and in the alternative the obligations and restrictions on LMIM referred to in sub-paragraphs (a) to (d) of paragraph 18 were imposed on LMIM in Equity.
  20. As at 16 November 2012 when Trilogy became the RE of the WFMIF, the rights of Trilogy as RE of the WFMIF and in that capacity as a Class B unitholder in the FMIF were thereafter qualified and limited by reference to the principles referred to in paragraphs 18 and 19 above, insofar as they had applied to LMIM immediately before it ceased to be the RE of the WFMIF.

#### **Unit holdings**

21. At all material times, there were three different classes of issued Units in the FMIF, as follows:
  - (a) Class A units, which were issued to ordinary unitholders of the FMIF;
  - (b) Class B units, all of which were issued to LMIM, apart from those held by Trilogy after 16 November 2012 as RE for the WFMIF;
  - (c) Class C units, which were issued to unitholders of the FMIF who had invested in foreign currencies.
22. LMIM held each of its Class B units in the FMIF on behalf of one of the CPAIF, the ICPAIF or, before it was replaced by Trilogy as RE of the WFMIF, the WFMIF.
23. On and after 16 November 2012, Trilogy held all of its Class B units in the FMIF on behalf of the WFMIF.

## **Redemptions**

24. Pursuant to s.601KA of the Act, the Constitution of the FMIF was entitled to make provision for members to withdraw from the FMIF:
- (a) while the FMIF is liquid, as defined in s.601GA(4) of the Act; or
  - (b) while the FMIF is not liquid, but only in accordance with the provisions of Part 5C.6 of the Act.
25. Pursuant to s.601KA(3) of the Act, the RE was not permitted to allow a member to withdraw from the FMIF:
- (a) if the FMIF is liquid – otherwise than in accordance with the Constitution; or
  - (b) if the FMIF is not liquid – otherwise than in accordance with the Constitution and ss.601KB to 601KE of the Act.
26. Pursuant to s.601KA(4) of the Act, the FMIF was liquid if liquid assets account for at least 80% of the value of the property of the FMIF.

### **Particulars.**

- (a) Pursuant to s.601KA(5) of the Act, the following were liquid assets unless it is proved that LMIM as RE of the FMIF cannot reasonably expect to realise them within the period specified in the Constitution for satisfying withdrawal requests while the FMIF is liquid:
    - (i) money in an account or on deposit with a bank;
    - (ii) bank accepted bills;
    - (iii) marketable securities (as defined in section 9);
    - (iv) property of a prescribed kind.
  - (b) Pursuant to s.601KA(6) of the Act, any other property was a liquid asset if LMIM as RE of the FMIF reasonably expected that the property can be realised for its market value within the period specified in the Constitution for satisfying withdrawal requests while the FMIF is liquid.
27. The Constitution made no provision for members to withdraw from the FMIF while the FMIF was not liquid in accordance with the provisions of Part 5C.6 of the Act.
28. The Constitution made provision for members to withdraw from the FMIF while the FMIF was liquid in terms to the following effect:
- (a) by clause 7.1, while the Scheme was liquid as defined in s.601KA(4) of the Act, any Member may request that some or all of their Units be redeemed by giving the RE a Withdrawal Notice by the start of or within the relevant Withdrawal Notice Period (as required by the relevant definition of Withdrawal Notice);

- (b) by clause 7.2(a), the RE must, subject to clause 7.2(b), redeem Units the subject of a request made by any Member under clause 7.1 out of the Scheme Property for the Withdrawal Price (being the Net Fund Value divided by the total number of Units issued) within 365 days or 180 days (as provided therein), or within a shorter period in its absolute discretion (the “**Withdrawal Offer**”);
- (c) by clause 7.2(b), the RE may suspend the Withdrawal Offer as detailed in clause 7.2(a) for such periods as it determines where:
  - (i) the Scheme’s cash reserves fall and remain below five per cent for ten consecutive days; or
  - (ii) if in any period of 90 days, the RE receives valid net Withdrawal Notices equal to 10 per cent or more of the Scheme’s issued Units and, during the period of 10 consecutive days falling within the 90 day period, the Scheme’s cash reserves are less than ten per cent of the total assets; or
  - (iii) it is not satisfied that sufficient cash reserves are available to pay the Withdrawal Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or
  - (iv) any other event or circumstance arises which the RE considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme;
- (d) by clause 7.3(b), a Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

29. At all material times from 14 April 2009, LMIM as RE of the FMIF was the recipient of relief from ASIC under s.601QA(1) of the Act (“**ASIC Relief**”) by which it was:

- (a) exempted from s.601FC(1)(d) of the Act in relation to allowing a member of the FMIF to withdraw in accordance with s.601KEA of the Act as inserted by the ASIC Relief;
- (b) conferred (by s.601KEA thereby inserted) with the power to allow a member to withdraw from the FMIF in accordance with the Constitution as inserted by the ASIC Relief if that member was experiencing circumstances of hardship as defined by the ASIC Relief, which included the power to allow LMIM to withdraw in accordance with the Constitution insofar as a member of one of the Feeder Funds was experiencing circumstances of hardship as so defined, subject to the limits defined by the ASIC Relief;
- (c) exempted from s.601FC(3) of the Act to the extent of the power thereby conferred.

#### **Particulars**

The ASIC Relief was granted by the following instruments:

- (i) ASIC Instrument 09-00278 dated 14 April 2009; and

(ii) ASIC Instrument 09-00963 dated 11 November 2009.

30. From time to time after 14 April 2009, LMIM as RE of the FMIF permitted certain redemptions in accordance with the ASIC Relief (hereinafter referred to as “**Genuine Hardship Redemptions**”).
31. On or about 11 May 2009, LMIM as RE of the FMIF suspended the Withdrawal Offer under clause 7.2(b) of the Constitution, purportedly with the exception of those approved under hardship provisions, and of those requested by itself as a Class B unitholder for distributions to investors in the Feeder Funds or for the expenses of the Feeder Funds, as the cash flow of the FMIF allowed.

#### Particulars

- (a) LMIM stated in its Second Supplementary Product Disclosure Statement dated 3 March 2009 that “... *payment of investor withdrawals is likely to take 365 days. The Manager may also suspend withdrawals for such periods as it determines*”.
- (b) LMIM stated in its Third Supplementary Product Disclosure Statement dated 30 October 2009 that “*In order to protect all investments, the Manager has, as it determines, suspended withdrawals, with the exception of those approved under hardship provisions and feeder fund payments for investor distributions and fund expenses, as the cash flow allows*”.
32. In the premises, the suspension of the Withdrawal Offer subject to the exceptions referred to in paragraph 31 above was not authorised by the Constitution.
33. At no time after 11 May 2009, did LMIM as RE of the FMIF:
- (a) lift the suspension referred to in paragraph 31 above; or
- (b) re-instate the Withdrawal Offer.
34. Despite the suspension of the Withdrawal Offer between 11 May 2009 and 31 January 2013:
- (a) LMIM as a Class B unitholder made requests to redeem Class B units, which were not Genuine Hardship Redemptions;
- (b) LMIM as RE of the FMIF granted such requests, and in satisfaction thereof:
- (i) caused to be paid amounts from the assets of the FMIF; or
- (ii) recognised a payment of an amount or payments of amounts from the assets of the FMIF which it had previously caused to be paid for the benefit of a Feeder Fund;

#### Particulars of (i) and (ii)

- (1) the amounts paid or recognised by LMIM in respect of the redemptions of the Class B units equalled the value of the units the

subject of that request, calculated as the Net Fund Value divided by the total number of units issued in the FMIF at that time, multiplied by the number of units the subject of the request;

- (2) the amounts were paid to various entities at the direction of LMIM as a Class B unit holder;
  - (3) LMIM as RE of the FMIF satisfied requests in respect of 45,240,212.36 units held by LMIM as RE of the CPAIF for an aggregate value of \$42,510,704.06;
  - (4) LMIM as RE of the FMIF satisfied requests in respect of 11,271,272.09 units held by LMIM as RE of the WFMIF for an aggregate value of \$9,796,090.76, the latest of which was satisfied on 15 November 2012;
  - (5) LMIM as RE of the FMIF satisfied requests in respect of 5,335,882.97 units held by LMIM as RE of the ICPAIF for an aggregate value of \$5,069,118.30;
  - (6) The amounts referred to in sub-paragraphs (2) to (5) hereof include amounts which were reported by LMIM to ASIC as Genuine Hardship Redemptions in respect of the CPAIF of \$1,927,595, in respect of the WFMIF of \$364,000 and in respect of the ICPAIF of \$25,000;
  - (7) The amount referred to in sub-paragraphs (3) hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the CPAIF, and were recognised as being in satisfaction of withdrawal requests in an aggregate amount of approximately \$12,191,153.59 across the financial years ended 30 June 2010 and 30 June 2011;
  - (8) The amount referred to in sub-paragraphs (4) hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the WFMIF, and were recognised as being in satisfaction of withdrawal requests in an aggregate amount of \$67,295.91 across the financial year ended 30 June 2011;
  - (9) The amount referred to in sub-paragraphs (5) hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the ICPAIF, and were recognised as being in satisfaction of withdrawal requests in an aggregate amount of \$677,439.07 across the financial year ended 30 June 2011.
- (c) LMIM then purported to cancel Class B units to the extent of each such request.



## **Breach**

35. As at 11 May 2009 and thereafter until it was wound up, around 94% or more of the value of the property of the FMIF comprised its loans and receivables.

### **Particulars**

- (a) The audited accounts for the year ending 30 June 2008, record that at least around 96% of the value of the property of the FMIF comprised its loans and receivables.
  - (b) The audited accounts for the year ending 30 June 2009, record that at least around 96% of the value of the property of the FMIF comprised its loans and receivables.
  - (c) The audited accounts for the year ending 30 June 2010, record that at least around 98% of the value of the property of the FMIF comprised its loans and receivables.
  - (d) The audited accounts for the year ending 30 June 2011, record that at least around 94% of the value of the property of the FMIF comprised its loans and receivables.
  - (e) The audited accounts for the year ending 30 June 2012, record that at least around 97% of the value of the property of the FMIF comprised its loans and receivables.
36. As at 11 May 2009 and at all material times thereafter, LMIM as RE of the FMIF did not have any reasonable basis on which to expect that the loans and receivables of the FMIF could be realised for their market value within 365 days.
37. In the premises of paragraphs 35 and 36 above, on and from at least 11 May 2009 the FMIF was not liquid within the meaning of s.601KA(4) of the Act.
38. In the premises, by approving the withdrawal requests and making or causing to be made the payments referred to in paragraph 34 above while the FMIF was not liquid and while the Withdrawal Offer was suspended, LMIM:
- (a) made payments out of the property of the FMIF which were not authorised by the Constitution or the Act, in that:
    - (i) it approved withdrawal requests from itself of Class B units which were not Genuine Hardship Redemptions, while the FMIF was not liquid;
    - (ii) in the alternative, if the FMIF was liquid at the time any such request was approved, it approved that request without authority to do so under the Constitution;
  - (b) gave priority to its own interests as a holder of Class B units in the FMIF over the interests of the members of the FMIF as a whole;
  - (c) preferred the interests of the members of the Feeder Funds over the interests of the members of the FMIF;
  - (d) failed to treat members who hold interests of different classes, namely Class A and Class B units, fairly; and
  - (e) failed to act in the best interests of the members of the FMIF as a whole.

39. In the premises, LMIM as RE of the FMIF breached the terms of its trust, and the obligations set out in paragraphs 15 and 25 above.
40. In the premises, the FMIF suffered loss or damage by reason of LMIM's breaches and contraventions referred to in paragraph 39 above.

#### **Particulars**

The FMIF suffered loss or damage in the following amounts:

- (a) \$40,583,109.06 referable to redemptions of Class B units held as RE of the CPAIF, plus interest;
- (b) \$9,432,090.76 referable to redemptions of Class B units held as RE of the WFMIF, plus interest;
- (c) \$5,044,118.30 referable to redemptions of Class B units held as RE of the ICPAIF, plus interest.

41. In the premises, LMIM is liable to compensate the FMIF to the extent of the loss or damage referred to in paragraph 40 above.

#### **Particulars**

- (a) LMIM is liable as pleaded both in equity, and pursuant to section 1317H of the Act.

42. Further and in the alternative, LMIM's rights as a Class B unitholder in the FMIF are qualified and limited according to the principles referred to in paragraph 18(a) to (d) above to the extent of its liabilities referred to in paragraphs 40 and 41 above, alternatively so far as they concern the CPAIF and the ICPAIF.
43. As at and from 16 November 2012 when Trilogy became the RE of the WFMIF, Trilogy's rights as a Class B unitholder in the FMIF were and remain qualified and limited according to the principles referred to in paragraphs 18 to 20 above to the extent of the liabilities referred to in paragraphs 40 and 41 above, alternatively so far as they concern the WFMIF.
44. Further and in the alternative, in the premises, each cancellation of Class B units referred to in paragraph 34(c) of this Statement of Claim is void *ab initio*.

#### **Indemnity against the assets of the Feeder Funds**

45. The Constitution of each Feeder Fund conferred on LMIM as RE thereof a right to be indemnified from the assets of that fund on a full indemnity basis, in respect of a matter unless, in respect of that matter, it had acted negligently, fraudulently or in breach of trust, in that capacity.

### Particulars

- (a) Clause 18.3 of the Constitution of the CPAIF, clause 19.1(c) of the Constitution of the WFMIF, and clause 18.3 of the Constitution of the ICPAIF.
46. In acting as pleaded in paragraph 34 above, and in respect of each request for withdrawal of Class B units from the FMIF, LMIM:
- (a) was acting both as the RE of the FMIF and as the RE of a Feeder Fund;
  - (b) conferred a benefit on the Feeder Fund in question;
  - (c) acted in the proper performance of its duties to the Feeder Fund in question;
  - (d) became entitled to an indemnity out of the assets of the Feeder Fund in question in respect of its liability for the loss to the FMIF pleaded in paragraphs 40 and 41 above, insofar as that loss relates to each such request; and
  - (e) became entitled to a lien or charge over the assets of the Feeder Fund in question to secure and to the extent of that indemnity.
47. Further and in the alternative to paragraphs 42 and 43 above, LMIM as RE of the FMIF is entitled to exercise or be subrogated to LMIM's right to the indemnity referred to in paragraph 46(d) above, or to enforce the lien or charge referred to in paragraph 46(e) above.

The plaintiff claims the following relief:

1. A declaration that the Plaintiff is entitled to withhold from distributions or payments otherwise payable to the Defendants as Class B unitholders in the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) (FMIF) the sum of \$55,059,318.12 plus interest.
2. In the alternative to paragraph 1, declarations that the Plaintiff:
  - (a) is entitled to withhold from distributions or payments otherwise payable to the First Defendant as a Class B unitholder in FMIF the sum of \$40,583,109.06, plus interest;
  - (b) is entitled to withhold from distributions or payments otherwise payable to the Second Defendant as a Class B unitholder in the FMIF the sum of \$9,432,090.76, plus interest; and
  - (c) is entitled to withhold from distributions or payments otherwise payable to the Third Defendant as a Class B unitholder in the FMIF the sum of \$5,044,118.30, plus interest.
3. Further and in the alternative, declarations that:
  - (a) LMIM is liable to compensate the FMIF for loss and damage in the amount of \$55,059,318.12 plus interest; and

- (b) the Plaintiff is entitled to exercise or be subrogated to LMIM's right to an indemnity from the assets of each of the Feeder Funds in satisfaction of that liability, in the following proportions:
- (i) from the assets of the CPAIF, \$40,583,109.06 plus interest;
  - (ii) from the assets of the WFMIF, \$9,432,090.76 plus interest; and
  - (iii) from the assets of the ICPAIF, \$5,044,118.30 plus interest.
4. A declaration that each cancellation of Class B units referred to in paragraph 34(c) of this Statement of Claim is void ab initio.
5. Interest.
6. Costs.
7. Such further or other order as this Honourable Court sees fit.

Signed: *C. Adant*

Description: Solicitor for the plaintiff

This pleading was settled by Mr Derrington of Queens Counsel with Mr Ananian-Cooper of Counsel.

#### NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane  
NUMBER 8032/14

Plaintiffs

**KORDAMENTHA PTY LTD (ACN 100 169 391)  
AND CALIBRE CAPITAL PTY LTD (ACN 108  
318 985) IN THEIR ITS CAPACITY AS  
TRUSTEES OF THE LM MANAGED  
PERFORMANCE FUND**

AND

First Defendant

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

AND

Second Defendant

**DAVID WHYTE IN HIS CAPACITY AS COURT  
APPOINTED RECEIVER OF THE PROPERTY  
OF THE LM FIRST MORTGAGE INCOME  
FUND**

Filed in Brisbane registry on 19 April 2016

**THIRD FURTHER AMENDED STATEMENT OF CLAIM**

This claim in this proceeding is made in reliance on the following facts:

1. The plaintiffs:

- (a) ~~are companies~~ is a company duly incorporated according to law;
- (b) ~~are~~ is capable of suing in ~~their~~ its corporate names; and

**THIRD FURTHER AMENDED STATEMENT OF  
CLAIM**

Filed on behalf of the Plaintiffs

Form 16 Rules 22 and 146

ME\_128236339\_6 (W2007)

MINTER ELLISON  
Waterfront Place  
1 Eagle Street  
BRISBANE QLD 4000  
DX 102 BRISBANE  
Telephone (07) 3119 6000  
Facsimile (07) 3119 1000  
Reference MJV 40-7747729

- (c) in the premises pleaded in paragraphs 4 to 10 below, ~~have~~ has been the trustees of a trust named the LM Managed Performance Fund since 12 April 2013.

2. The first defendant:

- (a) is a company duly incorporated according to law;
- (b) is capable of being sued in its corporate name;
- (c) since at least 1999, has carried on business as a professional trustee for reward, in which capacity it created and managed investment schemes;
- (d) in the premises pleaded in paragraphs 4 to 10 below, was the trustee of the MPF from in or about December 2001 until 12 April 2013; and
- (e) in the premises pleaded in paragraphs 11 and 12 below, has been the responsible entity of a registered managed investment scheme named the LM First Mortgage Income Fund (“**the FMIF**”) since 28 September 1999.
- (f) in the premises pleaded in paragraphs 14 and 16 below, has been the responsible entity of a registered managed investment scheme named the LM Australian Income Fund – Currency Protected (“**the AIFCP**”) since 14 October 2008.

2A The second defendant (“**Receiver**”):

- (a) is a partner of BDO Business Recovery & Insolvency (Old) Pty Ltd;
- (b) on 21 August 2013, was appointed by order of the Supreme Court of Queensland as the receiver of the property of the FMIF.

2B The Receiver controls cash at bank belonging to the first defendant ATF the FMIF in the amount of at least \$58.7 million (plus future accretions) (“**Fund**”).

~~2C The FMIF has approximately 4,500 unitholders (“**FMIF Unitholders**”).~~

3. In this pleading:

- (a) the first defendant, when acting in its capacity as the trustee of the MPF, is referred to as “the first defendant ATF the MPF”;
- (b) the first defendant, when acting in its capacity as the responsible entity of the FMIF, is referred to as “the first defendant ATF the FMIF”;
- (c) the first defendant, when acting in its capacity as the responsible entity of the AIFCP, is referred to as “the first defendant ATF the AIFCP.”

**The LM Managed Performance Fund**

4. By a trust deed dated December 2001 (“**the First Trust Deed**”), the first defendant:

- (a) established a unit trust named The LM Managed Performance Fund (“**the MPF**”); and
- (b) became trustee of the MPF.

5. By a Deed of Variation dated 11 November 2002 (“**the Second Trust Deed**”), the first defendant ATF the MPF deleted all parts of the First Trust Deed other than the parties, and replaced it with the terms set out in the Second Trust Deed (Recital B of the Second Trust Deed).

6. By a Deed of Variation dated 25 November 2009 (“**the Third Trust Deed**”), the first defendant ATF the MPF deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced it with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed).

7. Relevantly, the following were terms of the First, Second and Third Trust Deeds:

- (a) the first defendant was the Manager (clause 1.1 of each Deed);
- (b) the Constitution was the Trust Deed including any Schedule, Annexure or Amendments to it (clause 1.1 of each Deed);

- (c) the Scheme was the trust created by the Deed to be known as the LM Managed Performance Fund (clause 1.1 of each Deed);
- (d) the assets of the Scheme were:
  - (i) the Scheme Fund (clauses 1.1 of the First and Second Trust Deeds); subsequently
  - (ii) the Scheme Property (clause 1.1 of the Third Trust Deed);
- (e) the Manager agreed to act as trustee of the Scheme (clause 2.1 of each Deed);
- (f) the Manager declared that it held:
  - (i) the Scheme Fund (clauses 2.2 of the First and Second Deeds); subsequently
  - (ii) the Scheme Property (clause 2.2 of the Third Trust Deed);
 on trust for the Members;
- (g) the name of the Scheme was:
  - (i) The LM Managed Performance Fund (clause 2.3 of the First Trust Deed); subsequently
  - (ii) The LM Managed Performance Fund or any other name that the Manager may determine from time to time (clauses 2.3 of the Second and Third Trust Deeds);
- (h) the beneficial interest in the Scheme Fund would be divided into Units (clause 3.1 of each Deed);
- (i) the Constitution might be modified or repealed or replaced with a new Constitution by the Manager if the Manager reasonably considered that the change would not adversely affect Members' rights or was deemed necessary to conduct the affairs of the Scheme (clauses 24.1 of the First and Third Trust Deeds; clause 18.1 of the Second Trust Deed);



- (j) the Manager must resign if (being a corporation) it became an externally-administered body corporate as defined in the *Corporations Act 2001* (clauses 23.1(b)(ii) of the First and Third Trust Deeds; clause 17.1(b)(ii) of the Second Trust Deed).
- 8. On or about 19 March 2013, John Richard Park and Ginette Dawn Muller were appointed voluntary administrators of the first defendant.
- 9. In the premises, pursuant to clause 23.1(b)(ii) of the Third Trust Deed the first defendant was required to resign as Manager of the MPF.
- 10. By order of this Honourable Court dated 12 April 2013:
  - (a) the first defendant was removed as trustee of the MPF; and
  - (b) ~~the plaintiffs~~ KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) were appointed trustees of the MPF.
- 10A. On 5 January 2015 Calibre Capital Limited (ACN 108 318 985) resigned as trustee of the MPF.

#### **The LM First Mortgage Income Fund**

- 11. On or about 28 September 1999 the first defendant established the FMIF.
- 12. Since on or about 28 September 1999:
  - (a) the FMIF has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act 2001* (Cth).
  - (b) the first defendant has been, and remains, the Responsible Entity of the FMIF;
  - (c) the first defendant has held, and continues to hold, the property of the FMIF on trust for its members, pursuant to s.601FC of the *Corporations Act 2001* (Cth).

13. Pursuant to the terms of a Custody Agreement dated 4 February 1999 between the first defendant and Permanent Trustee Australia Ltd ACN 008 412 913 (later re-named The Trust Company (PTAL) Ltd) (“PTAL”):
  - (a) PTAL agreed to custodially hold the Portfolio and Title Documents as agent for the first defendant in relation to (inter alia) the FMIF (clause 2.1 and Schedule 2);
  - (b) the first defendant was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on the first defendant’s Instructions in relation to any assets of the Portfolio (clause 4.1);
  - (c) the plaintiffs will rely upon the full terms of the Custody Agreement at the hearing of this proceeding.

**LM Australian Income Fund – Currency Protected**

14. On or about 14 October 2008 the first defendant established the AIFCP.
15. The first defendant commenced operating the AIFCP on or about 25 November 2008.
16. Since on or about 14 October 2008, or alternatively 25 November 2008:
  - (a) the AIFCP has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act 2001* (Cth).
  - (b) the first defendant has been, and remains, the Responsible Entity of the AIFCP;
  - (c) the first defendant has held, and continues to hold, the property of the AIFCP on trust for its members, pursuant to s.601FC of the *Corporations Act 2001* (Cth).

**Duties owed by the first defendant ATF the MPF**

17. At all material times the first defendant ATF the MPF owed a fiduciary duty to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty.
18. At all material times the first defendant ATF the MPF owed a duty in equity to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.
19. At all material times the first defendant ATF the MPF owed duties to the beneficiaries of the MPF:
  - (a) pursuant to s.22 of the *Trusts Act* 1973 (Qld) ("**the Trusts Act**"), to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment; and
  - (b) pursuant to s.24 of the *Trusts Act*, to take into account, inter alia, the following matters, when exercising a power of investment:
    - (i) the risk of capital or income loss or depreciation (s.24(e));
    - (ii) the likely income return and the timing of income return (s.24(g));
    - (iii) the length of the term of the proposed investment (s.24(h));
    - (iv) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment (s.24(j)); and
    - (v) the cost (including commissions, fees, charges and duties payable) of making the proposed investment (s.24(n)).

**The FMIF's first loan to KPG 13<sup>th</sup> Beach Stage 1 Pty Ltd**

20. On or about 26 November 2003:
  - (a) the first defendant ATF the FMIF;

(b) KPG 13<sup>th</sup> Beach Stage 1 Pty Ltd ACN 105 265 923 (“**KPG**”) as Borrower; and

(c) PTAL as Lender/Custodian;

entered into a Loan Agreement (“**the First KPG Loan**”).

21. Relevantly, the following were terms of the First KPG Loan:

(a) the Lender (as Custodian for the Responsible Entity) had, at the Borrower’s request, agreed to lend and advance to the Borrower the Loan Amount on the conditions, among others, that the Borrower execute the Agreement (page 2);

(b) the Loan Amount was \$5,933,000.00 (item 4, schedule);

(c) the date for repayment was 28 May 2005, being 18 months from the date of the advance (item 5, schedule);

(d) the following securities were taken as security for the performance of KPG’s obligations under the First KPG Loan (item 9, schedule):

(i) registered mortgage AC626247K from KPG to PTAL over property situated at S10 and S11 at 13th Beach Golf Links Estate, Barwon Heads in the State of Victoria, more particularly described as all that land contained in lot S10 and lot S11 in plan of subdivision 443550R, Certificates of Title volume 10686 folio 369 and volume 10686 folio 370 (“**Lots S10 and S11**”);

(ii) a Deed of Guarantee and Indemnity given by David Robert Kirkham (“**Kirkham**”), Tristaleigh Pty Ltd ACN 086 855 898 (“**Tristaleigh**”), Jamieson Woods Pty Ltd ACN 088 725 642 (“**Jamieson Woods**”) and Turnstile Pty Ltd ACN 059 943 887 (“**Turnstile**”) to PTAL (as Lender);

(iii) a fixed and floating charge given by KPG as Mortgagor to PTAL as Mortgagee, registered with the Australian Securities and Investment Commission (“**ASIC**”) as registered charge 1003923;

- (iv) a fixed and floating charge given by Tristaleigh as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003927;
- (v) a fixed and floating charge given by Jamieson Woods as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003926;
- (vi) a fixed and floating charge given by Turnstile as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003924;
- (e) the Facility to Security Ratio was defined as the maximum acceptable ratio between the Money Secured and the Principal Security (clause 1.1);
- (f) the Money Secured was defined to include:
  - (i) the Loan Amount;
  - (ii) all moneys deemed to be principal in arrears; and
  - (iii) all money now or hereafter owing or payable to the Lender by the Borrower; and
  - (iv) all advances and further advances that may be given by the Lender to, for, on account of or at the expressed or implied request of the Borrower;

(clause 1.1);
- (g) Lots S10 and S11 were the Principal Security (item 10, schedule);
- (h) the Facility to Security Ratio was 66.67% from time to time, at the discretion of the Lender (item 13, schedule);
- (i) if at any time the Lender determined that the Facility to Security Ratio had been exceeded, the Lender had power to require the Borrower to provide additional security (clause 5.4).

### Variation of the First KPG Loan

22. On a date which the plaintiff is unable to particularise, but which occurred in or about 2004:

- (a) the first defendant ATF the FMIF ~~(in its capacity as Responsible Entity of the FMIF);~~
- (b) KPG as the Borrower;
- (c) PTAL as Lender/Custodian; and
- (d) Kirkham, Tristaleigh, Jamieson Woods and Turnstile as the Guarantor;

entered into a Deed of Variation of the First KPG Loan (**"the Deed of Variation of the First Loan"**).

23. Relevantly, the following were terms of the Deed of Variation:

- (a) the variation to the Principal Security contained in the Deed would be "effective as and from the        day of        200        " (item 6, schedule);
- (b) the Principal Security was defined as the First KPG Loan (item 4, Schedule);
- (c) the First KPG Loan was varied so that the Loan Amount was increased to \$7,108,000.00 (item 6, Schedule);
- (d) the Guarantor consented to the variation of the Principal Security as provided by the Deed of Variation (clause 5).

### The Second KPG Loan

24. On or about 3 March 2004:

- (a) the first defendant ATF the FMIF;
- (b) KPG as Borrower; and

(c) PTAL as Lender/Custodian;

entered into a further Loan Agreement (“**the Second KPG Loan**”).

25. Relevantly, the following were terms of the Second KPG Loan:

- (a) the Lender (as Custodian for the Responsible Entity) had, at the Borrower’s request, agreed to lend and advance to the Borrower the Loan Amount on the conditions, among others, that the Borrower execute the Agreement (page 2);
- (b) the Loan Amount was \$2,415,000.00 (item 4, schedule);
- (c) the date for repayment was 12 September 2005, being 18 months from the date of the advance (item 5, schedule);
- (d) the following securities were taken as security for the performance of KPG’s obligations under the Second KPG Loan (item 9, schedule):
  - (i) registered mortgage AC754113R from KPG to PTAL over property situated at Lot S12 at 13th Beach Golf Links Estate, Barwon Heads in the State of Victoria, more particularly described as all that land contained in lot S12 in plan of subdivision 443550R, Certificate of Title volume 10686 folio 371 (“**Lot S12**”);
  - (ii) a Deed of Guarantee and Indemnity given by Kirkham, Tristaleigh, Jamieson Woods and Turnstile to PTAL (as Lender);
  - (iii) a fixed and floating charge given by KPG as Mortgagor to PTAL as Mortgagee, registered with the Australian Securities and Investment Commission (“**ASIC**”) as registered charge 1003923;
  - (iv) a fixed and floating charge given by Tristaleigh as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003927;

- (v) a fixed and floating charge given by Jamieson Woods as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003926;
- (vi) a fixed and floating charge given by Turnstile as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1003924;
- (e) the Facility to Security Ratio was defined as the maximum acceptable ratio between the Money Secured and the Principal Security (clause 1.1);
- (f) the Money Secured was defined to include:
  - (i) the Loan Amount;
  - (ii) all moneys deemed to be principal in arrears; and
  - (iii) all money now or hereafter owing or payable to the Lender by the Borrower; and
  - (iv) all advances and further advances that may be given by the Lender, to, for, on account of or at the expressed or implied request of the Borrower;
 (clause 1.1);
- (g) Lot S12 was the Principal Security (item 10, schedule);
- (h) the Facility to Security Ratio was up to 66.67% from time to time, at the discretion of the Lender (item 13, schedule);
- (i) if at any time the Lender determined that the Facility to Security Ratio had been exceeded, the Lender had power to require the Borrower to provide additional security (clause 5.4).

#### **Variation of the Second KPG Loan**

26. On a date which the plaintiff is unable to particularise, but which occurred in or about 2004:



- (a) the first defendant ATF the FMIF (~~in its capacity as Responsible Entity of the FMIF~~);
- (b) KPG as the Borrower;
- (c) PTAL as Lender/Custodian; and
- (d) Kirkham, Tristaleigh, Jamieson Woods and Turnstile as the Guarantor;

entered into a Deed of Variation of the Second KPG Loan (“**the Deed of Variation of the Second Loan**”).

27. Relevantly, the following were terms of the Deed of Variation of the Second Loan:

- (a) the variation to the Principal Security contained in the Deed would be “effective as and from the            day of            200            “ (item 6, schedule);
- (b) the Principal Security was defined as the Second KPG Loan (item 4, Schedule);
- (c) the Second KPG Loan was varied so that the Loan Amount was increased to \$2,892,000.00 (item 6, Schedule);
- (d) the Guarantor consented to the variation of the Principal Security as provided by the Deed of Variation (clause 5).

#### **The Priority Deed**

28. On or about 30 May 2005 the following parties entered into a Priority Deed:

- (a) PTAL as the First Mortgagee;
- (b) the first defendant ATF the FMIF ~~as the Responsible Entity for the FMIF~~;
- (c) KPG as the Mortgagor;
- (d) Kathleen Monica Murphy and others as the Second Mortgagee;

- (e) Kathleen Monica Murphy and others as the Third Mortgagee;
- (f) Contract Control Constructions Pty Ltd as the Builder;
- (g) David Robert Kirkham;
- (h) Tristaleigh Pty Ltd;
- (i) Jamieson Woods Pty Ltd; and
- (j) Turnstile Pty Ltd.

29. The recitals to the Priority Deed state:

- A. The First Mortgagee is the custodian for the Responsible Entity;*
- B. The First Mortgagee has at the request of the Mortgagor made available or proposes to make financial accommodation on the First Mortgagee's Securities;*
- C. The Second Mortgagee has at the request of the Mortgagor made available financial accommodation on the Second Mortgagee's Securities;*
- D. The Third Mortgagee has at the request of the Mortgagor made available financial accommodation on the Third Mortgagee's Securities;*
- E. The Builder has been engaged to construct a residential development on the Land pursuant to the Construction Contract;*
- F. Money owing by the Mortgagor to the Builder pursuant to the Construction Contract is secured by the Builder's Caveat;*
- G. The parties have agreed to regulate the priorities between the Securities on the terms set out in this Deed.*

30. "Land" was defined as the Parcel 1 Land and the Parcel 2 Land (clause 1.1(14)); further defined as:

- (a) Parcel 1 Land: Lots S10 and S11 (clause 1.1(19));

- (b) Parcel 2 Land: Lot S12 (clause 1.1(20)).
31. The First Mortgagee's Priority was defined as the First Mortgagee's Principal Amount plus Interest and Enforcement Expenses (Item 4, Schedule).
32. The First Mortgagee's Principal Amount was defined as \$10,000,000.00 (clause 1.1(10));
33. The First Mortgagee's Securities were defined as the securities specified in Item 1 (clause 1.1(11)), which included the securities pleaded in paragraphs 21(d) and 25(d) above;
34. Clause 3 provided (relevantly):
- (a) that PTAL as First Mortgagee had first priority on the First Mortgagee's Securities over the Land, for the amount specified in Item 4 (clause 3.1(1)), that is, \$10,000,000.00 plus interest and enforcement expenses;
  - (b) that PTAL as First Mortgagee had the fourth priority on the First Mortgagee's Securities over the Land, for the balance of the money thereby secured (clause 3.1(5)).

#### **Default under the First and Second KPG Loans**

35. In breach of the terms of the First and Second KPG Loans pleaded in paragraphs 21(c) and 25(c) above, KPG:
- (a) failed to repay the First KPG Loan by 28 May 2005; and
  - (b) failed to repay the Second KPG Loan by 12 September 2005.
36. On 21 November 2006 KPG changed its name to Barly Wood Pty Ltd.
37. On 28 February 2008 PTAL appointed Blair Alexander Pleash of Hall Chadwick managing controller of KPG, pursuant to registered charge 1003923.
38. On 14 August 2008 Mr. Pleash, in his capacity as managing controller of KPG, obtained a valuation report for the land that was previously Lots S10, S11 and S12 from Hymans Asset Management Pty Ltd ("**the Hymans Valuation**").

39. Relevantly, the Hymans Valuation stated that:

- (a) the "date of valuation review" was 14 August 2008;
- (b) the "date of desk review" was 14 August 2008;
- (c) the "instructions" were *"to undertake a desk basis review of the market values on each lot as valued by Fitzroys Pty Ltd dated 6 September 2007 and having regard to a marketing period of 12-18 months"*;
- (d) the valuation dated 6 September 2007 had valued the lots at amounts that totalled \$8,700,000.00;
- (e) the Hymans Valuation valued the lots at amounts totalling \$7,781,000.00;
- (f) Hymans *"owe no duty of care to any third party that becomes aware of this valuation and, without our knowledge, chooses to act or rely on the whole or any part of it"*;
- (g) the valuation:

*"...is current as at the date of valuation only. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property). We do not accept liability for losses arising from such subsequent changes in value. Without limiting the generality of the above, we do not assume any responsibility or accept any liability in circumstances where this valuation is relied upon after the expiration of three (3) months from the date of valuation."*

40. At a time which is unknown to the plaintiffs, but which the plaintiffs believes occurred in 2008:

- (a) the first defendant ATF the FMIF; and/or
  - (b) Mr. Pleash in his capacity as managing controller appointed to KPG;
- conducted a sale campaign for Lots S10, S11 and S12.

41. The sale campaign did not result in a sale of Lots S10, S11 and S12.

Particulars of the sale campaign

- (a) The best particulars the plaintiffs can provide are that in a document entitled "Conflict Record" dated 2 October 2008, which referred to loans including the First and Second KPG Loans, the first defendant stated:

*"FMIF has held sale campaigns for the security properties, however no sale has eventuated."*

- (b) The plaintiffs will not be able to provide further particulars of the sale campaign until the completion of interlocutory steps in this proceeding.

**Assignment of the First and Second KPG Loans to the MPF**

42. On 28 August 2008:

- (a) PTAL, in its capacity as Custodian of the FMIF, as Assignor;  
 (b) the first defendant ATF the FMIF; and  
 (c) the first defendant ATF the MPF, as Assignee;

entered into an Assignment Deed ("the Assignment Deed").

43. Relevantly, the following were terms of the Assignment Deed:

- (a) in consideration of the Assignee agreeing to pay the Settlement Sum to the Assignor, the Assignor unconditionally, irrevocably and absolutely assigned all its right, title and interest in the Securities to the Assignee, which was to take effect from the Settlement Date (clause 2.1);  
 (b) the Assignee was required to pay the Settlement Sum to the Assignor six months from the Settlement Date (clause 2.2);  
 (c) "Securities" was defined to include the First KPG Loan, the Deed of Variation of the First KPG Loan, the Second KPG Loan, the Deed of

Variation of the Second Loan, the Priority Deed and the securities pleaded in paragraphs 21(d) and 25(d) above (clause 1.1);

- (d) "Settlement Date" was defined as " 2008 or such other date as is agreed by the Parties in writing" (clause 1.1);
- (e) "Property" was Lots S10, S11 and S12 (clause 1.1);
- (f) "Interest Rate" was 10% per annum (clause 1.1);
- (g) Clause 4 provided:

**"4. Valuation and Payment of the Settlement Sum**

**4.1 Valuation**

- (a) *The Assignee must commission and pay for an independent valuation of the Property addressed to the Assignor by a valuer approved by the Assignor (approval not to be unreasonably withheld) for the purpose of determining the market value of the Property as at the Settlement Date. The valuation must be delivered to the Assignor within 90 days of the Settlement Date.*
- (b) *If the Assignee does not deliver to the Assignor the valuation under clause 4.1(a) the Assignor will obtain a valuation for the purposes of determining the market value of the Property as at the Settlement Date. The reasonable costs of the valuation must be paid by the Assignee to the Assignor at the same time as the Settlement Sum is paid.*

**4.2 Settlement Sum**

*The Settlement Sum shall be the market value as determined by the valuation pursuant to clause 4.1.*

**4.3 Interest**

*Interest shall be payable by the Assignee on the full amount of the Settlement Sum, from the Settlement Date until the date that the Settlement*

*Sum is paid in full. Interest shall be calculated daily at the Interest Rate and paid at the same time as the Settlement Sum is paid.*

44. On 28 August 2008, the first defendant ATF the FMIF caused:
- (a) registered mortgages AC626247K and AC754113R to be transferred from PTAL as Custodian of the FMIF to the first defendant ATF MPF; and
  - (b) registered charges 1003923, 1035436 and ~~1003923~~ 1061658 to be assigned from PTAL as Custodian of the FMIF to the first defendant ATF MPF.

**Internal approvals for the assignment of the First and Second KPG Loans**

45. On 2 October 2008 Mr. David Monaghan of the first defendant prepared a document entitled "Conflict Record" ("**the Conflict Record**").
46. Relevantly, the Conflict Record stated that:
- (a) the First and Second KPG Loans were in default;
  - (b) the FMIF had held a sale campaign for the security properties, but no sale had eventuated;
  - (c) the security property comprised 20 residential units in a beachside golf course complex located approximately one hour from the Melbourne CBD;
  - (d) the responsible entity (in the premises, LMIM ATF the FMIF) had obtained an updated valuation for the security property to ascertain an appropriate assignment price;
  - (e) it was proposed to assign the loans to the MPF for the valuation price, as this price represented the likely recovery amount for the loans;
  - (f) as the MPF did not have sufficient cash reserves at that time to pay the assignment price, it was proposed that payment of the price be delayed by six months, with interest to be paid by the MPF at the rate of 10% per annum;

- (g) the price was to be secured by a fixed and floating charge over the assets of the MPF;
  - (h) it was not anticipated that there would be any recovery from the guarantors.
47. On 15 October 2008 Ms. Shelley Chalmers of the first defendant sent an email with the subject "FW: for consideration by MIF and MPF CCs – KPG 13<sup>th</sup> Beach" to the following recipients:
- (a) "321 MPF Investment Committee";
  - (b) "801 Credit Committee";
  - (c) Grant Fischer;
  - (d) Eghard van der Hoven;
  - (e) Ann McCallum;
  - (f) Lisa Darcy; and
  - (g) David Monaghan.
48. The email dated 15 October 2008 had attached to it a document entitled "MPF Credit Committee – Synopsis," dated 28 August 2008 ("**the Synopsis**").
49. The Synopsis was headed: *"Transaction: Proposed purchase from and short term finance from LM First Mortgage Income Fund to acquire residential units at Barwon Heads, Victoria."*
50. Relevantly, the Synopsis stated that:
- (a) the MPF proposed to acquire an existing FMIF loan, which was secured over units 152, 158 and 160-177 at Barwon Heads;
  - (b) the units were residential holiday letting units, attached to a golf resort, and leased on a holiday letting basis;



- (c) the income fluctuated from month to month depending on the time of year, and historically it ranged anywhere between \$3,000 and \$20,000 per month;
  - (d) the MPF was relying on a recent valuation conducted for the FMIF by Hymans dated 14 August 2008, to verify the property value;
  - (e) the MPF wished to enter into a six month sale contract to buy the loan as at 28 August 2008, on the following finance terms:
    - (i) the purchase price was \$9,731,662.76, which was the total of the FMIF's debt as at 28 August 2008;
    - (ii) the MPF had until 28 February 2009 to settle the purchase;
    - (iii) until the payment of the settlement amount, the MPF would pay to the FMIF 10% interest per annum on the purchase price;
    - (iv) from 28 August 2008, the MPF would look after the property and pay levies, taxes, insurance etc. as if it were the owner.
51. On 22 October 2008 Ms. Shelley Chalmers of the first defendant sent a further email with the subject "FW: for consideration by MIF and MPF CCs – KPG 13<sup>th</sup> Beach" to the recipients listed in paragraph 47 above.
52. In her email dated 22 October 2008, Ms. Chalmers stated:
- "As a number of committee members will be away please register your vote or wish for discussion."*
53. In response, on 22 October 2008 and 23 October 2008 the recipients listed in paragraph 47 above, together with Ms. Chalmers, responded that they approved the transaction.

#### **Approval of the Assignment by the first defendant's Board of Directors**

54. By a resolution dated 27 October 2008 ("Resolution"), the Board of Directors of the first defendant ATF the MPF and ATF the FMIF resolved to approve the assignment of the First and Second KPG Loans from the FMIF to the MPF.

54A. The effect of the Resolution and the Synopsis was that LMIM ATF the MPF and ATF the FMIF, agreed that the amount of \$9,731,662.76 would be treated as the amount of the Settlement Sum referred to in clause 4 of the Assignment Deed.

54B. Hereafter, a reference to the Settlement Sum is a reference to the amount of \$9,731,662.76.

#### **Variations of the Assignment Deed**

55. On 12 December 2008:

- (a) the first defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed (**“the First Deed of Variation of the Assignment Deed”**).

56. Relevantly, the following were terms of the First Deed of Variation of the Assignment Deed:

- (a) clause 2.2 of the Assignment Deed was varied, so that the Assignee was required to pay the Settlement Sum to the Assignor on the date falling 12 months from the Settlement Date (item 2, Schedule);
- (b) the variation to the Assignment Deed contained in the First Deed of Variation would be effective as and from the 12<sup>th</sup> day of December 2008 (item 2, Schedule).

57. On 28 August 2009:

- (a) the first defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed (“**the Second Deed of Variation of the Assignment Deed**”).

58. Relevantly, the following were terms of the Second Deed of Variation of the Assignment Deed:

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 7% per annum (item 2, Schedule);
- (b) clause 2.2 of the Assignment Deed was varied and replaced, so that the Assignee was required to pay the Settlement Sum to the Assignor on 28 August 2010 or such earlier date as may be mutually agreed (item 2, Schedule);
- (c) the variation to the Assignment Deed contained in the Second Deed of Variation would be effective as and from 28 August 2009.

59. On 30 November 2010:

- (a) the first defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed (“**the Third Deed of Variation of the Assignment Deed**”).

60. Relevantly, the following were terms of the Third Deed of Variation of the Assignment Deed:

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 8.5% per annum (item 2, Schedule);
- (b) clause 2.2 of the Assignment Deed was varied and replaced, so that the Assignee was required to pay the Settlement Sum to the Assignor on 28 August 2011 or such earlier date as may be mutually agreed (item 2, Schedule);

- (c) the variation to the Assignment Deed contained in the Second Deed of Variation would be effective as and from 28 August 2010.

60A. Hereafter, the Assignment Deed, the First Deed of Variation of the Assignment Deed, the Second Deed of Variation of the Assignment Deed and the Third Deed of Variation of the Assignment Deed are collectively referred to as the "Deeds".

#### **Payment of the Settlement Sum under the Assignment Deed**

61. By no later than ~~On or about~~ 30 May 2011 the first defendant ATF the MPF as Assignee had paid the Settlement Sum to PTAL (acting as Custodian for the first defendant ATF the FMIF) as Assignor or, in the alternative, to LMIM ATF the FMIF, pursuant to clause 2.2 of the Assignment Deed (as varied).

#### Particulars

- (a) Page 21 of the MPF's Audited Annual Financial Report dated 30 June 2011 states:

*"On August 2008, it was resolved by the Board of Directors of the Responsible Entity, to transfer three mortgage loans to the value of \$33,513,345 and the related first mortgage security to the Scheme from a related Scheme, LM First Mortgage Income Fund. There is a fixed charge over these two specific secured properties plus a floating charge over the remaining assets of the Scheme to provide security to the LM First Mortgage Income Fund in the event of default by the Scheme. This loan between the Scheme and LM First Mortgage Income Fund is interest bearing at 7% with the interest being capitalised. On 30 May 2011, this receivable was successfully repaid in full by the Scheme";*

- (b) By an ASIC Form 312 dated 6 July 2011 the first defendant as Chargor notified ASIC that registered charge number 1768753, which was a fixed and floating charge in favour of PTAL, had been paid or satisfied in full and had therefore been discharged or released on 6 July 2011;

- (c) The first defendant ATF the MPF had provided registered charge number 1768753 to PTAL as security for (relevantly) payment of all moneys that the first defendant ATF the MPF owed to PTAL, which included the Settlement Sum payable under the Assignment Deed;
- (d) The first defendant maintained an internal account ledger no. 13041 called "Receivable – MPF Purchase of Loan Assets" that recorded receivables to be paid by LMIM ATF the MPF to LMIM ATF the FMIF in relation to the Settlement Sum in this proceeding, a separate settlement sum in related proceeding S8034/14 ("Second Proceeding") and an unrelated (but similar) assignment concerning a Mr Kamel Albassit in the total amount of \$33,420,755.57. Ledger no. 13401 shows that as at 27 May 2011, LMIM ATF the MPF had paid all receivables owing.
- (e) At page 33 of the FMIF's Audited Annual Financial Report dated 30 June 2011 it is stated that "LM MPF has successfully settled the full value of these loans as at 30 June 2011". The loans being referred to included the loans assigned to the first defendant ATF the MPF under the Assignment Deed.
- (f) ~~The plaintiffs will not be able to provide further particulars of the payment of the Settlement Sum until the completion of interlocutory steps in this proceeding.~~

~~61A The Settlement Sum:~~

- ~~(a) consisted of, at least:~~
  - ~~i. direct cash payments;~~
  - ~~ii. payments on behalf of or for the benefit of the defendant ATF FMIF, to third parties;~~

**Particulars**

~~The plaintiff will not be able to provide particulars of the payments until the completion of interlocutory steps in this proceeding.~~

- ~~(b) delivered value to the defendant ATF the FMIF in relation to which the plaintiff is entitled to trace.~~

Particulars

~~The plaintiff will not be able to provide particulars of the assets represented by that value until the completion of interlocutory steps in this proceeding.~~

~~61A. The Settlement Sum consisted of a total payment of principal in the amount of \$9,731,662.76, comprising the following classes of payments made between 28 August 2008 and 27 May 2011:~~

- ~~(a) payments by the first defendant ATF MPF direct to the first defendant ATF FMIF ("Direct Payments");~~
- ~~(b) payments by the first defendant ATF MPF to LM Administration Pty Ltd ("LMA") for FMIF's operation fees, at the direction of the first defendant ATF FMIF;~~
- ~~(c) payments by the first defendant ATF MPF to the first defendant for trust management fees;~~
- ~~(d) payments by the first defendant ATF MPF to borrowers from FMIF, at the direction of the first defendant ATF FMIF;~~
- ~~(e) payments by the first defendant ATF MPF to unitholders of the FMIF, at the direction of the first defendant ATF FMIF;~~
- ~~(f) payments by the first defendant ATF MPF to sundry third party creditors of the FMIF, at the direction of the first defendant ATF FMIF.~~

Particulars

~~The transactions within these classes are identified within internal ledger account no. 13041, which was maintained by the first defendant in relation to the Settlement Sum in this proceeding, a separate Settlement Sum in related proceeding S8034/14 and an~~

~~unrelated (but similar) assignment concerning Mr Kamel Albassit ("Albassit assignment")~~

~~61B. The total Direct Payments by the first defendant ATF MPF to the first defendant ATF FMIF as part of the Settlement Sum in this proceeding and as part of the Settlement Sum in related proceeding S8034/14 ("Second Proceeding"), was \$5,556,008. The plaintiff accepts that this amount has to be apportioned between this proceeding and the Second Proceeding.~~

**Payment of interest on the Settlement Sum under the Assignment Deed**

61C. As pleaded in paragraphs 43(f), 43(g), 58(a) and 60(a) above, by clause 4.3 of the Assignment Deed (as varied) the first defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates of:

- (a) 10% per annum between 28 August 2008 and 28 August 2009;
- (b) 7% per annum between 28 August 2009 and 28 August 2010; and
- (c) 8.5% per annum from 28 August 2010.

~~61D. Between August 2008 and July By no later than May 2011, the first defendant ATF the MPF had paid at least \$5,679,658 ("Total Interest") to PTAL (acting as custodian for the first defendant ATF the FMIF) as Assignor or, in the alternative, the first defendant ATF the FMIF for interest ("Interest") on:~~

- (a) ~~the Settlement Sum under the Assignment Deed in this proceeding;~~
- (b) ~~the Settlement Sum settlement sum referred to in under the Assignment Deed assignment deed in the subject of the Second Proceeding. The plaintiff accepts that this amount has to be apportioned between this proceeding and the Second Proceeding.~~

Particulars

The best particulars that the plaintiff can currently give in relation to the composition of the \$5,679,658 was provided in the plaintiff's further and better particulars dated 30 March 2016.

~~The interest transactions are identified within: (i) internal ledger account no. 1300/A1472 which was maintained by the first defendant in relation to the Settlement Sum in this proceeding, the Settlement Sum in the Second Proceeding, the Albassit assignment and an unrelated loan for \$5.1 million and (ii) internal ledger account no. 13041 and (iii) internal ledger account no. 13040.~~

61E. Of the Total Interest, the plaintiff claims the amount of \$1,874,287.14 ("Interest") as having been paid in relation to the Settlement Sum.

#### Particulars

This represents 33% of \$5,679,658.

The amount of 33% was calculated by dividing \$9,731,662.76 by \$29,283,463.41.

The amount of \$29,283,463.41 was calculated by adding \$9,731,662.76 to the amount of \$19,551,800.65, which is the settlement sum in the Second Proceeding.

#### Contribution to the Fund

~~61E. The Payment by the first defendant ATF MPF of the Settlement Sum and the Interest to the first defendant ATF FMIF, was a contribution to the Fund in that:~~

~~(a) but for the payment of the Settlement Sum and the Interest, the Fund would have been for a considerably lesser sum;~~

~~(b) the first defendant ATF FMIF used the Settlement Sum and the Interest to continue its business, which contributed to the creation of the Fund.~~

#### The first defendant's breaches of duty

##### The "no conflict" duty

62. By entering into the Assignment Deed, the first defendant ATF the MPF placed itself in a position where the duties that it owed to the beneficiaries of the FMIF



were in conflict with the duties that it owed to the beneficiaries of the MPF, in that:

- (a) the interests of the beneficiaries of the FMIF required LMIM to maximise the amount the FMIF could recover for the First and Second KPG Loans; while
- (b) the interests of the beneficiaries of the MPF required LMIM to minimise, as far as reasonably possible, the amount it paid to acquire assets on behalf of the MPF.

63. The first defendant ATF the MPF did not seek, or obtain, the informed consent of the beneficiaries of the MPF:

- (a) to the first defendant being in the position of conflict pleaded in paragraph 62 above; or
- (b) to ~~engage enter into the Deeds Assignment Deed or the First, Second and Third Deeds of Variation of the Assignment Deed, as pleaded in paragraphs 42 to 61 of this Statement of Claim.~~

Equitable duties duty of care

64. Notwithstanding its knowledge of the matters pleaded in paragraphs 46 and 50 above:

- (a) if the first defendant ATF the MPF relied upon the Hymans Valuation in entering into the Assignment Deed:
  - (i) the first defendant ATF the MPF failed to comply with the obligation in clause 4.1 of the Assignment Deed for the Assignee to obtain a new valuation of Lots S10, S11 and S12 within 90 days of the Settlement Date;
  - (ii) notwithstanding the matters pleaded in paragraphs 38 and 39(f) above, the first defendant ATF the MPF did not obtain Hymans' consent to the first defendant ATF the MPF relying upon the

Hymans Valuation for the purposes of entering into the Assignment Deed;

- (b) in the premises pleaded in paragraph 50(e)(i) above, the first defendant ATF the MPF agreed to pay the amount of \$9,731,662.76 as the Settlement Sum under the Assignment Deed, notwithstanding that:
  - (i) in breach of clause 4.1 of the Assignment Deed the first defendant ATF the MPF and as the Assignee did not commission and pay for an independent valuation (or any valuation) as contemplated by that clause;
  - (ii) this breached clause 4.2 of the Assignment Deed, as this was not the market value of the Lots S10, S11 and S12 as determined by a valuation obtained pursuant to clause 4.1 of the Assignment Deed;
  - (iii) this amount was \$1,950,662.76 more than the value of \$7,781,000.00 ascribed to Lots S10, S11 and S12 by the Hymans Valuation;
  - (iv) the First and Second KPG Loans were in default;
  - (v) the first defendant did not anticipate that there would be any recovery from the guarantors;
  - (vi) when the Assignment Deed was executed on 28 August 2008, the Facility to Security Ratio for the First and Second KPG Loans was approximately 125%, in circumstances where, in the premises pleaded in paragraph 21(h) and 25(h) above, the maximum permitted Facility to Security Ratio was 66.67%, at the discretion of the Lender;
- (c) ~~as pleaded in paragraphs 43(f), 43(g), 58(a) and 60(a) above, by clause 4.3 of the Assignment Deed~~ the first defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates pleaded at 61C above of:

- ~~(i) 10% per annum between 28 August 2008 and 28 August 2009;~~
- ~~(ii) 7% per annum between 28 August 2009 and 28 August 2010; and~~
- ~~(iii) 8.5% per annum from 28 August 2010;~~

notwithstanding that:

- (iv) in or about August 2008 or, alternatively, when the Conflict Record was prepared in October 2008, the MPF did not have sufficient cash reserves to pay the Settlement Sum to the FMIF;
  - (v) in the premises pleaded in paragraph 61 above, the MPF did not have sufficient cash reserves to pay the Settlement Sum until approximately July 2011;
  - (vi) in the premises, the Assignment Deed as varied caused interest to accrue on the Settlement Sum ~~amount of \$9,731,662.76~~ per annum, at the rates pleaded in paragraph 61 ~~paragraphs (e)(i) to (iii)~~ above, for a period of almost three years;
  - (vii) as pleaded in paragraph 64(b)(vi) above, the Facility to Security Ratio for the First and Second KPG Loans was approximately 125% as at 28 August 2008, before interest commenced accruing on the unpaid Settlement Sum pursuant to clause 4.3 of the Assignment Deed; and
- (d) as pleaded in paragraphs 43(a) and 44 above, in breach of clause 2.1 of the Assignment Deed the first defendant caused the Securities to be assigned to itself ATF the MPF on 28 August 2008, notwithstanding that:
- (i) clause 2.1 provided that the assignment was to take effect from the Settlement Date;
  - (ii) as pleaded in paragraph 60(b) above, the Assignment Deed was varied so that the Settlement Date was 28 August 2011 or such earlier date as may be mutually agreed;

- (iii) in the premises pleaded in paragraphs 53 and 54 above neither the MPF Credit Committee, nor the Board of Directors of LMIM, had approved the Assignment Deed when the Securities were assigned to the first defendant ATF the MPF.

*Breach of duty*

65. In the premises pleaded in paragraphs 62, 63 and 64 above, by entering into the Assignment Deed on 28 August 2008, and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds the first defendant ATF the MPF breached the duty (pleaded at paragraph 17 above) that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties that it owed to the beneficiaries of the FMIF.
66. In the premises pleaded in paragraph 64 above, by entering into the Assignment Deed on 28 August 2008, and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds the first defendant ATF the MPF breached the duty (pleaded at paragraph 18 above) that it owed to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.

Duties under the *Trusts Act* 1973 (Old)

67. In the premises pleaded in paragraph 64 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF breached the duty (pleaded in paragraph 19(a) above) it owed pursuant to s.22 of the *Trusts Act* to the beneficiaries of the MPF, to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment.
68. The first defendant ATF the MPF breached the duties (pleaded at paragraph 19(b) above) that it owed pursuant to s.24 of the *Trusts Act* to the beneficiaries

of the MPF, in that by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds:

- (a) in the premises pleaded in paragraphs 64(a), 64(b) and 64(c) above, the first defendant breached ATF the MPF the duty that it owed pursuant to s.24(e) of the *Trusts Act* to take into account the risk of capital or income loss or depreciation when exercising its power of investment;
- (b) in the premises pleaded in paragraphs 64(a), 64(b) and 64(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(g) of the *Trusts Act* to take into account the likely income return and the timing of income return;
- (c) in the premises pleaded in paragraphs 64(c)(iv), (v) and (vi) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(h) of the *Trusts Act* to take into account the length of the term of the proposed investment;
- (d) in the premises pleaded in paragraphs 64(a), 64(b) and 64(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(j) of the *Trusts Act* to take into account the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment; and
- (e) in the premises pleaded in paragraph 64(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(n) of the *Trusts Act* to take into account the cost of making the proposed investment.

#### **Loss suffered by the MPF**

69. But for the first defendant ATF the MPF's breaches of duties pleaded at paragraphs 62 to 68 above, the first defendant ATF the MPF would not have:

- (a) entered into the Deeds;
- (b) paid the Settlement Sum;

(c) paid the Interest.

~~In consequence of the first defendant's breaches of duty:~~

~~(d) in or about July 2011 the first defendant ATF the MPF paid the amount of \$9,731,662.76 as the Settlement Sum pursuant to the Assignment Deed, plus the Interest interest calculated at the rates pleaded in paragraphs 64(c)(i) to (iii) above, to PTAL in its capacity as Custodian of the FMIF;~~

~~(e) in exchange, the only valuable securities that the first defendant ATF the MPF received pursuant to the Assignment Deed were registered mortgages AC626247K and AC754113R over Lots S10, S11 and S12.~~

69A. As a result of the matters pleaded in paragraph 69, the first defendant ATF the MPF suffered a loss in the amount of \$5,128,071.34 ("Loss").

Particulars

(Settlement Sum plus Interest) minus (the AIFCP Payment plus the Sale Proceeds – both defined below)

(\$9,731,662.76 and \$1,874,287.14) minus (\$3,933,750 plus \$2,544,128.56)

69B. The first defendant is liable (the "Liability") to pay equitable compensation to the plaintiff for the Loss.

70. On or about 29 December 2011:

- (a) PTAL as security trustee;
- (b) the first defendant ATF the AIFCP; and
- (c) the first defendant ATF the MPF;

entered into a Deed that created The AIF-CP and MPF Security Trust, pursuant to which (relevantly):

- (d) the first defendant ATF the AIFCP and the defendant ATF the MPF acknowledged that on 29 December 2011, the defendant ATF the AIFCP had paid the amount of \$3,933,750.00 ("AIFCF Payment") to PTAL as Custodian Trustee of the MPF (clause 3.3(b)); and

- (e) the security trustee was required to apply all money thereafter received under the First and Second KPG Loans, and/or the securities provided for those loans, in the order and manner set out in clause 6.1 of the Deed; and
- (f) the security trustee was (relevantly) required to pay the amount of \$3,933,750.00 to the first defendant ATF the AIFCP, before paying any secured moneys owed to the first defendant ATF the MPF (clauses 6.1(a)(vi) and (vii)).

~~71. The market value of Lots S10, S11 and S12 ("Property") as at:~~

- ~~(a) 28 August 2008, being the date of the Assignment Deed;~~
  - ~~(b) July 2011, being the date on or about which the first defendant ATF the MPF paid the Settlement Sum to PTAL in its capacity as Custodian of the FMIF; and~~
  - ~~(c) the trial of this proceeding;~~
- ~~was, and will be, significantly less than:~~
- ~~(d) the amount of \$9,731,662.76 that the first defendant ATF the MPF agreed to and did pay as the Settlement Sum pursuant to the Assignment Deed; and~~
  - ~~(e) the amount of \$9,731,662.76 plus the interest calculated between 28 August 2008 and July 2011 at the rates and on the basis pleaded in paragraphs 64(c)(i) to (iii) above, which that the first defendant ATF the MPF agreed to and did pay pursuant to the Assignment Deed (as varied);~~
  - ~~(f) the amount of \$5,797,912.76 (plus the interest already paid) calculated between 28 August 2008 and July 2011 at the rates and on the basis pleaded in paragraphs 64(c)(i) to (iii) above, being the amount of \$9,731,662.76 paid as the Settlement Sum, less the amount of \$3,933,750.00 received from the first defendant ATF the AIFCP on 29 December 2011.~~

Particulars

~~At the present time, the best particulars that the plaintiffs can provide of the market value of Lots S10, S11 and S12 are that a letter of advice from RWG Accountants and Advisers to Ms. Shelley Chalmers of LMIM, dated 21 February 2012, states:~~

~~"Valuations have been conducted by a recognised member of the Australian Property Institute — Nicholas Harvey Valuations \$5,245,000.00."~~

71A. In the period ~~December~~ August 2011 to April 20122013, the plaintiff received net proceeds of \$2,544,128.56 exclusive of GST from the sale of Lots S10, S11 and S12 ("Sale Proceeds")~~the Property~~.

#### Particulars

The best particulars that the plaintiff can provide about the sale process are provided in the further and better particulars dated 30 March 2016 save that to those particulars one further sale dated 23 April 2012 by PTAL to Mr Peter Farrell of Lot 177 in the amount of \$455,000 should be added.

~~72. The first defendant was:~~

- ~~(a) in the premises pleaded in paragraphs 4 to 7 above, aware that it, ATF the MPF, held the assets of the MPF on trust for the beneficiaries of the MPF;~~
- ~~(b) in the premises pleaded in paragraphs 45 to 50, paragraph 54 and paragraphs 62 to 64 above, aware that the payments to itself ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, of \$9,731,662.76 as the Settlement Sum pursuant to the Assignment Deed, and the Interest interest pursuant to clause 4.3 of the Assignment Deed, were made in breach of trust.~~

73. In the premises pleaded in paragraph 13 above, insofar as PTAL may hold the Fund or other assets in its capacity as Custodian of the FMIF, it holds the Fund or other assets, as agents for the first defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.



~~(a) — the amount pleaded in paragraph 72 above in its capacity as Custodian of the FMIF, it holds that amount as agent for the first defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement;~~

~~(b) — assets representing the value it received from the Settlement Sum, it holds those assets as agent for the first defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.~~

74. ~~In the premises, the defendant ATF the FMIF holds:~~

~~(a) — the amount of \$9,731,662.76 paid as the Settlement Sum pursuant to the Assignment Deed (subject to any appropriate adjustments); and~~

~~(b) — all interest paid pursuant to clause 4.3 of the Assignment Deed;~~

~~on a constructive trust for the plaintiffs, in their its capacity as trustees of the MPF.~~

**The first defendant's right of indemnity and the plaintiff's right of subrogation**

75. The first defendant is insolvent.

76. The first defendant ATF the FMIF entered into the Deeds acting for the benefit of the FMIF.

77. The Deeds, the payment of Settlement Sum and the payment of the Interest, provided a benefit to LMIM ATF the FMIF and the FMIF.

78. The first defendant was acting ATF the MPF and ATF the FMIF when it entered into the Deeds.

79. The first defendant was acting ATF the MPF and ATF the FMIF when the Settlement Sum was paid.

80. The first defendant was acting ATF the MPF and ATF the FMIF when the Interest was paid.

81. The first defendant was acting ATF the MPF and ATF the FMIF when it passed the Resolution.

82. In the premises pleaded at paragraphs 78 to 81, the first defendant incurred the Liability to the plaintiff, in circumstances where the first defendant was acting ATF the MPF and ATF the FMIF.

83. The first defendant is entitled to an indemnity out of the assets of the FMIF, including the Fund, in respect of the Liability and any other liabilities to the plaintiff in this proceeding ("Indemnity").

84. The first defendant is entitled to a lien or charge over the assets of the FMIF, including the Fund, to secure the Indemnity.

85. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the Indemnity.

~~76. In the premises pleaded at paragraphs 28 and 40 to 61A, the first defendant:~~

~~(a) incurred the liabilities for the breaches of duty pleaded above pleaded at paragraphs 69 to 74, while acting as the trustee of the FMIF;~~

~~(b) is entitled to an indemnity out of the assets of the FMIF in respect of the liabilities of the first defendant to the plaintiff in this proceeding;~~

~~(c) is entitled to a lien or charge over the assets of the FMIF to secure that indemnity.~~

~~77. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the assets of the FMIF, including the Fund.~~

The plaintiffs claims the following relief:

1. Equitable compensation against the first defendant in the amount of the Loss;
2. ~~A declaration that the defendant holds the amount paid pursuant to the Assignment Deed (as varied) on constructive trust for the plaintiffs;~~
3. Interest pursuant to s.58 of the *Civil Proceedings Act* 2011 (Qld);

4. Costs;
5. Such further or other order as the Court sees fit;
6. A declaration that:
  - (a) the first defendant is entitled to an indemnity ~~be indemnified~~ out of the assets of the FMIF, including the Fund, in respect of the ~~liability~~ Liability and any other liabilities of the first defendant to the plaintiff in this proceeding;
  - (b) the first defendant has a lien or charge over the assets of the FMIF, including the Fund, in respect of the ~~liability~~ Liability and any other liabilities of the first defendant to the plaintiff in this proceeding;
  - (c) the plaintiff is entitled to be subrogated to the rights of the first defendant in respect of the assets of the FMIF, including the Fund in relation to the indemnity;
- ~~6A Further or in the alternative, a declaration that:~~
  - ~~(a) the plaintiff and the FMIF Unitholders rank equally in the Fund;~~
  - ~~(b) the plaintiff is entitled to a rateable distribution in the Fund in relation to the Settlement Sum and the Interest;~~
  - ~~(c) the plaintiff is entitled to an equitable charge or lien over the Fund to the extent of its rateable distribution;~~
- ~~7. Further, or in the alternative, an equitable charge or lien over the assets of the defendant to the extent of the defendant's liability to the plaintiff in this proceeding.~~
8. Further or in the alternative, an order that the first defendant and the second defendant instruct PTAL pursuant to clause 2.1 of the Custody Agreement to do all things necessary to give effect to any orders made against the first defendant.

Signed:

*M. L. Ellison*

Description: MINTER ELLISON  
Solicitors for the plaintiffs

Dated: ~~27 August 2014~~ ~~1 September 2015~~ ~~14 October 2015~~ ~~29 February~~  
2016 19 April 2016

This pleading was settled by Mr. Crowe QC and Ms. Ahern of Counsel. The amendments to this pleading were settled by Mr Crowe QC and Mr Goodwin of Counsel.

## NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane  
NUMBER 8034/14

Plaintiffs

**KORDAMENTHA PTY LTD (ACN 100 169 391)  
AND CALIBRE CAPITAL PTY LTD (ACN 108  
318 985) IN THEIR ITS CAPACITY AS  
TRUSTEES OF THE LM MANAGED  
PERFORMANCE FUND**

AND

First Defendant

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

AND

Second Defendant

**DAVID WHYTE IN HIS CAPACITY AS COURT  
APPOINTED RECEIVER OF THE PROPERTY  
OF THE LM FIRST MORTGAGE INCOME  
FUND**

Filed in Brisbane registry on 19 April 2016

**THIRD FURTHER AMENDED STATEMENT OF CLAIM**

19 APR 2016

This claim in this proceeding is made in reliance on the following facts:

1. The plaintiffs:

- (a) ~~are companies~~ is a company duly incorporated according to law;

**THIRD FURTHER AMENDED STATEMENT OF  
CLAIM**

Filed on behalf of the Plaintiffs

Form 16 Rules 22 and 146

MINTER ELLISON  
Waterfront Place  
1 Eagle Street  
BRISBANE QLD 4000  
DX 102 BRISBANE  
Telephone (07) 3119 6000  
Facsimile (07) 3119 1000  
Reference MJV 40-7747729

- (b) ~~are~~ is capable of suing in ~~their~~ its corporate names; and
- (c) in the premises pleaded in paragraphs 4 to 10 below, ~~have~~ has been the trustees of a trust named the LM Managed Performance Fund since 12 April 2013.

2. The first defendant:

- (a) is a company duly incorporated according to law;
- (b) is capable of being sued in its corporate name;
- (c) since at least 1999, has carried on business as a professional trustee for reward, in which capacity it created and managed investment schemes;
- (d) in the premises pleaded in paragraphs 4 to 10 below, was the trustee of the MPF from in or about December 2001 until 12 April 2013; and
- (e) in the premises pleaded in paragraphs 11 and 12 below, has been the responsible entity of a registered managed investment scheme named the LM First Mortgage Income Fund ("**the FMIF**") since 28 September 1999.

2A The second defendant ("**Receiver**"):

- (a) is a partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd;
- (b) on 21 August 2013, was appointed by order of the Supreme Court of Queensland as the receiver of the property of the FMIF.

2B The Receiver controls cash at bank belonging to the first defendant ATF the FMIF in the amount of at least \$58.7 million (plus future accretions) ("**Fund**").

~~2C The FMIF has approximately 4,500 unitholders ("**FMIF Unitholders**").~~

3. In this pleading:

- (a) the first defendant, when acting in its capacity as the trustee of the MPF, is referred to as "the first defendant ATF the MPF";

- (b) the first defendant, when acting in its capacity as the responsible entity of the FMIF, is referred to as “the first defendant ATF the FMIF.”

#### **The LM Managed Performance Fund**

4. By a trust deed dated December 2001 (“**the First Trust Deed**”), the first defendant:
  - (a) established a unit trust named The LM Managed Performance Fund (“**the MPF**”); and
  - (b) became trustee of the MPF.
5. By a Deed of Variation dated 11 November 2002 (“**the Second Trust Deed**”), the first defendant ATF the MPF deleted all parts of the First Trust Deed other than the parties, and replaced it with the terms set out in the Second Trust Deed (Recital B of the Second Trust Deed).
6. By a Deed of Variation dated 25 November 2009 (“**the Third Trust Deed**”), the first defendant ATF the MPF deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced it with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed).
7. Relevantly, the following were terms of the First, Second and Third Trust Deeds:
  - (a) the first defendant was the Manager (clause 1.1 of each Deed);
  - (b) the Constitution was the Trust Deed including any Schedule, Annexure or Amendments to it (clause 1.1 of each Deed);
  - (c) the Scheme was the trust created by the Deed to be known as the LM Managed Performance Fund (clause 1.1 of each Deed);
  - (d) the assets of the Scheme were:
    - (i) the Scheme Fund (clauses 1.1 of the First and Second Trust Deeds); subsequently

- (ii) the Scheme Property (clause 1.1 of the Third Trust Deed);
  - (e) the Manager agreed to act as trustee of the Scheme (clause 2.1 of each Deed);
  - (f) the Manager declared that it held:
    - (i) the Scheme Fund (clauses 2.2 of the First and Second Deeds); subsequently
    - (ii) the Scheme Property (clause 2.2 of the Third Trust Deed);
 on trust for the Members;
  - (g) the name of the Scheme was:
    - (i) The LM Managed Performance Fund (clause 2.3 of the First Trust Deed); subsequently
    - (ii) The LM Managed Performance Fund or any other name that the Manager may determine from time to time (clauses 2.3 of the Second and Third Trust Deeds);
  - (h) the beneficial interest in the Scheme Fund would be divided into Units (clause 3.1 of each Deed);
  - (i) the Constitution might be modified or repealed or replaced with a new Constitution by the Manager if the Manager reasonably considered that the change would not adversely affect Members' rights or was deemed necessary to conduct the affairs of the Scheme (clauses 24.1 of the First and Third Trust Deeds; clause 18.1 of the Second Trust Deed);
  - (j) the Manager must resign if (being a corporation) it became an externally-administered body corporate as defined in the *Corporations Act 2001* (clauses 23.1(b)(ii) of the First and Third Trust Deeds; clause 17.1(b)(ii) of the Second Trust Deed).
8. On or about 19 March 2013, John Richard Park and Ginette Dawn Muller were appointed voluntary administrators of the first defendant.



9. In the premises, pursuant to clause 23.1(b)(ii) of the Third Trust Deed the first defendant was required to resign as Manager of the MPF.
10. By order of this Honourable Court dated 12 April 2013:
  - (a) the first defendant was removed as trustee of the MPF; and
  - (b) ~~the plaintiffs~~ KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) ("Calibre") were appointed trustees of the MPF.

10A. On 5 January 2015 Calibre Capital Limited (ACN 108 318 985) resigned as trustee of the MPF.

#### **The LM First Mortgage Income Fund**

11. On or about 28 September 1999 the first defendant established the LM First Mortgage Income Fund ("the FMIF").
12. Since on or about 28 September 1999:
  - (a) the FMIF has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act 2001* (Cth).
  - (b) the first defendant has been, and remains, the Responsible Entity of the FMIF;
  - (c) the first defendant has held, and continues to hold, the property of the FMIF on trust for its members, pursuant to s.601FC of the *Corporations Act 2001* (Cth).
13. Pursuant to the terms of a Custody Agreement dated 4 February 1999 between the first defendant and Permanent Trustee Australia Ltd ACN 008 412 913 (later re-named The Trust Company (PTAL) Ltd) ("PTAL"):
  - (a) PTAL agreed to custodially hold the Portfolio and Title Documents as agent for the first defendant in relation to (inter alia) the FMIF (clause 2.1 and Schedule 2);

- (b) the first defendant was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on the first defendant's Instructions in relation to any assets of the Portfolio (clause 4.1);
- (c) the plaintiffs will rely upon the full terms of the Custody Agreement at the hearing of this proceeding.

**Duties owed by the first defendant ATF the MPF**

- 14. At all material times the first defendant ATF the MPF owed a fiduciary duty to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty.
- 15. At all material times the first defendant ATF the MPF owed a duty in equity to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.
- 16. At all material times the first defendant ATF the MPF owed duties to the beneficiaries of the MPF:
  - (a) pursuant to s.22 of the *Trusts Act* 1973 (Qld), ("the Trusts Act") to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment; and
  - (b) pursuant to s.24 of the Trusts Act to take into account, inter alia, the following matters, when exercising a power of investment:
    - (i) the risk of capital or income loss or depreciation (s.24(e));
    - (ii) the likely income return and the timing of income return (s.24(g));
    - (iii) the length of the term of the proposed investment (s.24(h));
    - (iv) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment (s.24(j)); and

- (v) the cost (including commissions, fees, charges and duties payable) of making the proposed investment (s.24(n)).

### **The FMIF's loan to Lifestyle**

17. On or about 30 March 2005:

- (a) the first defendant ATF the FMIF;
- (b) Lifestyle Investment Company Pty Ltd ("Lifestyle") as Borrower; and
- (c) PTAL as Lender/Custodian;

entered into a Loan Agreement ("**the Lifestyle Loan**").

18. Relevantly, the following were terms of the Lifestyle Loan:

- (a) the Lender (as Custodian for the Responsible Entity) had, at the Borrower's request, agreed to lend and advance to the Borrower the Loan Amount on the conditions, among others, that the Borrower execute the Agreement (page 2);
- (b) the Loan Amount was \$15,120,000.00 (item 4, schedule);
- (c) the date for repayment was 18 months from the date of the advance (item 5, schedule);
- (d) the following securities were taken as security for the performance of Lifestyle's obligations under the Lifestyle Loan (item 9, schedule):
  - (i) registered mortgage AB414899G from Lifestyle to PTAL over real property situated at 76 Wisemans Ferry Road, Cattai in the State of New South Wales, more particularly described as:
    - A. lot 31 on DP136837 as contained in title reference folio 31/136837;
    - B. lot 38 on DP136838 as contained in title reference folio 38/136838; and

C. lot 37 on DP752039 as contained in title reference folio 37/752039;

**("the Cattai Property");**

- (ii) a Deed of Guarantee and Indemnity given by Grahame Beach and Jacink Pty Ltd ACN 064 853 201 ("**Jacink**") in its own right and as trustee for the Beach Family Trust (as Guarantors) to PTAL (as Lender);
- (iii) a fixed and floating charge given by Lifestyle as Mortgagor to PTAL as Mortgagee, registered with the Australian Securities and Investment Commission ("**ASIC**") as registered charge 1147332; and
- (iv) a fixed and floating charge given by Jacink as Mortgagor to PTAL as Mortgagee, registered with ASIC as registered charge 1147334;
- (e) the Facility to Security Ratio was defined as the maximum acceptable ratio between the Money Secured and the Principal Security (clause 1.1);
- (f) the Money Secured was defined to include:
  - (i) the Loan Amount;
  - (ii) all moneys deemed to be principal in arrears; and
  - (iii) all money now or hereafter owing or payable to the Lender by the Borrower; and
  - (iv) all advances and further advances that may be given by the Lender to, for, on account of or at the expressed or implied request of the Borrower;

(clause 1.1);
- (g) the Cattai Property was the Principal Security (item 11, schedule);

- (h) the Facility to Security Ratio was 63% from time to time, at the discretion of the Lender (item 13, schedule);
- (i) if at any time the Lender determined that the Facility to Security Ratio had been exceeded, the Lender had power to require the Borrower to provide additional security (clause 5.4).

### **Variation of the Lifestyle Loan**

19. On or about 5 February 2007:

- (a) the first defendant ATF the FMIF (~~in its capacity as Responsible Entity of the FMIF~~);
- (b) Lifestyle as the Borrower;
- (c) PTAL as Lender/Custodian; and
- (d) Grahame Beach and Jacink in their own right and as trustee for the Beach Family Trust, as Guarantor;

entered into a Deed of Variation of the Lifestyle Loan ("**the Deed of Variation**").

20. Relevantly, the following were terms of the Deed of Variation:

- (a) the variation to the Principal Security contained in the Deed would be effective as and from 30 September 2006 (clause 4.11(f));
- (b) the Principal Security was defined as the Lifestyle Loan (item 4, Schedule);
- (c) the Lifestyle Loan was varied so that:
  - (i) the Loan Amount of the Lifestyle Loan was increased to \$16,070,000.00 (item 6, Schedule);
  - (ii) the date for repayment was varied from 31 (sic) September 2006 to 30 April 2007 (item 6, Schedule); and

- (iii) the Facility to Security Ratio was amended to “67% from time to time at the discretion of the lender” (item 6, Schedule).

**Default under the Lifestyle Loan and attempt to sell the Cattai Property**

21. In breach of the term of the Lifestyle Loan pleaded in paragraph 20(c)(ii) above, Lifestyle failed to repay the Loan Amount by 30 April 2007.
22. On 11 February 2008 PTAL appointed Blair Alexander Pleash of Hall Chadwick receiver and manager of Lifestyle pursuant to registered charge 1147332 (as pleaded in paragraph 18(d)(iii) above).
23. On 29 February 2008 Mr. Pleash, in his capacity as receiver and manager of Lifestyle, obtained a valuation of the Cattai Property from Hymans Asset Management Pty Ltd (“**the Hymans Valuation**”).
24. Relevantly, the Hymans Valuation stated that:
  - (a) the inspection date was 9 February 2008;
  - (b) the valuation date was 29 February 2008;
  - (c) the purpose of the valuation was “to assess the current market value as is in accordance with current DA approvals for proposed sale”;
  - (d) the development application approval obtained for the Cattai Property was for a tourist recreation resort and community title subdivision comprising an 18-hole golf course, tourist accommodation, conference centre and associated facilities;
  - (e) the current market value of the Cattai Property, exclusive of GST, was \$19 million;
  - (f) the valuation “*is made at the express request and is prepared solely for the use of Hall Chadwick for a proposed sale*”;
  - (g) Hymans “*accepts no responsibility for any negative outcomes to any third party who may use or rely on the whole or any part of this valuation for any purpose, without prior written consent*”;

- (h) the valuation:

*"...is current as at the date of valuation only. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property). We do not accept liability for losses arising from such subsequent changes in value. Without limiting the generality of the above comment, we do not assume any responsibility or accept any liability where this valuation is relied upon after the expiration of three months from the date of valuation, or such earlier date if you become aware of any factors that have any effect on the valuation."*

25. On 26 May 2008 Mr. Pleash was:

- (a) removed as receiver and manager of Lifestyle;
- (b) was appointed managing controller of Lifestyle.

26. At a time which is unknown to the plaintiffs, but which the plaintiffs believes occurred between the appointment of Mr. Pleash as receiver and manager of Lifestyle on 11 February 2008 and the execution of the Assignment Deed (as defined in paragraph 28 below) on 28 August 2008:

- (a) the first defendant ATF the FMIF; and/or
- (b) Mr. Pleash in his capacity as receiver and manager appointed to Lifestyle; and/or
- (c) Mr. Pleash in his capacity as managing controller appointed to Lifestyle; conducted a sale campaign for the Cattai Property.

27. The sale campaign did not result in a sale of the Cattai Property.

Particulars of the sale campaign for the Cattai Property

- (a) The best particulars the plaintiffs can provide are that in a document entitled "Conflict Record" dated 2 October 2008, which referred to three loans including the Lifestyle Loan, the first defendant stated:

*"FMIF has held sale campaigns for the security properties, however no sale has eventuated."*

- (b) The plaintiffs will not be able to provide further particulars of the sale campaign until the completion of interlocutory steps in this proceeding.

#### **Assignment of the Lifestyle Loan to the MPF**

28. On 28 August 2008:

- (a) PTAL, in its capacity as Custodian of the FMIF, as Assignor;
- (b) the first defendant ATF the FMIF; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into an Assignment Deed ("**the Assignment Deed**").

29. Relevantly, the following were terms of the Assignment Deed:

- (a) in consideration of the Assignee agreeing to pay the Settlement Sum to the Assignor, the Assignor unconditionally, irrevocably and absolutely assigned all its right, title and interest in the Securities to the Assignee, which was to take effect from the Settlement Date (clause 2.1);
- (b) the Assignee was required to pay the Settlement Sum to the Assignor six months from the Settlement Date (clause 2.2);
- (c) "Securities" was defined to include the Lifestyle Loan, the Deed of Variation and the securities pleaded in paragraph 18(d) above (clause 1.1);
- (d) "Settlement Date" was defined as " 2008 or such other date as is agreed by the Parties in writing" (clause 1.1);
- (e) "Property" was the Cattai Property (clause 1.1);
- (f) "Interest Rate" was 10% per annum (clause 1.1);
- (g) Clause 4 provided:



**“4. Valuation and Payment of the Settlement Sum**

**4.1 Valuation**

- (a) *The Assignee must commission and pay for an independent valuation of the Property addressed to the Assignor by a valuer approved by the Assignor (approval not to be unreasonably withheld) for the purpose of determining the market value of the Property as at the Settlement Date. The valuation must be delivered to the Assignor within 90 days of the Settlement Date.*
- (b) *If the Assignee does not deliver to the Assignor the valuation under clause 4.1(a) the Assignor will obtain a valuation for the purposes of determining the market value of the Property as at the Settlement Date. The reasonable costs of the valuation must be paid by the Assignee to the Assignor at the same time as the Settlement Sum is paid.*

**4.2 Settlement Sum**

*The Settlement Sum shall be the market value as determined by the valuation pursuant to clause 4.1.*

**4.3 Interest**

*Interest shall be payable by the Assignee on the full amount of the Settlement Sum, from the Settlement Date until the date that the Settlement Sum is paid in full. Interest shall be calculated daily at the Interest Rate and paid at the same time as the Settlement Sum is paid.*

30. On 28 August 2008, the first defendant caused:

- (a) registered mortgage AB414899G over the Cattai Property to be transferred from PTAL as Custodian of the FMIF to the first defendant ATF MPF; and
- (b) registered charges 1147332 and 1147334 to be assigned from PTAL as Custodian of the FMIF to the first defendant ATF MPF.

### Internal approvals for the assignment of the Lifestyle Loan

31. On 2 October 2008 Mr. David Monaghan of the first defendant prepared a document entitled "Conflict Record" ("**the Conflict Record**").
32. Relevantly, the Conflict Record stated that:
  - (a) the Lifestyle Loan was in default;
  - (b) the FMIF had held a sale campaign for the security property, but no sale had eventuated;
  - (c) the Cattai Property was currently zoned for a golf course residential development;
  - (d) pre-sales for this style of development had not reached required levels to enable construction funding to proceed;
  - (e) most interested parties considered that a change of zoning would be desirable;
  - (f) the responsible entity (in the premises, LMIM ATF the FMIF) believed that a joint venture development involving a change of zoning would be successful;
  - (g) the responsible entity (in the premises, LMIM ATF the FMIF) had obtained an updated valuation for the security property to ascertain an appropriate assignment price;
  - (h) it was proposed to assign the loan to the MPF for the valuation price, as this price represented the likely recovery amount for the loan;
  - (i) as the MPF did not have sufficient cash reserves at that time to pay the assignment price, it was proposed that payment of the price be delayed by six months, with interest to be paid by the MPF at the rate of 10% per annum;
  - (j) the price was to be secured by a fixed and floating charge over the assets of the MPF;

- (k) it was not anticipated that there would be any recovery from the guarantors.
33. On 15 October 2008 Ms. Shelley Chalmers of the first defendant sent an email with the subject "FW: for consideration by MIF and MPF CCs – Lifestyle" to the following recipients:
- (a) "321 MPF Investment Committee";
  - (b) "801 Credit Committee";
  - (c) Grant Fischer;
  - (d) Eghard van der Hoven;
  - (e) Ann McCallum;
  - (f) Lisa Darcy; and
  - (g) David Monaghan.
34. The email dated 15 October 2008 had attached to it a document entitled "MPF Credit Committee – Synopsis," dated 28 August 2008 ("**the Synopsis**").
35. The Synopsis was headed: "*Transaction: Proposed purchase from and short term finance from LM First Mortgage Income Fund to acquire ppty at 76 Wisemans Ferry Road, Cattai.*"
36. Relevantly, the Synopsis stated that:
- (a) the MPF proposed to acquire an existing FMIF mortgage, which was secured over the Cattai Property;
  - (b) the Cattai Property comprised a future residential/golf course type development site;
  - (c) the Cattai Property was not income producing;
  - (d) the first defendant ATF the FMIF had obtained an updated valuation, and the MPF was relying on this report for its purposes;

(e) the MPF wished to enter into a six month sale contract to buy the Lifestyle Loan as at 28 August 2008, on the following finance terms:

- (i) the purchase price was \$19,551,800.65, which was the total of the FMIF's debt as at 28 August 2008;
- (ii) the MPF had until 28 February 2009 to settle the purchase;
- (iii) until the payment of the settlement amount, the MPF would pay to the FMIF 10% interest per annum on the purchase price.

37. On 22 October 2008 Ms. Shelley Chalmers of the first defendant sent a further email with the subject "FW: for consideration by MIF and MPF CCs – Lifestyle" to the recipients listed in paragraph 33 above.

38. In her email dated 22 October 2008, Ms. Chalmers stated:

*"As a number of committee members will be away please register your vote or wish for discussion."*

39. In response, on 22 October 2008 and 23 October 2008 the recipients listed in paragraph 33 above, together with Ms. Chalmers, responded that they approved the transaction.

**Approval of the Assignment by the first defendant's Board of Directors**

40. By a resolution dated 27 October 2008 ("Resolution"), to which the Conflict Record was attached, the Board of Directors of the first defendant ATF the MPF and ATF the FMIF resolved to approve the assignment of the Lifestyle Loan from the FMIF to the MPF.

40A. The effect of the Resolution and the Synopsis was that LMIM ATF the MPF and ATF the FMIF, agreed that the amount of \$19,551,800.65 would be treated as the amount of the Settlement Sum referred to in clause 4 of the Assignment Deed.

40B. Hereafter, a reference to the Settlement Sum is a reference to the amount of \$19,551,800.65.

### Variations of the Assignment Deed

41. On 12 December 2008:

- (a) the first defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed ("**the First Deed of Variation**").

42. Relevantly, the following were terms of the First Deed of Variation:

- (a) clause 2.2 of the Assignment Deed was varied, so that the Assignee must pay the Settlement Sum to the Assignor on the date falling 12 months from the Settlement Date (item 2, Schedule);
- (b) the variation to the Assignment Deed contained in the First Deed of Variation would be effective as and from the 12<sup>th</sup> day of December 2008 (item 2, Schedule).

43. On 10 August 2009:

- (a) the first defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed ("**the Second Deed of Variation**").

44. Relevantly, the following were terms of the Second Deed of Variation:

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 7% per annum (item 2, Schedule);

- (b) clause 2.2 of the Assignment Deed was varied and replaced, so that the Assignee was required to pay the Settlement Sum to the Assignor on 28 August 2010 or such earlier date as may be mutually agreed (item 2, Schedule);
- (c) the variation to the Assignment Deed contained in the Second Deed of Variation would be effective as and from 28 August 2009.

45. On 30 November 2010:

- (a) the first defendant ATF the FMIF;
- (b) PTAL as the Assignor; and
- (c) the first defendant ATF the MPF, as Assignee;

entered into a Deed of Variation of the Assignment Deed ("**the Third Deed of Variation**").

46. Relevantly, the following were terms of the Third Deed of Variation:

- (a) the definition of Interest Rate set out in clause 1.1 of the Assignment Deed was varied, to read 8.5% per annum (item 2, Schedule);
- (b) clause 2.2 of the Assignment Deed was varied and replaced, so that the Assignee was required to pay the Settlement Sum to the Assignor on 28 August 2011 or such earlier date as may be mutually agreed (item 2, Schedule);
- (c) the variation to the Assignment Deed contained in the Second Deed of Variation would be effective as and from 28 August 2010.

46A. Hereafter, the Assignment Deed, the First Deed of Variation of the Assignment Deed, the Second Deed of Variation of the Assignment Deed and the Third Deed of Variation of the Assignment Deed are collectively referred to as the "Deeds".

### Payment of the Settlement Sum under the Assignment Deed

47. By no later than ~~On or about~~ 30 May 2011 the first defendant ATF the MPF as Assignee paid the Settlement Sum to PTAL (acting as Custodian for the first defendant ATF the FMIF) as Assignor or, in the alternative, to the first defendant ATF the FMIF, pursuant to clause 2.2 of the Assignment Deed (as varied).

#### Particulars

- (a) Page 21 of the MPF's Audited Annual Financial Report dated 30 June 2011 states:

*"On August 2008, it was resolved by the Board of Directors of the Responsible Entity, to transfer three mortgage loans to the value of \$33,513,345 and the related first mortgage security to the Scheme from a related Scheme, LM First Mortgage Income Fund. There is a fixed charge over these two specific secured properties plus a floating charge over the remaining assets of the Scheme to provide security to the LM First Mortgage Income Fund in the event of default by the Scheme. This loan between the Scheme and LM First Mortgage Income Fund is interest bearing at 7% with the interest being capitalised. On 30 May 2011, this receivable was successfully repaid in full by the Scheme";*

- (b) By an ASIC Form 312 dated 7 July 2011 the first defendant as Chargor notified ASIC that registered charge number 1768753, which was a fixed and floating charge in favour of PTAL, had been paid or satisfied in full and had therefore been discharged or released on 6 July 2011;
- (c) The first defendant ATF the MPF had provided registered charge number 1768753 to PTAL as security for (relevantly) payment of all moneys that the first defendant ATF the MPF owed to PTAL, which included the Settlement Sum payable under the Assignment Deed.
- (d) The first defendant maintained an internal account ledger no. 13041 called "Receivable – MPF Purchase of Loan Assets" that recorded receivables to

be paid by the first defendant ATF the MPF to the first defendant ATF the FMIF in relation to the Settlement Sum in this proceeding, a separate settlement sum in related proceeding S8032/14 ("First Proceeding") and an unrelated (but similar) assignment concerning a Mr Kamel Albassit in the total amount of \$33,420,755.57. Ledger no. 13401 shows that as at 27 May 2011, the first defendant ATF the MPF had paid all receivables owing.

- (e) At page 33 of the FMIF's Audited Annual Financial Report dated 30 June 2011 it is stated that "LM MPF has successfully settled the full value of these loans as at 30 June 2011". The loans being referred to included the loans assigned to the first defendant ATF the MPF under the Assignment Deed.

- ~~(f) The plaintiffs will not be able to provide further particulars of the payment of the Settlement Sum until the completion of interlocutory steps in this proceeding.~~

47A—The Settlement Sum:

- (a)——consisted of, at least:

- i.——direct cash payments;
- ii.——payments on behalf of or for the benefit of the defendant ATF FMIF, to third parties:

Particulars

~~The plaintiff will not be able to provide particulars of the payments until the completion of interlocutory steps in this proceeding.~~

- ~~(b)——delivered value to the defendant ATF the FMIF in relation to which the plaintiff is entitled to trace.~~

Particulars



The plaintiff will not be able to provide particulars of the assets represented by that value until the completion of interlocutory steps in this proceeding.

~~47A. The Settlement Sum consisted of a total payment of principal in the amount of \$19,551,800.65, comprising the following classes of payments made between 28 August 2008 and 27 May 2011:~~

- ~~(a) payments by the first defendant ATF MPF direct to the first defendant ATF FMIF ("Direct Payments");~~
- ~~(b) payments by the first defendant ATF MPF to LM Administration Pty Ltd ("LMA") for FMIF's operation fees, at the direction of the first defendant ATF FMIF;~~
- ~~(c) payments by the first defendant ATF MPF to the first defendant for trust management fees;~~
- ~~(d) payments by the first defendant ATF MPF to borrowers from FMIF, at the direction of the first defendant ATF FMIF;~~
- ~~(e) payments by the first defendant ATF MPF to unitholders of the FMIF, at the direction of the first defendant ATF FMIF;~~
- ~~(f) payments by the first defendant ATF MPF to sundry third party creditors of the FMIF, at the direction of the first defendant ATF FMIF.~~

#### Particulars

~~The transactions within these classes are identified within internal ledger account no: 13041, which was maintained by the first defendant in relation to the Settlement Sum in this proceeding, a separate Settlement Sum in related proceeding S8032/14 and an unrelated (but similar) assignment concerning Mr Kamel Albassit ("Albassit assignment")~~

~~47B. The total Direct Payments by the first defendant ATF MPF to the first defendant ATF FMIF as part of the Settlement Sum in this proceeding and as part of the Settlement Sum in related proceeding S8032/14 ("First Proceeding"), was~~

~~\$5,556,008. The plaintiff accepts that this amount has to be apportioned between this proceeding and the First Proceeding.~~

**Payment of interest on the Settlement Sum under the Assignment Deed**

47C. As pleaded in paragraphs 29(f), 29(g), 44(a) and 46(a) above, by clause 4.3 of the Assignment Deed (as varied) the first defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates of:

- (a) 10% per annum between 28 August 2008 and 28 August 2009;
- (b) 7% per annum between 28 August 2009 and 28 August 2010; and
- (c) 8.5% per annum from 28 August 2010.

47D. ~~Between August 2008 and July~~By no later than May 2011, the first defendant ATF the MPF had paid at least \$5,679,658 ("**Total Interest**") to PTAL (acting as Custodian for the first defendant ATF the FMIF) as Assignor or, in the alternative, the first defendant ATF the FMIF for interest on ("**Interest**"):

- (a) the Settlement Sum under the Assignment Deed in this proceeding;
- (b) the Settlement Sum settlement sum referred to in under the Assignment Deed in the assignment deed the subject of the First Proceeding. The plaintiff accepts that this amount has to be apportioned between this proceeding and the First Proceeding.

**Particulars**

The best particulars that the plaintiff can currently give in relation to the composition of the \$5,679,658 was provided in the plaintiff's further and better particulars dated 30 March 2016.

The interest transactions are identified within: (i) internal ledger account no. 1300/A1472 which was maintained by the first defendant in relation to the Settlement Sum in this proceeding, the Settlement Sum in the First Proceeding, the Albassit assignment and an unrelated loan for \$5.1 million and (ii) internal ledger account no. 13041 and (iii) internal ledger account no. 13040.

47E. Of the Total Interest, the plaintiff claims the amount of \$3,805,370.86 ("Interest") as having been paid in relation to the Settlement Sum.

Particulars

This represents 67% of \$5,679,658.

The amount of 67% was calculated by dividing \$19,551,800.65 by \$29,283,463.41.

The amount of \$29,283,463.41 was calculated by adding \$19,551,800.65 to the amount of \$9,731,662.76, which is the settlement sum in the First Proceeding.

Contribution to the Fund

~~47E. The Payment by the first defendant ATF MPF of the Settlement Sum and the Interest to the first defendant ATF FMIF, was a contribution to the Fund in that:~~

~~(a) but for the payment of the Settlement Sum and the Interest, the Fund would have been for a considerably lesser sum;~~

~~(b) the first defendant ATF FMIF used the Settlement Sum and the Interest to continue its business, which contributed to the creation of the Fund.~~

The first defendant's breaches of duty

The "no conflict" duty

48. By entering into the Assignment Deed, the first defendant ATF the MPF placed itself in a position where the duties that it owed to the beneficiaries of the FMIF were in conflict with the duties that it owed to the beneficiaries of the MPF, in that:

- (a) the interests of the beneficiaries of the FMIF required LMIM to maximise the amount the FMIF could recover for the Lifestyle Loan; while
  - (b) the interests of the beneficiaries of the MPF required LMIM to minimise, as far as reasonably possible, the amount it paid to acquire assets on behalf of the MPF.
49. The first defendant ATF the MPF did not seek, or obtain, the informed consent of the beneficiaries of the MPF:
- (a) to the first defendant being in the position of conflict pleaded in paragraph 48 above; or
  - (b) to enter into the ~~Deeds Assignment Deed or the First, Second or Third Deeds of Variation of the Assignment Deed, as pleaded in paragraphs 28 to 47 of this Statement of Claim.~~

Equitable duties~~duty of care~~

50. Notwithstanding its knowledge of the matters pleaded in paragraphs 32 and 36 above:
- (a) if the first defendant ATF the MPF relied upon the Hymans Valuation in entering into the Assignment Deed:
    - (i) the first defendant ATF the MPF failed to comply with the obligation in clause 4.1 of the Assignment Deed for the Assignee to obtain a new valuation of the Cattai Property within 90 days of the Settlement Date;
    - (ii) the “valuation date” of the Hymans Valuation was 29 February 2008, and (as pleaded in paragraph 24(h) above) the Hymans Valuation stated that Hymans did not assume any responsibility or accept any liability where the valuation was relied upon after the expiration of three months from the date of valuation;
    - (iii) notwithstanding the matters pleaded in paragraphs 24(f) and 24(g) above, the first defendant ATF the MPF did not obtain Hymans’

prior written consent to the first defendant ATF the MPF relying upon the Hymans Valuation for the purposes of entering into the Assignment Deed;

- (iv) notwithstanding the matters pleaded in paragraph 24(h) above, the first defendant ATF the MPF did not advise Hymans of the following factors that would be likely to have an effect on the valuation of the Cattai Property:
  - A. that the FMIF had held a sale campaign for the security property, but no sale had eventuated; and
  - B. that the first defendant, and most interested parties, considered that a change of zoning for the Cattai Property would be desirable;
- (b) in the premises pleaded in paragraph 36(e)(i) above, the first defendant ATF the MPF agreed to pay the amount of \$19,551,800.65 as the Settlement Sum under the Assignment Deed, notwithstanding that:
  - (i) in breach of clause 4.1 of the Assignment Deed the first defendant ATF the MPF and as the Assignee did not commission and pay for an independent valuation (or any valuation) as contemplated by that clause.
  - (ii) this breached clause 4.2 of the Assignment Deed, as this was not the market value of the Cattai Property as determined by a valuation obtained pursuant to clause 4.1 of the Assignment Deed;
  - (iii) this was \$551,880.65 more than the value of \$19 million ascribed to the Cattai Property by the Hymans Valuation;
  - (iv) the first defendant did not anticipate that there would be any recovery from the guarantors (that is, Beach and Jacink, as pleaded in paragraph 18(d) above);

(v) when the Assignment Deed was executed on 28 August 2008, the Facility to Security Ratio for the Lifestyle Loan was approximately 103%, in circumstances where, in the premises pleaded in paragraphs 18(e), 18(h) and 20(c)(iii) above:

A. between 30 March 2005 and 5 February 2007 the Facility to Security Ratio had been required to be 63%, at the discretion of the Lender; and

B. from 5 February 2007, the Facility to Security ratio was required to be 67%, at the discretion of the Lender;

~~(e) as pleaded in paragraphs 29(f), 29(g), 44(a) and 46(a) above, by clause 4.3 of the Assignment Deed the first defendant ATF the MPF agreed to pay interest to the Assignor on the unpaid Settlement Sum at the rates pleaded at 47C above of:~~

~~(i) 10% per annum between 28 August 2008 and 28 August 2009;~~

~~(ii) 7% per annum between 28 August 2009 and 28 August 2010; and~~

~~(iii) 8.5% per annum from 28 August 2010;~~

notwithstanding that:

(iv) in or about August 2008 or, alternatively, when the Conflict Record was prepared in October 2008, the MPF did not have sufficient cash reserves to pay the Settlement Sum to the FMIF;

(v) in the premises pleaded in paragraph 47 above, the MPF did not have sufficient cash reserves to pay the Settlement Sum until approximately July 2011;

(vi) in the premises, the Assignment Deed as varied caused interest to accrue on the Settlement Sum on the amount of \$19,551,800.65 per annum, at the rates pleaded in paragraph 47C above~~50(e)~~ above, for a period of almost three years;

- (vii) as pleaded in paragraph 50(b)(v) above, the Facility to Security Ratio for the Lifestyle Loan was approximately 103% as at 28 August 2008, before interest commenced accruing on the unpaid Settlement Sum pursuant to clause 4.3 of the Assignment Deed; and
- (viii) the Cattai Property was not income producing (as pleaded in paragraph 36(c) above); and
- (d) as pleaded in paragraphs 29(a) and 30 above, in breach of clause 2.1 of the Assignment Deed the first defendant caused the Securities to be assigned to itself ATF the MPF on 28 August 2008, notwithstanding that:
  - (i) clause 2.1 provided that the assignment was to take effect from the Settlement Date;
  - (ii) as pleaded in paragraph 46(b) above, the Assignment Deed was varied so that the Settlement Date was 28 August 2011 or such earlier date as may be mutually agreed;
  - (iii) in the premises pleaded in paragraphs 39 and 40 above neither the MPF Credit Committee, nor the Board of Directors of LMIM, had approved the Assignment Deed when the Securities were assigned to the first defendant ATF the MPF.

*Breach of duty*

- 51. In the premises pleaded in paragraphs 48, 49 and 50 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF breached the duty (pleaded at paragraph 14 above) that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties that it owed to the beneficiaries of the FMIF.
- 52. In the premises pleaded in paragraph 50 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF

breached the duty (pleaded at paragraph 15 above) that it owed to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.

Duties under the *Trusts Act* 1973 (Old)

53. In the premises pleaded in paragraph 50 above, by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds, the first defendant ATF the MPF breached the duty (pleaded at paragraph 16(a) above) it owed pursuant to s.22 of the *Trusts Act* to the beneficiaries of the MPF, to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment.
54. The first defendant ATF the MPF breached the duties (pleaded at paragraph 16(b) above) that it owed pursuant to s.24 of the *Trusts Act* to the beneficiaries of the MPE, in that by entering into the Assignment Deed on 28 August 2008 and the First, Second and Third Deeds of Variation and by performing the terms of these Deeds:
  - (a) in the premises pleaded in paragraphs 50(a), 50(b) and 50(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(e) of the *Trusts Act* to take into account the risk of capital or income loss or depreciation when exercising its power of investment;
  - (b) in the premises pleaded in paragraphs 50(b), 50(c) and 50(d) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(g) of the *Trusts Act* to take into account the likely income return and the timing of income return;
  - (c) in the premises pleaded in paragraphs 50(c)(iv) and (v) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(h) of the *Trusts Act* to take into account the length of the term of the proposed investment;



- (d) in the premises pleaded in paragraphs 50(a), 50(b) and 50(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(j) of the *Trusts Act* to take into account the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment; and
- (e) in the premises pleaded in paragraph 50(c) above, the first defendant ATF the MPF breached the duty that it owed pursuant to s.24(n) of the *Trusts Act* to take into account the cost of making the proposed investment.

#### **Loss suffered by the MPF**

55. But for the first defendant ATF the MPF's breach of duties pleaded at paragraphs 48 to 54 above, the first defendant ATF the MPF would not have:

- (a) entered into the Deeds;
- (b) paid the Settlement Sum;
- (c) paid the Interest.

~~In consequence of the first defendant's breaches of duty:~~

- ~~(d) in or about July 2011 the first defendant ATF the MPF paid the amount of \$19,551,800.65 as the Settlement Sum pursuant to the Assignment Deed, plus the Interest calculated at the rates pleaded in paragraphs 50(e)(i) to (iii) above, to PTAL in its capacity as Custodian of the FMIF;~~
- ~~(e) in exchange, the only valuable security that the first defendant ATF the MPF received pursuant to the Assignment Deed was registered mortgage AB414899G over the Cattai Property.~~

55A. As a result of the matters pleaded in paragraph 55, the first defendant ATF the MPF suffered a loss in the amount of \$18,982,171.51 ("Loss").

#### Particulars

(Settlement Sum plus Interest) minus (the Sale Proceeds – defined below)

(\$19,551,800.65 and \$3,805,370.86) minus (\$4,375,000)

55B. The first defendant is liable (the "Liability") to pay equitable compensation to the plaintiff for the Loss.

~~56. The market value of the Cattai Property as at:~~

- ~~(a) 28 August 2008, being the date of the Assignment Deed;~~
  - ~~(b) July 2011, being the date on or about which the first defendant ATF the MPF paid the Settlement Sum to PTAL in its capacity as Custodian of the FMIF; and~~
  - ~~(c) the trial of this proceeding;~~
- ~~was, and will be, significantly less than:~~
- ~~(d) the amount of \$19,551,800.65 that the first defendant ATF the MPF agreed to and did pay as the Settlement Sum pursuant to the Assignment Deed; and~~
  - ~~(e) the amount of \$19,551,800.65 plus the Interest calculated between 28 August 2008 and July 2011 at the rates pleaded in paragraphs 50(e)(i) to (iii) above, which the first defendant ATF the MPF agreed to pay and did pay pursuant to the Assignment Deed (as amended).~~

#### Particulars

~~The best particulars the plaintiffs can provide are that:~~

- ~~(i) on or about 1 July 2013 the plaintiffs KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) obtained a valuation from LandMark White valuers for the Cattai Property in the amount of \$4,180,000.00, excluding GST; and~~

- ~~(ii) the plaintiffs KordaMentha Pty Ltd (ACN 100 169 391) and Calibre Capital Limited (ACN 108 318 985) sold the Cattai Property for \$4,357,000 plus GST in July 2013.~~

56A. In July 2013, the plaintiff and Calibre sold the Cattai Property for \$4,357,000 ("Sale Proceeds").

#### Particulars

The best particulars that the plaintiff can provide the sale process are provided in the further and better particulars dated 30 March 2016 save that to those particulars one further sale dated 23 April 2012 by PTAL to Mr Peter Farrell of Lot 177 in the amount of \$455,000 should be added.

~~57. The first defendant was:~~

- ~~(a) in the premises pleaded in paragraphs 4 to 7 above, aware that it, ATF the MPF, held the assets of the MPF on trust for the beneficiaries of the MPF;~~
- ~~(b) in the premises pleaded in paragraphs 31 to 36, paragraph 40 and paragraphs 48 to 50 above, aware that the payments to itself ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, of \$19,551,800.65 as the Settlement Sum pursuant to the Assignment Deed, and the Interest pursuant to clause 4.3 of the Assignment Deed, were made in breach of trust.~~

58. In the premises pleaded in paragraph 13(a) above, insofar as PTAL may hold the Fund or other assets in its as Custodian of the FMIF, it holds the Fund or other assets, as agent for the first defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.

- ~~(a) the amount pleaded in paragraph 57 above in its capacity as Custodian of the FMIF, it holds that amount as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement;~~
- ~~(b) assets representing the value it received from the Settlement Sum, it holds those assets as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.~~

~~59. In the premises, the defendant ATF the FMIF holds:~~

~~(a) the amount of \$19,551,800.65 paid as the Settlement Sum pursuant to the Assignment Deed (subject to any appropriate adjustments); and~~

~~(b) all interest paid pursuant to clause 4.3 of the Assignment Deed;~~

~~on a constructive trust for the plaintiffs, in their its capacity as trustees of the MPF.~~

**The first defendant's right of indemnity and the plaintiff's right of subrogation**

61. The first defendant is insolvent.

62. The first defendant ATF the FMIF entered into the Deeds acting for the benefit of the FMIF.

63. The Deeds, the payment of Settlement Sum and the payment of the Interest, provided a benefit to LMIM ATF the FMIF and the FMIF.

64. The first defendant was acting ATF the MPF and ATF the FMIF when it entered into the Deeds.

65. The first defendant was acting ATF the MPF and ATF the FMIF when the Settlement Sum was paid.

66. The first defendant was acting ATF the MPF and ATF the FMIF when the Interest was paid.

67. The first defendant was acting ATF the MPF and ATF the FMIF when it passed the Resolution.

68. In the premises pleaded at paragraphs 64 to 67, the first defendant incurred the Liability to the plaintiff, in circumstances where the first defendant was acting ATF the MPF and ATF the FMIF.

69. The first defendant is entitled to an indemnity out of the assets of the FMIF, including the Fund, in respect of the Liability and any other liabilities to the plaintiff in this proceeding ("**Indemnity**").

70. The first defendant is entitled to a lien or charge over the assets of the FMIF, including the Fund, to secure the Indemnity.

71. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the Indemnity.

~~In the premises pleaded at paragraphs 17 to 47A, the first defendant:~~

~~(a) incurred the liabilities for breaches of duty pleaded above pleaded at paragraphs 55 to 59, while acting as the trustee of the FMIF;~~

~~(b) is entitled to an indemnity out of the assets of the FMIF in respect of the liabilities of the first defendant to the plaintiff in this proceeding;~~

~~(c) is entitled to a lien or charge over the assets of the FMIF to secure that indemnity;~~

~~62. The plaintiff is entitled to be subrogated to the rights of the first defendant in relation to the assets of the FMIF, including the Fund.~~

The plaintiffs claims the following relief:

1. Equitable compensation against the first defendant in the amount of the Loss;
2. ~~A declaration that the defendant holds the amount paid pursuant to the Assignment Deed (as varied) on constructive trust for the plaintiffs;~~
3. Interest pursuant to s.58 of the *Civil Proceedings Act 2011* (Qld);
4. Costs;
5. Such further or other order as the Court sees fit.
6. A declaration that:

(a) the first defendant is entitled to be indemnified an indemnity out of the assets of the FMIF, including the Fund, in respect of the liability Liability

and any other liabilities of the first defendant to the plaintiff in this proceeding;

- (b) the first defendant has a lien or charge over the assets of the FMIF, including the Fund, in respect of the ~~liability~~ Liability and any other liabilities of the first defendant to the plaintiff in this proceeding;
- (c) the plaintiff is entitled to be subrogated to the rights of the first defendant in respect of the assets of the FMIF, including the Fund in relation to the indemnity;

~~6A Further or in the alternative, a declaration that:~~

- ~~(a) the plaintiff and the FMIF Unitholders rank equally in the Fund;~~
- ~~(b) the plaintiff is entitled to a rateable distribution in the Fund in relation to the Settlement Sum and the Interest;~~
- ~~(c) the plaintiff is entitled to an equitable charge or lien over the Fund to the extent of its rateable distribution;~~

~~7. Further, or in the alternative, an equitable charge or lien over the assets of the defendant to the extent of the defendant's liability to the plaintiff in this proceeding.~~

~~8. Further or in the alternative, an order that the first defendant and the second defendant instruct PTAL pursuant to clause 2.1 of the Custody Agreement to do all things necessary to give effect to any orders made against the first defendant.~~

Signed:

*J. L. K. L. L.*

Description: MINTER ELLISON  
Solicitors for the plaintiffs

Dated: 27 August 2014 1 September 2015 14 October 2015 ~~29 February~~  
~~2016~~ 19 April 2016

This pleading was settled by Mr Crowe QC and Ms Ahern of Counsel. The amendments to this pleading were settled by Mr Crowe QC and Mr Goodwin of Counsel.

#### NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

SUPREME COURT OF QUEENSLAND

REGISTRY Brisbane  
NUMBER 12716/15

Plaintiff: KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS  
CAPACITY AS TRUSTEE OF THE LM MANAGED  
PERFORMANCE FUND

AND

Defendant: LM INVESTMENT MANAGEMENT LIMITED  
(RECEIVERS AND MANAGERS APPOINTED) (IN  
LIQUIDATION) (ACN 077 208 461)

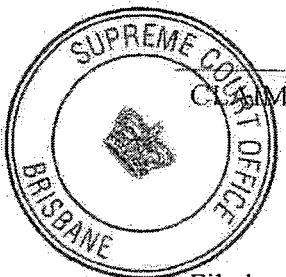
CLAIM

The plaintiff claims:

1. Equitable compensation calculated as follows:

Payments pursuant to the AIIS Loan of	\$11,385,581.62
<u>Less</u> receipts applied to principal of	\$3,609,648.53
Net Loss	\$7,775,633.09
<u>Plus</u> lost opportunity interest	\$9,044,723.21
Equitable compensation:	<u>\$16,820,356.30</u>

2. A declaration that the defendant as trustee for the LM First Mortgage Income Fund ("FMIF") holds the amount of \$3,905,721.81 on constructive trust for the plaintiff, in its capacity as trustee of the LM Managed Performance Fund ("MPF");
3. A declaration that:
  - (a) the plaintiff is entitled to be indemnified out of the assets of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;



Filed on behalf of the plaintiff

Form 2 Rule 22

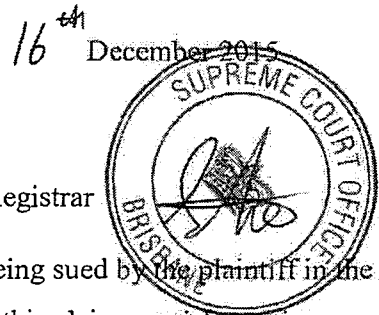
MINTERELLISON  
Waterfront Place  
1 Eagle Street  
BRISBANE QLD 4000  
DX 102 BRISBANE  
Telephone (07) 3119 6000  
Facsimile (07) 3119 1000  
Email david.obrien  
@minterellison.com  
Reference DOB 407747963

- (b) the plaintiff has a lien or charge over the assets and undertaking of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;
  - (c) the plaintiff is entitled to be subrogated to the rights of the defendant in respect of the assets of the FMIF, in respect of the amount of \$3,905,721.81;
4. Interest pursuant to s.58 of the *Civil Proceedings Act* 2011 (Qld) but excluding interest on so much of the claim for equitable compensation as includes the lost opportunity to earn interest;
  5. Costs;
  6. Such further or other order as the Court sees fit.

The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on



Registrar

To the defendant: TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.



Address of Registry: QEII Courts of Law Complex  
415 George Street  
Brisbane QLD 4000

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

PARTICULARS OF THE PLAINTIFF:

Name: KordaMentha Pty Ltd (ACN 100 169 391) in its capacity as trustee of the LM Managed Performance Fund

Plaintiff's residential or business address: Level 14, 12 Creek Street, Brisbane QLD 4000, Australia

Plaintiff's solicitors name: David Thomas O'Brien

and firm name: Minter Ellison

Solicitor's business address: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

Address for Service: Waterfront Place, 1 Eagle Street, BRISBANE QLD 4000

DX: 102 BRISBANE

Telephone: (07) 3119 6000

Fax: (07) 3119 1000

Email address: david.obrien@minterellison.com

Signed: *M.T. Ellison*

Description: MINTER ELLISON  
Solicitors for the plaintiff

Dated: 15 December 2015

This claim is to be served on: LM INVESTMENT MANAGEMENT LIMITED  
(RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)

of: FTI CONSULTING, 'CORPORATE CENTRE ONE'  
LEVEL 9, 2 CORPORATE COURT, BUNDALL, QLD,  
4217

and of: BDO, LEVEL 10, 12 CREEK STREET, BRISBANE,  
QLD, 4000

and of: McGRATHNICOL, LEVEL 7, 175 EAGLE STREET,  
BRISBANE, QLD, 4000

**SUPREME COURT OF QUEENSLAND**

REGISTRY: Brisbane

NUMBER:

Plaintiff: **KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND**

AND

Defendant: **LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 077 208 461)**

**STATEMENT OF CLAIM**

**Table of Contents**

<b>The LM Managed Performance Fund.....</b>	<b>3</b>
<b>The LM First Mortgage Income Fund .....</b>	<b>6</b>
<b>Duties owed by the defendant ATF the MPF.....</b>	<b>7</b>
<b>Incorporation of Australian International Investment Services Pty Ltd.....</b>	<b>8</b>
<b>Acquisition by AIIS of a lease over land located in Canberra, ACT.....</b>	<b>8</b>
<b>The MPF's loan to AIIS ("the AIIS Loan").....</b>	<b>9</b>
<b>The FMIF's loan to AIIS ("the FMIF Loan") .....</b>	<b>9</b>
<b>First Deed of Variation of the AIIS Loan.....</b>	<b>11</b>
<b>Second Deed of Variation of the AIIS Loan.....</b>	<b>12</b>
<b>Priority Deed.....</b>	<b>13</b>
<b>Internal approvals for the Third Deed of Variation of the AIIS Loan.....</b>	<b>14</b>
<b>Third Deed of Variation of the AIIS Loan.....</b>	<b>16</b>
<b>Second Priority Deed.....</b>	<b>16</b>
<b>Internal approvals for the Fourth Deed of Variation of the AIIS Loan.....</b>	<b>17</b>
<b>Fourth Deed of Variation of the AIIS Loan .....</b>	<b>19</b>
<b>Third Priority Deed .....</b>	<b>20</b>

STATEMENT OF CLAIM

Filed on behalf of the plaintiff

Form 2 Rule 22

MINTER ELLISON

Waterfront Place

1 Eagle Street

BRISBANE QLD 4000

DX 102 BRISBANE

Telephone (07) 3119 6000

Facsimile (07) 3119 1000

Reference NYB DOB 407747963

Internal approvals for the Extension Letter for the AIIS Loan.....	21
Extension Letter for the AIIS Loan .....	22
Incorporation of Aalto Apartments Pty Ltd .....	23
Appointment of PTAL as custodian trustee of the MPF, and assignment of the securities for the AIIS Loan.....	23
Internal approval for Fifth Deed of Variation of the AIIS Loan, and Land Availability Agreement between AIIS and Aalto .....	24
Land Availability Agreement between AIIS and Aalto .....	26
Jones Lange LaSalle Valuation Report .....	28
Internal approvals for the Fifth Deed of Variation of the AIIS Loan .....	29
Fifth Deed of Variation of the AIIS Loan.....	30
Fourth Priority Deed .....	31
Sixth Deed of Variation of the AIIS Loan .....	32
Appointment of administrators to the defendant, and sale of the Land .....	33
The defendant's breaches of duty .....	33
<u>Equitable duty of care.....</u>	<u>33</u>
<i>Third Deed of Variation of the AIIS Loan.....</i>	<i>33</i>
<i>Fourth Deed of Variation of the AIIS Loan.....</i>	<i>35</i>
<i>Extension Letter for the AIIS Loan .....</i>	<i>36</i>
<i>Fifth Deed of Variation of the AIIS Loan.....</i>	<i>38</i>
<i>Sixth Deed of Variation of the AIIS Loan .....</i>	<i>41</i>
<u>Duties under the <i>Trusts Act</i> 1973 (Qld).....</u>	<u>44</u>
Loss suffered by the MPF .....	47
Interest paid on the FMIF Loan.....	49
Constructive trust.....	49
Right of subrogation .....	50

This claim in this proceeding is made in reliance on the following facts:

1. The plaintiff:
  - (a) is a company duly incorporated according to law;
  - (b) is capable of suing in its corporate name; and
  - (c) in the premises pleaded in paragraphs 4 to 11 below, has been with Calibre Capital Ltd ACN 108 318 985 ("**Calibre**") a trustee of a trust named the LM Managed Performance Fund ("**the MPF**") since 12 April 2013 and the sole trustee of the MPF since on or about 5 January 2015.

2. The defendant:

- (a) is a company duly incorporated according to law;
- (b) is, subject to the plaintiff obtaining leave to proceed against the defendant pursuant to s.500 of the *Corporations Act* 2001 (Cth), capable of being sued in its corporate name;
- (c) since at least 1999, has carried on business as a professional trustee for reward, in which capacity it created and managed investment schemes;
- (d) in the premises pleaded in paragraphs 4 to 11 below, was the trustee of the MPF from in or about December 2001 until 12 April 2013; and
- (e) in the premises pleaded in paragraphs 15 and 16 below, has been the responsible entity of a registered managed investment scheme named the LM First Mortgage Income Fund (**"the FMIF"**) since 28 September 1999.

3. In this pleading:

- (a) the defendant, when acting in its capacity as the trustee of the MPF, is referred to as **"the defendant ATF the MPF"**;
- (b) the defendant, when acting in its capacity as the responsible entity of the FMIF, is referred to as **"the defendant ATF the FMIF."**

**The LM Managed Performance Fund**

4. By a trust deed dated 4 December 2001 (**"the First Trust Deed"**), the defendant:

- (a) established a unit trust named The LM Managed Performance Fund (**"the MPF"**); and
- (b) became trustee of the MPF.

5. By a Deed of Variation dated 11 November 2002 (**"the Second Trust Deed"**), the defendant ATF the MPF deleted all parts of the First Trust Deed other than the parties, and replaced them with the terms set out in the Second Trust Deed (Recital B of the Second Trust Deed).

6. By a Deed of Variation dated 25 November 2009 ("**the Third Trust Deed**"), the defendant ATF the MPF deleted clauses 1, 2.3, 2.4 and 3 to 27 of the Second Trust Deed, and replaced them with the terms set out in the Schedule to the Third Trust Deed (clause 1 of the Third Trust Deed).
7. By a Supplemental Deed Poll dated 23 October 2012 ("**the Fourth Trust Deed**") the defendant ATF MPF amended the Third Trust Deed in the way set out in the Schedule to the Fourth Trust Deed (clause 2 of the Fourth Trust Deed).
8. Relevantly, the following were terms of the First, Second, Third and Fourth Trust Deeds:
  - (a) the defendant was the Manager (clause 1.1 of each Deed);
  - (b) the Constitution was the Trust Deed including any Schedule, Annexure or Amendments to it (clause 1.1 of each Deed);
  - (c) the Scheme was the trust created by the Deed to be known as the LM Managed Performance Fund (clause 1.1 of each Deed);
  - (d) the assets of the Scheme were:
    - (i) the Scheme Fund (clauses 1.1 of the First and Second Trust Deeds); subsequently
    - (ii) the Scheme Property (clause 1.1 of the Third Trust Deed);
  - (e) the Manager agreed to act as trustee of the Scheme (clause 2.1 of each Deed);
  - (f) the Manager declared that it held:
    - (i) the Scheme Fund (clauses 2.2 of the First and Second Deeds); subsequently
    - (ii) the Scheme Property (clause 2.2 of the Third Trust Deed);
 on trust for the Members;

- (g) the name of the Scheme was:
    - (i) The LM Managed Performance Fund (clause 2.3 of the First Trust Deed); subsequently
    - (ii) The LM Managed Performance Fund or any other name that the Manager may determine from time to time (clauses 2.3 of the Second and Third Trust Deeds);
  - (h) the beneficial interest in the Scheme Fund would be divided into Units (clause 3.1 of each Deed);
  - (i) the Constitution might be modified or repealed or replaced with a new Constitution by the Manager if the Manager reasonably considered that the change would not adversely affect Members' rights or was deemed necessary to conduct the affairs of the Scheme (clauses 24.1 of the First and Third Trust Deeds; clause 18.1 of the Second Trust Deed);
  - (j) the Manager must resign if (being a corporation) it became an externally-administered body corporate as defined in the *Corporations Act 2001* (clauses 23.1(b)(ii) of the First and Third Trust Deeds; clause 17.1(b)(ii) of the Second Trust Deed).
9. On or about 19 March 2013, John Richard Park and Ginette Dawn Muller were appointed voluntary administrators of the defendant.
  10. In the premises, pursuant to clause 23.1(b)(ii) of the Third Trust Deed the defendant was required to resign as Manager of the MPF.
  11. By order of this Honourable Court made on 12 April 2013:
    - (a) the defendant was removed as trustee of the MPF; and
    - (b) the plaintiff, and Calibre, were appointed jointly and severally as trustees of the MPF.
  12. On or about 1 August 2013, the defendant's creditors resolved to place the defendant into liquidation, and Mr Park and Ms Muller were appointed its liquidators.

13. On or about 5 January 2015, Calibre retired as trustee of the MPF.
14. In the premises, the plaintiff is the sole trustee and Manager of the MPF.

**The LM First Mortgage Income Fund**

15. On or about 28 September 1999, the defendant established the LM First Mortgage Income Fund ("the FMIF").
16. Since on or about 28 September 1999:
  - (a) the FMIF has been, and remains, a registered managed investment scheme, pursuant to s.601EB of the *Corporations Act* 2001 (Cth).
  - (b) the defendant has been, and remains, the Responsible Entity of the FMIF;
  - (c) the defendant has held, and continues to hold, the property of the FMIF on trust for its members, pursuant to s.601FC of the *Corporations Act* 2001 (Cth).
17. Pursuant to the terms of a Custody Agreement dated 4 February 1999, between the defendant and Permanent Trustee Australia Ltd ACN 008 412 913 (later re-named The Trust Company (PTAL) Ltd) ("PTAL"):
  - (a) PTAL agreed to custodially hold the Portfolio and Title Documents as agent for the defendant in relation to (inter alia) the FMIF (clause 2.1 and Schedule 2);
  - (b) the defendant was responsible for taking all decisions in relation to the Portfolio and, subject to the Custody Agreement, PTAL was required to act on the defendant's Instructions in relation to any assets of the Portfolio (clause 4.1);
  - (c) the plaintiffs will rely upon the full terms of the Custody Agreement at the hearing of this proceeding.
18. In this pleading:
  - (a) PTAL, when acting in its capacity as the custodian trustee of the FMIF, is referred to as "PTAL ACF the FMIF"; and

- (b) PTAL, when acting in its capacity as the custodian trustee of the MPF, is referred to as "PTAL ACF the MPF."

**Duties owed by the defendant ATF the MPF**

19. At all material times, the defendant ATF the MPF owed a fiduciary duty to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty.
20. At all material times, the defendant ATF the MPF owed a duty to the beneficiaries of the MPF to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.
21. At all material times, the defendant ATF the MPF owed duties to the beneficiaries of the MPF:
  - (a) pursuant to s.22 of the *Trusts Act* 1973 (Qld), ("**the Trusts Act**") to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment; and
  - (b) pursuant to s.24 of the *Trusts Act* to take into account, inter alia, the following matters, when exercising a power of investment:
    - (i) the risk of capital or income loss or depreciation (s.24(e));
    - (ii) the likely income return and the timing of income return (s.24(g));
    - (iii) the length of the term of the proposed investment (s.24(h));
    - (iv) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment (s.24(j)); and
    - (v) the cost (including commissions, fees, charges and duties payable) of making the proposed investment (s.24(n)).



### **Incorporation of Australian International Investment Services Pty Ltd**

22. On or about 29 September 2002, Australian International Investment Services Pty Ltd ACN 102 261 898 ("AIIS") was registered as a company.
23. At all material times:
  - (a) the sole director and secretary of AIIS was Mr Peter Drake; and
  - (b) Mr Drake was a director of the defendant; and
  - (c) Mr Drake was the Chairman and Chief Executive Officer of the defendant.
24. On a date that is unknown to the plaintiff, but which was not later than 21 December 2004, LMIM acquired all the shares of AIIS, in its capacity as trustee of the MPF.

### Particulars

An ASIC company search for AIIS records that document number 1E0549876, effective 21 December 2004, was received and processed on 23 December 2004.

25. In the premises, at all material times after 21 December 2004:
  - (a) AIIS was a wholly-owned subsidiary of LMIM ATF the MPF; and
  - (b) LMIM ATF the MPF controlled the actions of AIIS.

### **Acquisition by AIIS of a lease over land located in Canberra, ACT**

26. On a date that is unknown to the plaintiff, but which occurred after AIIS was incorporated on 29 September 2002, AIIS acquired a leasehold interest in land situated at 7 Irving Street, Phillip, Australian Capital Territory; more particularly described as Block 1, Section 22, Division of Phillip, Volume 1541 in Folio 73, Deposit Plan 2329 ("the Land").
27. Insofar as they are known to the plaintiff, the terms of the lease over the Land were:

- (a) the lease was granted on 11 December 1998; and
- (b) the term of the lease was 99 years.

**The MPF's loan to AIIS ("the AIIS Loan")**

28. On or about 19 January 2005:

- (a) the defendant ATF the MPF, as Lender; and
- (b) AIIS as Borrower,

entered into a Loan Agreement ("the AIIS Loan").

29. Relevantly, the following were terms of the AIIS Loan:

- (a) the Borrower had requested the AIIS Loan from the Lender (Recital A);
- (b) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
- (c) the "Loan" was \$1,140,000.00 (item 8, schedule);
- (d) the "Approved Purpose" was "purchase and development of [the Land]" (item 1, schedule);
- (e) the "Commencement Date" was 23 December 2004 (item 4, schedule);
- (f) the "Expiry Date" was 22 December 2008 (item 5, schedule);
- (g) the Interest Rate was 10% per annum (item 6, schedule);
- (h) no securities were taken as security for the performance of AIIS's obligations under the AIIS Loan; and
- (i) the Lender was to provide the Loan to the Borrower "on or after the Commencement Date" (clause 2).

**The FMIF's loan to AIIS ("the FMIF Loan")**

30. On a date that is unknown to the plaintiff, but which the plaintiff believes occurred on or about 8 April 2005, parties including:

- (a) the defendant ATF the FMIF; and
- (b) PTAL ACF the FMIF; and
- (c) AIIS,

entered into a Loan Agreement ("the FMIF Loan"), by which the defendant ATF the FMIF, or in the alternative PTAL ACF the FMIF, loaned money to AIIS.

Particulars

- (i) On or about 30 November 2008:
  - A. PTAL ACF the FMIF;
  - B. the defendant ATF the FMIF (as First Lender);
  - C. the defendant ATF the MPF (as Second Lender); and
  - D. AIIS as Mortgagor,

executed a Priority Deed. Item 4(a) of the Schedule to the Priority Deed states that the First Lender's Security included a Loan Agreement with AIIS, dated 8 April 2005.

- 31. On or about 12 April 2005, the defendant ATF the FMIF caused PTAL ACF the FMIF to take a mortgage over the Land, as security for the performance of AIIS's obligations under the FMIF Loan.

Particulars

- (i) Mortgage 1416794, registered on 27 April 2005.
  - (ii) Item 4(b) of the Schedule to the Priority Deed dated 30 November 2008.
- 32. On 27 April 2005, the mortgage granted to the defendant ATF the FMIF was registered over the Land, as first registered mortgage 1416794.
  - 33. The Principal Sum secured by registered mortgage 1416794 was \$1,690,000.00.

Particulars

- (i) Item 7 of registered mortgage 1416794;
  - (ii) Clause 2 of the Memorandum of Provisions registered as document 1200308.
34. Other than as pleaded in paragraphs 30 to 33 above, the terms of the FMIF Loan are presently unknown to the plaintiff.
35. The FMIF Loan was subsequently varied by:
- (a) a Deed of Variation dated 19 June 2007;
  - (b) a Deed of Variation dated 12 December 2007;
  - (c) a Letter of Variation dated 14 April 2008; and
  - (d) a Letter of Variation/Deed of Variation, dated November 2008.

Particulars

Stated in item 4(a) of the Schedule to the Priority Deed dated 30 November 2008.

36. Other than as pleaded in paragraph 35 above, the terms upon which the FMIF Loan was varied are unknown to the plaintiff.

**First Deed of Variation of the AIIS Loan**

37. On or about 11 April 2005:
- (a) the defendant ATF the MPF, as Lender; and
  - (b) AIIS as the Borrower,
- entered into a Deed of Variation of the AIIS Loan (“the **First Deed of Variation of the AIIS Loan**”).
38. Relevantly, the following were terms of the First Deed of Variation of the AIIS Loan:

- (a) the Principal Security was defined as the AIIS Loan (item 4, Schedule);
  - (b) the Principal Security was varied as follows:
    - (i) the Loan Amount was increased to \$4,200,000.00; and
    - (ii) the variation to the Principal Security contained in the First Deed of Variation of the AIIS Loan would be effective as and from 11 April 2005;
- (item 6, Schedule).

#### **Second Deed of Variation of the AIIS Loan**

39. On or about 30 November 2008:

- (a) the defendant ATF the MPF, as Lender; and
- (b) AIIS as the Borrower;

entered into a Deed of Variation of the AIIS Loan ("**the Second Deed of Variation of the AIIS Loan**").

40. Relevantly, the following were terms of the Second Deed of Variation of the AIIS Loan:

- (a) the Principal Security was defined as the AIIS Loan, as varied by the First Deed of Variation of the AIIS Loan (item 4, Schedule);
- (b) the Principal Security was varied as follows:
  - (i) the Expiry Date was extended from 22 December 2008 to 1 May 2009;
  - (ii) AIIS was required to provide additional security, including a second registered mortgage over the Land;
  - (iii) the variation to the Principal Security contained in the Second Deed of Variation of the AIIS Loan would be effective as and from 22 December 2008;

(item 6, Schedule).

41. On 30 November 2008, the mortgage granted to the defendant ATF the MPF was registered over the Land, as second registered mortgage 1611828.

#### **Priority Deed**

42. On or about 30 November 2008:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;
- (c) LMIM ATF the MPF, as Second Lender; and
- (d) AIIS as Mortgagor,

entered into a Priority Deed.

43. Relevantly, the Priority Deed provided that:

- (a) the First Lender's Security, including:
  - (i) the FMIF Loan, as varied by Deeds of Variation dated 19 June 2007 and 12 December 2007, a Letter of Variation dated 14 April 2008, and a Letter of Variation/Deed of Variation dated November 2008; and
  - (ii) the first registered mortgage number 1416794 over the Land,
 

had the first priority to the extent of all money secured by it, up to a total of \$7,800,000.00, plus interest and costs (clause 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender's Security, including:
  - (iii) the AIIS Loan, as varied by the First and Second Deeds of Variation; and
  - (iv) the second registered mortgage over the Land,

had the second priority to the extent of all money secured by it, up to a total of \$4,200,000.00, plus interest and costs (clause 3.1 and Schedule, items 6 and 7);

(c) the First Lender's Security had the third priority, to the extent of all money secured by it in excess of \$7,800,000.00, plus interest and costs (clause 3.1 and Schedule, items 4 and 5); and

(d) the Second Lender's Security had the fourth priority, to the extent of all money secured by it in excess of \$4,200,000.00, plus interest and costs (clause 3.1 and Schedule, items 6 and 7).

#### **Internal approvals for the Third Deed of Variation of the AIIS Loan**

44. On 6 August 2009, Ms Shelley Chalmers, of the defendant's Commercial Lending section, sent an email with the subject: "For consideration – Canberra JA MPF term ext & loan increase" to the following recipients:

- (a) recipients described as "321 MPF Investment Committee";
- (b) Mr David Monaghan, a director of the defendant;
- (c) Mr Eghard van der Hoven;
- (d) Mr Nick Daking; and
- (e) Ms Lisa Darcy, a director of the defendant.

45. The email dated 6 August 2009, had attached to it a document entitled "Credit Committee Synopsis – Managed Performance Fund – Variation," dated 5 August 2009 ("the Synopsis").

46. By the Synopsis, approval was sought from the persons listed in subparagraphs 44(b) to 44(e) above, together with Ms Chalmers, for the AIIS Loan to be varied on the following basis:

- (a) the term of the AIIS Loan would be extended for one year, to 1 May 2010;
- (b) the maximum approved loan amount would be increased to \$5.5 million;

- (c) the reason for increasing the maximum approved loan amount to \$5.5 million was stated to be:

*"...to allow rollover fee and interest capitalization for both MPF and FMIF loans during the extension";*

- (d) an updated valuation was not to be obtained; and
- (e) the reason for not obtaining an updated valuation was stated to be:

*"...as site is "commercial" in nature and 2 year valuation rule applies."*

47. Relevantly, the Synopsis stated that:

- (a) the existing development approval for the Land had been issued on 19 May 2008;
- (b) the existing development approval was for a commercial project;
- (c) the Land had last been valued in February 2008, by CBRE Canberra;
- (d) that valuation had valued the Land at \$11.85 million;
- (e) the valuation had been conducted on the following basis:
  - (i) "as is"; and
  - (ii) before the development approval had been obtained;
- (f) the current balance of the AIIS Loan was \$4.064 million;
- (g) the balance of the FMIF Loan was approximately \$7.7 million;
- (h) "total exposure" across both the FMIF and the MPF was approximately \$11.8 million;
- (i) interest from the AIIS Loan and the FMIF Loan "capitalise[d]" to the AIIS Loan; and
- (j) the term of the MPF Loan had expired.



48. In response, on or about 6 August 2009, the persons listed in subparagraphs 44(b) to 44(e) above, together with Ms Chalmers, responded that they approved the proposed transaction.

### **Third Deed of Variation of the AIIS Loan**

49. In accordance with the internal approvals obtained, as pleaded in paragraphs 44 to 48 above, on or about 22 December 2009:

(a) LMIM ATF the MPF; and

(b) AIIS,

entered into a Deed of Variation of the AIIS Loan ("**the Third Deed of Variation of the AIIS Loan**").

50. Relevantly, the following were terms of the Third Deed of Variation of the AIIS Loan:

(a) the Principal Security was defined as the AIIS Loan, as varied from time to time (item 4, Schedule);

(b) the Principal Security was varied as follows:

(i) the Expiry Date was varied from 1 May 2009 to 1 May 2010;

(ii) the Loan Amount was increased to \$5,500,000.00; and

(iii) the variation to the Principal Security contained in the Third Deed of Variation of the AIIS Loan would be effective as and from 22 December 2009,

(item 6, Schedule).

### **Second Priority Deed**

51. On or about 22 December 2009;

(a) PTAL ACF the FMIF, as First Lender or Custodian;

(b) LMIM ATF the FMIF;

(c) LMIM ATF the MPF, as Second Lender; and

(d) AIIS as Mortgagor;

entered into a Priority Deed ("**the Second Priority Deed**").

52. Relevantly, the Second Priority Deed provided that:

- (a) the First Lender's Security, as pleaded in paragraph 43(a) above, had the first priority to the extent of all money secured by it, up to a total of \$7,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender's Security, as pleaded in paragraph 43(b) above, had the second priority to the extent of all money secured by it, up to a total of \$5,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7); and
- (c) the First Lender's Security, as pleaded in paragraph 43(c) above, had the fourth priority to the extent of all money secured by it in excess of \$7,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (d) the Second Lender's Security, as pleaded in paragraph 43(d) above, had the fourth priority to the extent of all money secured by it in excess of \$5,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7).

#### **Internal approvals for the Fourth Deed of Variation of the AIIS Loan**

53. On 1 September 2010, Ms Shauna Larkin, of the defendant's Client Relations – Treasury Services section, sent an email with the subject: "Increase and term extension to AIIS MPF. Voting require please" to the following recipients:

- (a) recipients described as "321 MPF Investment Committee";
- (b) Mr Greg McDonald;
- (c) Mr Eghard van der Hoven, a director of the defendant;

(d) Ms Lisa Darcy, a director of the defendant; and

(e) Ms Shelley Chalmers;

54. The email dated 1 September 2010, had attached to it a document entitled "Credit Committee Synopsis – Managed Performance Fund – Variation" ("the Synopsis").

55. By the Synopsis, approval was sought from the persons listed in subparagraphs 53(b) to 53(e) above for the AIIS Loan to be varied on the following basis:

(a) the amount of the AIIS Loan would be increased, from \$5,500,000.00 to \$7,500,000.00;

(b) the term of the AIIS Loan would be extended from 1 May 2010 to 1 May 2011;

(c) the interest rate would be raised from 10% to 12% per annum;

(d) the reason for increasing the maximum approved loan amount to \$7.5 million was stated to be:

*"...to accommodate FMIF and MPF interest capitalisation and consultancy costs in order to achieve the residential approval";*

(e) the MPF would rely upon any valuation obtained by the FMIF; and

(f) the LVR would increase to 130%.

56. Relevantly, the Synopsis stated that:

(a) the Land had last been valued in February 2008, by CBRE Canberra;

(b) in that valuation, CBRE Canberra had valued the Land at \$11.85 million;

(c) the valuation had been conducted on the following basis:

(i) "as is"; and

(ii) before development approval had been obtained;

- (d) a commercial development was no longer considered feasible;
- (e) the development approval obtained for a commercial development had lapsed;
- (f) a residential development was considered highly likely;
- (g) a development approval for residential purposes was being pursued;
- (h) no updated valuation was required;
- (i) the current balance of the AIIS Loan was \$5,150,000.00;
- (j) the "total exposure" for the AIIS Loan and the FMIF Loan was approximately \$13 million;
- (k) interest from the AIIS Loan and the FMIF Loan "capitalise[d]" to the AIIS Loan; and
- (l) the term of the MPF Loan had expired.

57. In response, on or about 1 September 2010 the persons listed in subparagraphs 53(b) to 53(e) above responded that they approved the proposed transaction.

58. At an MPF Credit Committee meeting on 2 September 2010 the Credit Committee resolved to approve the proposed transaction.

#### **Fourth Deed of Variation of the AIIS Loan**

59. In accordance with the internal approvals obtained, as pleaded in paragraphs 53 to 58 above, on or about 6 October 2010:

- (a) LMIM ATF the MPF; and
- (b) AIIS,

entered into a Deed of Variation of the AIIS Loan ("the **Fourth Deed of Variation of the AIIS Loan**").

60. Relevantly, the terms of the Fourth Deed of Variation of the AIIS Loan were:

- (a) the AIIS Loan was amended with effect at and from the Effective Date, to read as set out in Annexure A (clause 3.1);
- (b) the Effective Date was the date of the Deed (clause 1.1);
- (c) the date of the Deed was 6 October 2010 (page 1);
- (d) the document was executed as a Deed on 6 October 2010 (page 5);
- (e) a document entitled "Loan Agreement" was annexed to the Fourth Deed of Variation of the AIIS Loan, as Annexure A;
- (f) relevantly, the terms of the "Loan Agreement" that was Annexure A to the Fourth Deed of Variation of the AIIS Loan were:
  - (i) the Borrower had requested the Loan from the Lender (Recital A);
  - (ii) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
  - (iii) the "Loan" was \$7,500,000.00 (item 8, schedule);
  - (iv) the "Approved Purpose" was "purchase and development of [the Land]" (item 1, schedule);
  - (v) the "Commencement Date" was 23 December 2004 (item 4, schedule);
  - (vi) the "Expiry Date" was 1 May 2011 (item 5, schedule);
  - (vii) the Interest Rate was 10% per annum, increasing to 12% per annum with effect from 23 August 2010 (item 6, schedule).

### Third Priority Deed

61. On or about 12 December 2010:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;

(c) LMIM ATF the MPF, as Second Lender; and

(d) AIIS as Mortgagor;

entered into a Priority Deed ("**the Third Priority Deed**").

62. Relevantly, the Third Priority Deed provided that:

- (a) the First Lender's Security, as pleaded in paragraph 43(a) above, had the first priority to the extent of all money secured by it, up to a total of \$7,920,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender's Security, as pleaded in paragraph 43(b) above, had the second priority to the extent of all money secured by it, up to a total of \$7,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7);
- (c) the First Lender's Security, as pleaded in paragraph 43(c) above, had the fourth priority to the extent of all money secured by it in excess of \$7,920,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (d) the Second Lender's Security, as pleaded in paragraph 43(d) above, had the fourth priority to the extent of all money secured by it in excess of \$7,500,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7).

#### **Internal approvals for the Extension Letter for the AIIS Loan**

63. By an MPF Credit Committee Synopsis dated 10 May 2011, approval was sought to extend the term of the AIIS Loan from 1 May 2011 to 1 May 2012.

64. Relevantly, the Synopsis stated that:

- (a) AIIS wished to "*progress the development approval process for a residential development on the site*";
- (b) the Land had last been valued in February 2008, by CBRE Canberra;

- (c) in that valuation, CBRE Canberra had valued the Land at \$11.85 million;
  - (d) the valuation had been conducted on the following basis:
    - (i) "as is"; and
    - (ii) before development approval had been obtained;
  - (e) an updated valuation was to be obtained once development approval was obtained;
  - (f) the current balance of the AIIS Loan was \$6,495,000.00;
  - (g) the "total exposure" for the AIIS Loan and the FMIF Loan was approximately \$14.4 million; and
  - (h) interest from the AIIS Loan and the FMIF Loan "capitalise[d]" to the AIIS Loan.
65. In response, the following persons approved the proposed transaction:
- (a) Mr Grant Fisher, by email dated 22 May 2011;
  - (b) Ms Francene Mulder, a director of the defendant, by email dated 23 May 2011;
  - (c) Mr Simon Tickner, a director of the defendant, by email dated 23 May 2011;
  - (d) Ms Lisa Darcy, a director of the defendant, by email dated 3 June 2011.
66. Further, at an MPF Credit Committee meeting on 16 May 2011, the Credit Committee resolved to approve the proposed transaction.

#### **Extension Letter for the AIIS Loan**

67. In accordance with the internal approvals obtained, as pleaded in paragraphs 63 to 66 above, by letter dated 27 May 2011 the defendant notified AIIS that the Credit Committee had approved an extension of the AIIS Loan, on the following basis:

- (a) the term of the AIIS Loan was extended to 1 May 2012; and
- (b) the defendant did not require an updated valuation for the Land.

#### Particulars

Letter from Ms Shelley Chalmers of the defendant's Property Asset Management Department, to AIIS care of Mr Peter Drake, dated 27 May 2011.

68. AIIS accepted the extension of the AIIS Loan on these terms, by an Acceptance Form executed by Mr Peter Drake, the sole director of AIIS, dated 3 June 2011.

#### **Incorporation of Aalto Apartments Pty Ltd**

69. On or about 4 August 2011, Aalto Apartments Pty Ltd ACN 152 486 630 ("Aalto") was registered as a company.

#### **Appointment of PTAL as custodian trustee of the MPF, and assignment of the securities for the AIIS Loan**

70. On or about 1 November 2011:

- (a) LMIM ATF the MPF; and
- (b) PTAL,

entered into a Deed of Assignment.

71. Recitals C and D to the Deed of Assignment stated:

*C. PTAL and LM have agreed that PTAL will assume the role and responsibilities of custodian of the Fund in accordance with the terms of the Custody Agreement which will require LM to transfer the legal interest in the securities to PTAL.*

*D. PTAL and LM wish to enter into this document to record the basis upon which the legal interest in the Securities will be transferred to PTAL.*

72. Relevantly, the Deed of Assignment provided that:

- (a) with effect from the Commencement Date, PTAL would become the legal owner of certain Assets and Securities (clause 2.1);



- (b) the Commencement Date was 1 November 2011 (clause 1.1); and
- (c) the Securities were the securities, agreements and other documents described in Schedule 2 to the Deed (clause 1.1), which included:
  - (i) the AIIS Loan;
  - (ii) the First, Second, Third and Fourth Deeds of Variation;
  - (iii) the Extension Letter;
  - (iv) the First and Second Priority Deeds; and
  - (v) registered mortgage 1611828.

73. On or about 1 November 2011, registered mortgage 1611828 was transferred from LMIM ATF the MPF to PTAL ACF the MPF, pursuant to clause 2.1 of the Assignment Deed.

74. The transfer of registered mortgage 1611828 from LMIM ATF the MPF to PTAL ACF the MPF was registered on 3 February 2012.

**Internal approval for Fifth Deed of Variation of the AIIS Loan, and Land Availability Agreement between AIIS and Aalto**

75. By an MPF Credit Committee Synopsis dated 14 November 2011, approval was sought for the following variation to the AIIS Loan:

- (a) to increase the Maximum Approved Loan Amount of the AIIS Loan from \$7,500,000.00 to \$16,800,000.00;
- (b) for the interest rate of 12% per annum to remain unchanged; and
- (c) for an updated valuation to be obtained once development approval was obtained.

76. Relevantly, the Synopsis stated that:

- (a) the highest and best use for the Land was residential;

- (b) AIIS had entered into an agreement with Aalto to develop a residential scheme called "Aalto Apartments", which would include 278 residential units and a 67-place childcare centre;
- (c) the latest financial update, dated 1 November 2011, contained the following financial analysis for the project:

<i>Net Sales Revenue (after GST paid)</i>			<i>\$126.53m</i>
<i>Built Form Cost</i>	<i>\$85.00</i>		
<i>Contingency (5%)</i>	<i>\$ 4.25</i>	<i>\$89.25m</i>	
<i>Professional Fees</i>		<i>\$ 3.99m</i>	
<i>Statutory Fees</i>		<i>\$ 3.05m</i>	
<i>Misc</i>		<i>\$ 0.20m</i>	
<i>Holding Costs</i>		<i>\$ 0.06m</i>	
<i>Finance Charges</i>		<i>\$ 0.89m</i>	
<i>Interest Expense</i>	<i>\$ 14.29m</i>		<i>\$111.73m</i>
<i>Add – back GST reclaimed</i>			<i>\$ 8.92m</i>
<i>Net Development Profit</i>			<i>\$ 23.72m</i>
<i>Less Combined Loans to FMIF and MPF (at 8.11.11)</i>			<i>\$ 16.05m</i>
<i>Less FMIF/MPF Interest @ 12% for project life of 41mths</i>			<i>\$ 7.59m</i>
<i>Residual Balance</i>			<i>\$ 0.08m</i>

- (d) the increase to the AIIS Loan Amount was sought to pay certain costs until 31 March 2012, the date on which a development approval was expected, at which point a new valuation would be sought based on the DA, and on an "as-complete" basis;
- (e) as at 21 October 2011, the balance of the FMIF Loan was \$7,849,504;
- (f) as at 8 November 2011, the balance of the AIIS Loan was \$8,194,253;
- (g) a sale of the Land "as is" would be likely to result in a sale price of about \$3 million, which would result in the MPF writing off its investment of approximately \$8.2 million.

77. At an MPF Credit Committee meeting on 16 November 2011, the following persons approved the proposed transaction:

- (a) Ms Lisa Darcy (Chair and Executive Director), a director of the defendant;

- (b) Mr Peter Drake (Chief Executive Officer), a director of the defendant;
  - (c) Mr Eghard van der Hoven (Executive Director), a director of the defendant;
  - (d) Ms Francene Mulder (Executive Director), a director of the defendant;
  - (e) Mr Grant Fischer (Chief Financial Officer); and
  - (f) Scott King (Development Manager).
78. A document entitled "Land Availability Agreement AIIS Pty Ltd and Aalto Apartments Pty Ltd" was annexed to the MPF Credit Committee Synopsis dated 14 November 2011.
79. The document entitled "Land Availability Agreement AIIS Pty Ltd and Aalto Apartments Pty Ltd" set out the following "AIIS Entitlement Calculation as at 30.6.11":

<i>FMIF Loan Balance as at 30.6.11</i>	<i>\$7,849,604</i>	<i>(Item 1)</i>
<i>FMIF Interest (12%) over the Life of the Project</i>	<i>\$4,156,870</i>	<i>(Item 2)</i>
<i>MPF Loan Balance as at 30.6.11</i>	<i>\$6,987,755</i>	<i>(Item 3)</i>
<i>MPF Interest (12%) over the Life of the Project</i>	<i>\$3,946,759</i>	<i>(Item 4)</i>
<i>MPF Interest (12%) on funded Development Costs over the Life of the Project</i>	<i>\$3,639,808</i>	<i>(Item 5)</i>
<u><i>TOTAL AIIS Pty Ltd Entitlement</i></u>	<u><i>\$26,580,796</i></u>	

#### **Land Availability Agreement between AIIS and Aalto**

80. On a date which is unknown to the plaintiff, but which it believes occurred before 14 November 2011, AIIS and Aalto entered into a Land Availability Agreement.
81. Relevantly, the terms of the Land Availability Agreement were:
- (a) AIIS was the registered proprietor of the Land (Recital A);
  - (b) AIIS wished to sell the Land, in order to recover its indebtedness to the financier that held a registered mortgage over the Land (Recital B);
  - (c) Aalto had identified the Land as being appropriate for development and sale (Recital C);

- (d) AIIS did not wish to develop the Land itself (Recital D);
- (e) AIIS had agreed to make the Land available to Aalto to enable Aalto to develop the Land at Aalto's risk and for its own benefit (Recital E);
- (f) AIIS was required to make the Land available to Aalto to enable Aalto to develop the Land (clause 2.1);
- (g) Aalto was:
  - (i) required to use its best endeavours to obtain Development Borrowings from a third party financier (clause 7.1);
  - (ii) authorised to provide a real property mortgage over the Land, for this purpose (clause 8);
  - (iii) required to market and sell the units (clause 10);
  - (iv) required to pay any Development Income in the following order of priority (clause 9):
    - A. payment of the costs of sale of the units (including GST, sales commissions, mortgagee costs, legal fees and adjustments);
    - B. repayment of any amount owed to an External Lender;
    - C. payment of any unpaid Development Costs;
    - D. repayment of any unpaid Development Costs paid by Aalto;
    - E. repayment of any Development Costs paid by an LM Lender after 30 June 2011;
    - F. payment of the AIIS Entitlement, which was defined to be \$26,580,796 (clause 1.1); and
    - G. the balance to Aalto.

### Jones Lange LaSalle Valuation Report

82. LMIM obtained a valuation report for the Land from Jones Lang LaSalle valuers, dated 12 April 2012.

83. The valuer assessed the market value of the Land as follows:

- (a) as is, described as current market land value with development approval: \$8.5 million (GST exclusive); and
- (b) as if the Aalto Apartments development was complete: \$141,615,800 as a gross realisations value (GST inclusive).

84. The report also stated that:

- (a) it was prepared for LMIM for internal reporting purposes only ("valuation purpose," page 3);
- (b) the valuation was current as at the date of valuation only, being 12 April 2012 (page 4);
- (c) the valuation was based on the following critical assumptions, conditions and limitations (page 2):

- *The valuation is current as at the date of valuation only, being 12 April 2012. The value assessed herein may change significantly and unexpectedly over a relatively short period (including as a result of general market movements or factors specific to the particular property).*
- *We do not accept liability for losses arising from such subsequent changes in value. Without limiting this statement, we do not accept any liability where this valuation is relied upon more than three months after the date of valuation, or earlier if you become aware of any factors that may have any effect on the valuation.*
- *This report is relevant at the date of valuation and to the circumstances prevailing at that time. However, within a changing economic environment experiencing fluctuations in interest rates, inflation levels, rents and global economic circumstances, acceptable returns on investment may, as a consequence, be susceptible to future variation. We therefore strongly recommend that before any action is taken involving an acquisition, disposal, shareholding restructure or*

*other transaction more than three months after the date of this report, you consult the Valuer.*

#### **Internal approvals for the Fifth Deed of Variation of the AIIS Loan**

85. On 8 May 2012, Ms Ann McCallum, of the defendant's Property Asset Management section, sent an email with the subject: "AIIS and Aalto – redocumentation following Land Availability Agreement" to recipients described as "321 MPF Investment Committee."
86. The email dated 8 May 2012, sought approval (relevantly) for the term of the AIIS Loan to be extended to 1 September 2012.
87. Relevantly, the email stated that:
  - (a) as at 30 June 2011 the balance of the AIIS Loan totalled \$14,574,322.07;
  - (b) no further funds would be advanced to AIIS under the AIIS Loan, except for interest and fees relating to the first mortgage facility from the FMIF;
  - (c) on this basis, the balance of the AIIS Loan as at 31 March 2012, was \$15,086,480.07.
88. In response, the following persons approved the proposed transaction:
  - (a) Mr Andrew Petrik, by email dated 8 May 2012;
  - (b) Mr Grant Fischer, by email dated 8 May 2012;
  - (c) Mr Eghard van der Hoven, a director of the defendant, by email dated 8 May 2012;
  - (d) Mr Simon Tickner, by email dated 9 May 2012;
  - (e) Mr Scott King, by email dated 17 May 2012; and
  - (f) Ms Lisa Darcy, a director of the defendant, by email dated 17 May 2012.

### **Fifth Deed of Variation of the AIIS Loan**

89. In accordance with the internal approvals obtained, as pleaded in paragraphs 85 to 88 above, on or about 14 August 2012:

- (a) PTAL as Lender;
- (b) LMIM ATF the MPF; and
- (c) AIIS as the Borrower,

entered into a Deed of Variation of the AIIS Loan ("**the Fifth Deed of Variation of the AIIS Loan**").

90. Relevantly, the terms of the Fifth Deed of Variation of the AIIS Loan were:

- (a) the AIIS Loan was amended with effect at and from the Effective Date, to read as set out in Annexure A (clause 4.1);
- (b) the Effective Date was 1 July 2011 (clause 1.1);
- (c) relevantly, the terms of the "Loan Agreement" that was Annexure A to the Fourth Deed of Variation of the AIIS Loan were:
  - (i) the Borrower had requested the Loan from the Lender (Recital A);
  - (ii) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
  - (iii) the "Loan" was \$16,800,000.00 (item 8, schedule);
  - (iv) the "Approved Purpose" was (item 1, schedule):
    - A. purchase and development of the Land;
    - B. payment of interest on the AIIS Loan;
    - C. payment of interest on the FMIF Loan; and
    - D. towards payment of the AIIS Entitlement, as defined in the Land Availability Agreement;

- (v) the "Commencement Date" was 23 December 2004 (item 4, schedule);
- (vi) the "Expiry Date" was 1 September 2012 (item 5, schedule);
- (vii) the Interest Rate was nil (item 6, schedule).

#### **Fourth Priority Deed**

91. On or about 14 August 2012:

- (a) PTAL ACF the FMIF, as First Lender or Custodian;
- (b) LMIM ATF the FMIF;
- (c) LMIM ATF the MPF, as Second Lender; and
- (d) AIIS as Mortgagor,

entered into a Priority Deed ("**the Fourth Priority Deed**").

92. Relevantly, the Fourth Priority Deed provided that:

- (a) the First Lender's Security, as pleaded in paragraph 43(a) above, had the first priority to the extent of all money secured by it, up to a total of \$8,295,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (b) the Second Lender's Security, as pleaded in paragraph 43(b) above, had the second priority to the extent of all money secured by it, up to a total of \$18,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7);
- (c) the First Lender's Security, as pleaded in paragraph 43(c) above, had the fourth priority to the extent of all money secured by it in excess of \$8,295,000.00, plus interest and costs (clauses 3.1 and Schedule, items 4 and 5);
- (d) the Second Lender's Security, as pleaded in paragraph 43(d) above, had the fourth priority to the extent of all money secured by it in excess of



\$18,800,000.00, plus interest and costs (clauses 3.1 and Schedule, items 6 and 7).

**Sixth Deed of Variation of the AIIS Loan**

93. On or about 1 February 2013:

- (a) PTAL as Lender;
- (b) LMIM ATF the MPF; and
- (c) AIIS as the Borrower;

entered into a Deed of Variation of the AIIS Loan ("**the Sixth Deed of Variation of the AIIS Loan**").

94. Relevantly, the terms of the Sixth Deed of Variation of the AIIS Loan were:

- (a) the AIIS Loan was amended with effect at and from the Effective Date, to read as set out in Annexure A (clause 4.1);
- (b) the Effective Date was 1 December 2012 (clause 1.1);
- (c) relevantly, the terms of the "Loan Agreement" that was Annexure A to the Sixth Deed of Variation of the AIIS Loan were:
  - (i) the Borrower had requested the Loan from the Lender (Recital A);
  - (ii) the Lender had agreed to make the Loan available to the Borrower on the terms and conditions of the Loan Agreement (Recital B);
  - (iii) the "Loan" was \$24,000,000.00 (item 8, schedule);
  - (iv) the "Approved Purpose" was (item 1, schedule):
    - A. purchase and development of the Land;
    - B. payment of interest on the AIIS Loan;
    - C. payment of interest on the FMIF Loan; and

D. towards payment of the AIIS Entitlement, as defined in the Land Availability Agreement;

(v) the "Commencement Date" was 23 December 2004 (item 4, schedule);

(vi) the "Expiry Date" was 1 September 2013 (item 5, schedule);

(vii) the Interest Rate was nil (item 6, schedule; clause 4 of the Loan Agreement).

#### **Appointment of administrators to the defendant, and sale of the Land**

95. The plaintiff repeats and relies upon the matters pleaded in paragraphs 9 to 14 above.

96. On a date that is unknown to the plaintiff, but which the plaintiff believes occurred in or about October 2013, the Land was sold.

97. The plaintiff and Calibre, in their then capacity as the trustees of the MPF, did not receive any money from the sale of the Land.

#### **The defendant's breaches of duty**

##### Equitable duty of care

##### *Third Deed of Variation of the AIIS Loan*

98. In the premises pleaded in paragraphs 44 to 50 above, the defendant ATF the MPF entered into the Third Deed of Variation of the AIIS Loan, notwithstanding that the defendant knew, or ought to have known, that:

##### Combined loan to value ratio of 111.4%

(a) by reason of the matters pleaded in paragraphs 31, 32, 41, 46(c), 47(i) and 52 above:

(i) interest on the FMIF Loan was capitalised to, and paid from, the AIIS Loan;

- (ii) the second registered mortgage that the defendant ATF the MPF held over the Land was the only security for the AIIS Loan of any value; and
  - (iii) the defendant ATF the MPF would not recover any moneys from the sale of the Land, while any amount above \$7,800,000.00 plus interest and costs remained owing to the defendant ATF the FMIF;
- (b) the Third Deed of Variation of the AIIS Loan increased the loan to value ratio of the FMIF and AIIS Loans to 111.4%, in that:
- (i) the increase to the Loan Amount of the AIIS Loan by the Third Deed of Variation of the AIIS Loan increased the total balance of the FMIF and AIIS Loans to \$13.2 million; and
  - (ii) the most recent valuation that had been obtained for the Land, which was the CBRE Valuation, had valued the Land at \$11.85 million;
- (c) in the premises, LMIM ATF the MPF failed to assess whether the security obtained for the AIIS Loan was adequate, in light of the increase to the Loan Amount of the AIIS Loan by the Third Deed of Variation of the AIIS Loan;

Reliance upon CBRE Valuation

- (d) the defendant ATF the MPF relied upon the CBRE Valuation in entering into the Third Deed of Variation of the AIIS Loan on or about 22 December 2009, in circumstances where:
- (i) the CBRE Valuation had been obtained in or about February 2008;
  - (ii) the defendant ATF the MPF failed to obtain an up to date valuation of the Land, before entering into the Third Deed of Variation of the AIIS Loan;
  - (iii) the CBRE Valuation had been performed on an "as is" basis, without taking any development approval into account;

- (iv) when LMIM ATF the MPF entered into the Third Deed of Variation of the AIIS Loan, a development approval had been obtained for commercial development of the Land;
- (v) notwithstanding the matters pleaded in subparagraph 98(d)(iii) and (iv) above, LMIM ATF the MPF did not obtain a valuation of the Land for commercial development purposes, before entering into the Third Deed of Variation of the AIIS Loan.

*Fourth Deed of Variation of the AIIS Loan*

99. In the premises pleaded in paragraphs 53 to 60 above, the defendant ATF the MPF entered into the Fourth Deed of Variation of the AIIS Loan, notwithstanding that the defendant knew, or ought to have known, that:

Combined loan to value ratio of 130%

- (a) by reason of the matters pleaded in paragraphs 31, 32, 41, 52, 55(d) and 56(k) above:
  - (i) interest on the FMIF Loan was capitalised to, and paid from, the AIIS Loan;
  - (ii) the second registered mortgage that the defendant ATF the MPF held over the Land was the only security for the AIIS Loan of any value; and
  - (iii) the defendant ATF the MPF would not recover any moneys from the sale of the Land, while any amount above \$7,800,000.00 plus interest and costs remained owing to the defendant ATF the FMIF;
- (b) the Fourth Deed of Variation of the AIIS Loan increased the loan to value ratio of the FMIF and AIIS Loans to 130%, in that:
  - (i) the increase to the Loan Amount of the AIIS Loan by the Fourth Deed of Variation of the AIIS Loan increased the total balance of the FMIF and AIIS Loans to \$15.3 million; and

- (ii) the most recent valuation that had been obtained for the Land, which was the CBRE Valuation, had valued the Land at \$11.85 million;
- (c) in the premises, LMIM ATF the MPF failed to assess whether the security obtained for the AIIS Loan was adequate, in light of the increase to the Loan Amount of the AIIS Loan by the Fourth Deed of Variation of the AIIS Loan;

Reliance upon CBRE Valuation

- (d) the defendant ATF the MPF relied upon the CBRE Valuation in entering into the Fourth Deed of Variation of the AIIS Loan on or about 6 October 2010, in circumstances where:
  - (i) the CBRE Valuation had been obtained in or about February 2008;
  - (ii) in the premises, the defendant ATF the MPF failed to obtain an up to date valuation of the Land, before entering into the Fourth Deed of Variation of the AIIS Loan;
  - (iii) the CBRE Valuation had been performed on an “as is” basis, without taking any development approval into account;
  - (iv) when LMIM ATF the MPF entered into the Fourth Deed of Variation of the AIIS Loan, AIIS intended to undertake a residential development of the Land;
  - (v) notwithstanding the matters pleaded in subparagraph 99(d)(iv) above, LMIM ATF the MPF did not obtain a valuation of the Land for residential development purposes, before entering into the Fourth Deed of Variation of the AIIS Loan.

*Extension Letter for the AIIS Loan*

100. In the premises pleaded in paragraphs 63 to 68 above, the defendant ATF the MPF entered into the Extension Letter, notwithstanding that the defendant knew, or ought to have known, that:

Combined loan to value ratio of 130%

- (a) by reason of the matters pleaded in paragraphs 31, 32, 41, 61, 62, 55(d) and 64(h) above:
  - (i) interest on the FMIF Loan was capitalised to, and paid from, the AIIS Loan;
  - (ii) the second registered mortgage that the defendant ATF the MPF held over the Land was the only security for the AIIS Loan of any value; and
  - (iii) the defendant ATF the MPF would not recover any moneys from the sale of the Land, while any amount above \$7,920,000.00 plus interest and costs remained owing to the defendant ATF the FMIF;
- (b) the matters pleaded in paragraphs 99(b) and 99(c) above, upon which the plaintiff repeats and relies;

Reliance upon CBRE Valuation

- (c) the defendant ATF the MPF relied upon the CBRE Valuation in entering into the Extension Letter on or about 27 May 2011, in circumstances where:
  - (i) the CBRE Valuation had been obtained in or about February 2008;
  - (ii) in the premises, the defendant ATF the MPF failed to obtain an up to date valuation of the Land, before entering into the Extension Letter;
  - (iii) the CBRE Valuation had been performed on an "as is" basis, without taking any development approval into account;
  - (iv) when LMIM ATF the MPF entered into the Extension Letter, AIIS intended to undertake a residential development of the Land;
  - (v) notwithstanding the matters pleaded in subparagraph 100(c)(iv) above, LMIM ATF the MPF did not obtain a valuation of the Land

for residential development purposes, before entering into the Extension Letter.

*Fifth Deed of Variation of the AIIS Loan*

101. In the premises pleaded in paragraphs 85 to 88 above, the defendant ATF the MPF entered into the Fifth Deed of Variation of the AIIS Loan, notwithstanding that the defendant knew, or ought to have known, that:

Feasibility fails to include interest accruing on development costs

- (a) AIIS had entered into the Land Availability Agreement, as pleaded in paragraphs 80 and 81 above;
- (b) as pleaded in paragraph 81(g)(iv)(F) above, the maximum amount that AIIS was entitled to receive pursuant to the terms of the Land Availability Agreement was the "AIIS Entitlement" of \$26,580,796;
- (c) the AIIS Entitlement was calculated in the manner pleaded in paragraph 79 above; that is, by calculating:
  - (i) the amounts owing under the FMIF and AIIS Loans as at 30 June 2011; and
  - (ii) the interest that would accrue on the FMIF and AIIS Loans over the life of the Aalto Apartments development; and
  - (iii) interest that would accrue to LMIM ATF the MPF, on funded development costs over the life of the project;
- (d) the MPF Credit Committee approval for the Fifth Deed of Variation of the AIIS Loan, was provided on the basis of the feasibility for the Aalto Apartments development, pleaded in paragraph 76(c) above;
- (e) the feasibility for the Aalto Apartments development was calculated based on the following costs totalling \$23.64 million, over the life of the Aalto Apartments development:

- (i) a combined loan balance of \$16.05 million for the FMIF and AIIS Loans, as at 8 November 2011; and
  - (ii) interest totalling \$7.59 million on the FMIF and AIIS Loans, for a project life of 41 months;
- (f) the feasibility the defendant prepared for the Aalto Apartments development did not take into account the additional amount of \$2,940,796.00 in interest that would accrue to the MPF over the life of the project, as included in the AIIS Entitlement;

#### Particulars

\$2,940,796.00 is the difference between the AIIS Entitlement of \$26,580,796, and the amount of \$23.64 million included for principal and interest in the defendant's feasibility for the Aalto Apartments development and pleaded in paragraph 101(e) above;

- (g) in the premises, if LMIM ATF the MPF had included in its feasibility for the Aalto Apartments development the additional amount of \$2,940,796.00 in interest that would accrue to the MPF over the life of the project, as included in the AIIS Entitlement, the defendant's feasibility for the Aalto Apartments development would have predicted a shortfall;

#### Reliance upon Jones Lang LaSalle Valuation

- (h) the defendant ATF the MPF relied upon the Jones Lang LaSalle valuation dated 12 April 2012, in entering into the Fifth Deed of Variation of the AIIS Loan on or about 14 August 2012, in circumstances where:
- (i) that valuation had been prepared for the defendant for internal reporting purposes only, as pleaded at paragraph 84(a) above;
  - (ii) that valuation was valid at the date of valuation only, as pleaded at paragraph 84(c) above; and



- (iii) Jones Lang LaSalle did not accept any liability where the valuation was relied upon more than three months after the date of valuation, as pleaded at paragraph 84(c) above;

FMIF and AIIS Loans exceed the amount allowed for in the feasibility

- (i) the plaintiff repeats and relies upon paragraph 101(e) above;
- (j) by no later than 1 May 2012, the defendant ATF the MPF was aware that:
  - (i) the balance of the FMIF Loan was \$8,126,000.00, as at 31 March 2012;
  - (ii) the balance of the AIIS Loan was \$15,989,000 as at 3 April 2012; and
  - (iii) the maximum approved Loan Amount of the FMIF Loan was \$8,295,000 as at 31 March 2012;

Particulars

Recorded in a project summary for the Aalto Apartments dated 30 April 2012, attached to an email from Ms Shelley Chalmers of the defendant to the MPF Investment Committee, dated 1 May 2012;

- (k) in the premises:
  - (i) as at 3 April 2012, the combined balances of the FMIF Loan and the AIIS Loan totalled \$24,115,000.00;
  - (ii) as at 3 April 2012, the combined balances of the FMIF Loan and the AIIS Loan exceeded the amount of \$23.64 million allowed for these costs in the feasibility LMIM ATF the MPF had prepared for the Aalto Apartments development, as pleaded at paragraph 101(e) above;

(iii) upon execution of the Fifth Deed of Variation of the AIIS Loan, the combined Loan Amounts of the FMIF Loan and the AIIS Loan totalled \$25.095 million, comprising:

- A. the Loan Amount of \$16.8 million for the AIIS Loan, provided for by the Fifth Deed of Variation of the AIIS Loan; and
- B. the Loan Amount of \$8,295,000 for the FMIF Loan, as pleaded at paragraph 101(j)(iii) above; and

(iv) in the premises, the increase to the Loan Amount of the AIIS Loan by the Fifth Deed of Variation of the AIIS Loan permitted the combined Loan Amounts of the FMIF and AIIS Loans to exceed the amount of \$23.64 million LMIM ATF the MPF had allowed for these costs in the feasibility it had prepared for the Aalto Apartments development, as pleaded at paragraph 101(e) above.

*Sixth Deed of Variation of the AIIS Loan*

102. In the premises pleaded in paragraphs 93 and 94 above, the defendant ATF the MPF entered into the Sixth Deed of Variation of the AIIS Loan, notwithstanding the defendant knew, or ought to have known, that:

No internal approvals

- (a) the defendant ATF the MPF did not prepare any Synopsis in respect of the Sixth Deed of Variation of the AIIS Loan;
- (b) the Sixth Deed of Variation of the AIIS Loan was not approved by the MPF Credit Committee or the MPF Investment Committee;
- (c) in the premises the defendant ATF the MPF failed to assess whether the security obtained for the AIIS Loan was adequate, in light of the increase to the Loan Amount of the AIIS Loan by the Sixth Deed of Variation of the AIIS Loan;

Feasibility fails to include interest accruing on development costs

- (d) the matters pleaded in paragraphs 101(a) to 101(g) above, upon which the plaintiff repeats and relies;

Reliance upon Jones Lang LaSalle Valuation

- (e) the defendant ATF the MPF relied upon the Jones Lang LaSalle valuation dated 12 April 2012 in entering into the Sixth Deed of Variation of the AIIS Loan on or about 1 February 2013, in circumstances where:
- (i) that valuation had been prepared for the defendant for internal reporting purposes only, as pleaded at paragraph 84(a) above;
  - (ii) that valuation was valid at the date of valuation only, as pleaded at paragraph 84(c) above; and
  - (iii) Jones Lang LaSalle did not accept any liability where the valuation was relied upon more than three months after the date of valuation, as pleaded at paragraph 84(c) above;

FMIF and AIIS Loans exceed the amount allowed for in the feasibility

- (f) upon execution of the Sixth Deed of Variation of the AIIS Loan, the combined Loan Amounts of the FMIF Loan and the AIIS Loan totalled at least \$32,295,000, comprising:
- (i) the Loan Amount of \$24 million for the AIIS Loan, provided for by the Sixth Deed of Variation of the AIIS Loan; and
  - (ii) the Loan Amount of \$8,295,000 for the FMIF Loan, as pleaded at paragraph 101(j)(iii) above; and
- (g) in the premises, the increase to the Loan Amount of the AIIS Loan by the Sixth Deed of Variation of the AIIS Loan permitted the combined Loan Amounts of the FMIF and AIIS Loans to exceed the amount of \$23.64 million LMIM ATF the MPF had allowed for these costs in the feasibility it had prepared for the Aalto Apartments development, as pleaded at paragraph 101(e) above;

FMIF and AIIS Loans exceed the AIIS Entitlement

- (h) the plaintiff repeats and relies upon paragraphs 101(a), 101(b) and 102(f) above;
- (i) in the premises, by the execution of the Sixth Deed of Variation of the AIIS Loan, the combined Loan Amounts of the FMIF and AIIS Loans exceeded the amount AIIS was entitled to recover pursuant to the AIIS Entitlement.

*Breach of duty*

103. In the premises pleaded in:

- (a) paragraphs 98(a) to 98(c) above, by entering into the Third Deed of Variation of the AIIS Loan;
- (b) paragraphs 99(a) to 99(c) above, by entering into the Fourth Deed of Variation of the AIIS Loan;
- (c) paragraphs 100(a) and 100(b) above, by entering into the Extension Letter for the AIIS Loan;
- (d) paragraphs 101(i) to 101(k) above, by entering into the Fifth Deed of Variation of the AIIS Loan; and
- (e) paragraphs 102(f) to 102(i) above, by entering into the Sixth Deed of Variation of the AIIS Loan,

the defendant breached the duty that it owed to the beneficiaries of the MPF not to place itself in a position of conflict of interest or duty, in that the duties that it owed to the beneficiaries of the MPF conflicted with the duties that it owed to the beneficiaries of the FMIF.

104. In the premises pleaded in paragraphs 98 to 102 above, by entering into the Third, Fourth, Fifth and Sixth Deeds of Variation of the AIIS Loan and the Extension Letter, and by performing the terms of these Deeds and the Extension Letter, the defendant breached the duty it owed to the beneficiaries of the MPF

to exercise the same care that an ordinary, prudent person of business would exercise in the conduct of that business were it his or her own.

Duties under the *Trusts Act 1973 (Qld)*

105. In the premises pleaded in paragraphs 98 to 102 above, by entering into the Third, Fourth, Fifth and Sixth Deeds of Variation of the AIIS Loan and the Extension Letter, and by performing the terms of these Deeds and the Extension Letter, the defendant breached the duty it owed pursuant to s.22 of the *Trusts Act 1973 (Qld)*, to exercise the care, diligence and skill a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, when exercising a power of investment.
106. The defendant breached the duty that it owed pursuant to s.24(e) of the *Trusts Act 1973 (Qld)* to take into account the risk of capital or income loss or depreciation when exercising its power of investment:
  - (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
  - (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
  - (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
  - (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
  - (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

107. The defendant breached the duty that it owed pursuant to s.24(g) of the *Trusts Act* 1973 (Qld) to take into account the likely income return and the timing of income return:

- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
- (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

108. The defendant breached the duty that it owed pursuant to s.24(h) of the *Trusts Act* 1973 (Qld) to take into account the length of the term of the proposed investment:

- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;

- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
- (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

109. The defendant breached the duty that it owed pursuant to s.24(j) of the *Trusts Act* 1973 (Qld) to take into account the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment:

- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;
- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
- (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

110. The defendant breached the duty that it owed pursuant to s.24(n) of the *Trusts Act* 1973 (Qld) to take into account the cost of making the proposed investment:

- (a) by entering into the Third Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 98 above;

- (b) by entering into the Fourth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 99 above;
- (c) by entering into the Extension Letter and by performing the terms of the Extension Letter, in the premises pleaded in paragraph 100 above;
- (d) by entering into the Fifth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 101 above; and
- (e) by entering into the Sixth Deed of Variation of the AIIS Loan and by performing the terms of that Deed, in the premises pleaded in paragraph 102 above.

#### **Loss suffered by the MPF**

111. In consequence of the defendant's breaches of duty:

- (a) the defendant ATF the MPF caused amounts totalling \$11,385,581.62 to be paid to AIIS, or to be paid at the direction of AIIS, pursuant to the terms of the AIIS Loan;
- (b) the defendant ATF the MPF received payments in respect of the AIIS Loan totalling \$4,228,314.36, which:
  - (i) are first applied to the interest of \$618,365.83 that had accrued on the AIIS Loan, at the time of receiving these payments;
  - (ii) the balance of \$3,609,948.53 is applied to the amounts paid to, or at the direction of AIIS, as pleaded in paragraph 111(a);
  - (iii) in the premises, the assets of the defendant ATF the MPF were depleted by a net amount of \$7,775,633.09;
- (c) the defendant ATF the MPF caused the payments pleaded in paragraph 111(a) to be made, in circumstances where the only real property security that the defendant ATF the MPF held for the AIIS Loan was the second registered mortgage over the Land;



- (d) when the Land was sold, as pleaded in paragraphs 96 and 97 above, the plaintiff and Calibre ATF the MPF did not receive any money from the sale of the Land;
- (e) in the premises, by reason of the defendant's breaches of duty:
  - (i) the assets of the defendant ATF the MPF were depleted by the amount of \$11,385,581.62 paid to AIIS, or paid at the direction of AIIS, less the \$3,609,948.53 of payments received and applied to that amount; resulting in the assets of the defendant ATF the MPF being depleted by the net amount of \$7,775,633.09 and
  - (ii) the plaintiff ATF the MPF has lost the amount of \$11,385,581.62 paid to AIIS, or paid at the direction of AIIS, less the \$3,609,948.53 of payments received and applied to that amount; resulting in a net loss of \$7,775,633.09;
  - (iii) the defendant ATF the MPF lost the opportunity to lend the money paid to AIIS to a different borrower, and thereby recover the amount advanced, and earn interest on the money advanced.

#### Particulars

The best particulars that the plaintiff presently can provide are that the defendant ATF the MPF would have earned interest approximately equal to the amount of interest that accrued on the AIIS Loan, but which (in the premises pleaded in paragraphs 96 and 97 above) was never recovered by the defendant ATF the MPF.

The best particulars that the plaintiff presently can provide of the amount of interest that accrued on the AIIS Loan, but which was not recovered by the defendant ATF the MPF, are that an account statement for the AIIS Loan dated 22 November 2011 records that \$9,044,723.21 in interest accrued up to 22 November 2011, and which included interest that was pre-booked up to 31 March 2015.

### Interest paid on the FMIF Loan

112. The plaintiff repeats paragraphs 22 to 25 above.
113. Up to 2 January 2013 AIIS, or the defendant ATF the MPF, paid \$3,905,721.81 to the defendant ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, in interest accruing on the FMIF Loan.
114. In the premises pleaded in paragraphs 46(c), 47(i), 55(d), 56(k), 64(h), 87(b), 90(c)(iv)(C) and 94(c)(iv)(C) above, the payments pleaded in paragraph 113 were made from the amounts LMIM ATF the MPF advanced to AIIS pursuant to the AIIS Loan.

### *Constructive trust*

115. The defendant was:
- (a) in the premises pleaded in paragraphs 4 to 8 above, aware that it, ATF the MPF, held the assets of the MPF on trust for the beneficiaries of the MPF;
  - (b) in the premises pleaded in paragraphs 44 to 48, 53 to 58, 63 to 66, 85 to 88 and 98 to 110 above, aware that the payments to itself ATF the FMIF, or alternatively to PTAL as Custodian of the FMIF, of \$3,905,721.81 were made in breach of trust.
116. Insofar as PTAL may hold in its capacity as Custodian of the FMIF:
- (a) the amount of \$3,905,721.81, as pleaded in paragraph 113 above, it holds that amount as agent for the defendant ATF the FMIF pursuant to clause 2.1 of the Custody Agreement;
  - (b) assets representing the value it received from the payments of \$3,905,721.81, as pleaded in paragraph 113 above, it holds those assets as agent for the defendant ATF the FMIF, pursuant to clause 2.1 of the Custody Agreement.
117. In the premises, the defendant ATF the FMIF holds the amount of \$3,905,721.81, as pleaded in paragraph 113 above, on a constructive trust for the plaintiff, in its capacity as trustee of the MPF.

*Right of subrogation*

118. The plaintiff repeats paragraphs 112 to 114 above.
119. The payments totalling \$3,905,721.81 pleaded in paragraph 113 above delivered value to the defendant ATF the FMIF in relation to which the plaintiff is entitled to trace.
120. The defendant is insolvent.
121. In the premises:
- (a) the defendant received the interest payments accruing on the FMIF Loan totalling \$3,905,721.81, in its capacity as trustee of the FMIF;
  - (b) as a former trustee of the FMIF, the defendant has a right of indemnity out of the assets of the FMIF, in respect of the defendant's liability in this proceeding regarding the interest payments totalling \$3,905,721.81.
122. Any right of indemnity of the defendant ATF the FMIF operates as an equitable lien or charge over the assets of the FMIF.
123. The defendant ATF the FMIF holds the assets of the FMIF subject to any right of indemnity charge and lien of the defendant over those assets.
124. By reason of the matters pleaded in paragraphs 112 to 114, and 118 to 123 above, the plaintiff is entitled to be subrogated to the defendant's right of indemnity and lien or charge, in respect of the defendant's liability in this proceeding regarding the payments totalling \$3,905,721.81 pleaded in paragraph 113.

The plaintiff claims the following relief:

- I. Equitable compensation calculated as follows:

Payments pursuant to the AIIS Loan of	\$11,385,581.62
<u>Less</u> receipts applied to principal of	\$3,609,648.53
Net Loss	\$7,775,633.09
<u>Plus</u> lost opportunity interest	<u>\$9,044,723.21</u>
Equitable compensation:	<u>\$16,820,356.30</u>

2. A declaration that the defendant ATF the FMIF holds the amount of \$3,905,721.81 on constructive trust for the plaintiff, in its capacity as trustee of the MPF;
3. A declaration that:
  - (a) the plaintiff is entitled to be indemnified out of the assets of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;
  - (b) the plaintiff has a lien or charge over the assets and undertaking of the FMIF in respect of the defendant's liability to the plaintiff in this proceeding, in respect of the amount of \$3,905,721.81;
  - (c) the plaintiff is entitled to be subrogated to the rights of the defendant in respect of the assets of the FMIF, in respect of the amount of \$3,905,721.81;
4. Interest pursuant to s.58 of the *Civil Proceedings Act* 2011 (Qld) but excluding interest on so much of the claim for equitable compensation as includes the lost opportunity to earn interest;
5. Costs;
6. Such further or other order as the Court sees fit.

Signed:

*Mick Elin.*

Description:

*SOLICITOR FOR THE PLAINTIFF.*

This pleading was settled by Andrew Crowe QC and Ms Ahern of Counsel.

#### NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

**David Schwarz**

---

**From:** O'Kearney, Glenn <Glenn.OKearney@fticonsulting.com>  
**Sent:** Thursday, 23 July 2015 10:23 AM  
**To:** Murray Daniel  
**Subject:** RE: Management Accounts for year ending 30 June 2015

Hi Murray

Unpaid and accrued as at 30 June 2015.

Regards

**Glenn O'Kearney**  
Senior Director | Corporate Finance/Restructuring

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**From:** Murray Daniel [mailto:[Murray.Daniel@bdo.com.au](mailto:Murray.Daniel@bdo.com.au)]  
**Sent:** Thursday, 23 July 2015 10:21 AM  
**To:** O'Kearney, Glenn  
**Subject:** RE: Management Accounts for year ending 30 June 2015

Hi Glenn,


Thanks for provide this information, to clarify can you confirm what period the below costs relate to.

Any questions let me know.

Regards,

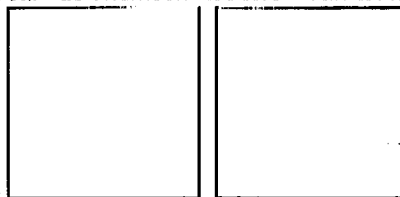
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**From:** O'Kearney, Glenn [mailto:Glenn.OKearney@fticonsulting.com]

**Sent:** 22 July 2015 2:55 PM

**To:** Murray Daniel

**Cc:** Robson, Benjamin; John Somerville; David Whyte; Trenfield, Kelly

**Subject:** RE: Management Accounts for year ending 30 June 2015

Dear Murray

Amounts are excluding GST.

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

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

Regards

**Glenn O'Kearney**

Senior Director | Corporate Finance/Restructuring

**FTI Consulting**

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**From:** Murray Daniel [mailto:Murray.Daniel@bdo.com.au]

**Sent:** Monday, 20 July 2015 2:53 PM

**To:** O'Kearney, Glenn

**Cc:** Robson, Benjamin; John Somerville; David Whyte

**Subject:** Management Accounts for year ending 30 June 2015

Glenn,

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

Thank you for your assistance.

Any questions let me know.

Regards,

**MURRAY DANIEL**

Supervisor

Direct: +61 7 3173 5563

[Murray.Daniel@bdo.com.au](mailto:Murray.Daniel@bdo.com.au)

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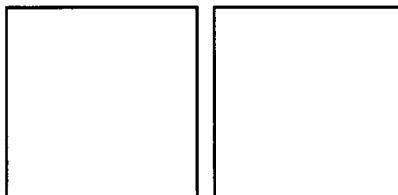
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**From:** Murray Daniel

**Sent:** 8 July 2015 3:48 PM

**To:** 'Glenn.OKearney@fticonsulting.com'

**Cc:** John Somerville; David Whyte; Robson, Benjamin ([Benjamin.Robson@fticonsulting.com](mailto:Benjamin.Robson@fticonsulting.com))

**Subject:** FW: Management Accounts for year ending 30 June 2015

Glenn

I refer to the attached email dated 22 January 2015 sent to Joanne Garcia of BDO, providing information to assist with the management accounts for half year ending 31 December 2014.

I am currently in process of preparing the June 2015 LM MIF Management Accounts. I understand from the December 2014 LM MIF Management Accounts, the total amount outstanding was \$3,394,747.

Please provide the same information, in respect of the remuneration and outlays (categories 1-3), operational costs, legal advisors and loan recovery costs as at 30 June 2015. Please provide this information by the end of this week, if this timeline is not suitable, please let me know.

Thank you for your assistance.

Any questions let me know.

Regards,

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**David Schwarz**

---

**From:** O'Kearney, Glenn <Glenn.OKearney@fticonsulting.com>  
**Sent:** Thursday, 14 January 2016 6:31 PM  
**To:** Murray Daniel  
**Cc:** John Somerville; David Whyte; Trenfield, Kelly  
**Subject:** RE: Management Accounts for year ending 31 December 2015

Dear Murray

Amounts are excluding GST.

- LM Investment remuneration and outlays:
  - Category 1: \$1,870,571
  - Category 2: \$1,289,742
- Legal Advisors: \$760,637
- Operational Costs: \$61,315
- Loan recovery costs (LM Administration Pty Ltd): \$229,373.

Please note that these are estimates only at this time, subject to a final review and allocation.

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

Regards

**Glenn O'Kearney**  
Senior Director | Corporate Finance & Restructuring

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

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**From:** Murray Daniel [mailto:Murray.Daniel@bdo.com.au]  
**Sent:** Tuesday, 12 January 2016 9:12 AM  
**To:** O'Kearney, Glenn  
**Cc:** John Somerville; David Whyte  
**Subject:** RE: Management Accounts for year ending 31 December 2015

Glenn

I refer to the email below providing information to assist with the management accounts for year ending 30 June 2015.

I am currently in process of preparing the LM FMIF Management Accounts for the half year to 31 December 2015.

Please provide the same information, in respect of the remuneration and outlays (categories 1-3), operational costs, legal advisors and loan recovery costs as at 31 December 2015. Please provide this information by the end of this week, if this timeline is not suitable, please let me know.

Thank you for your assistance.

Any questions let me know.

Regards,

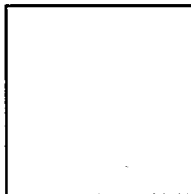
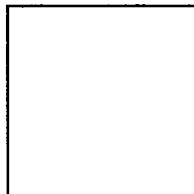
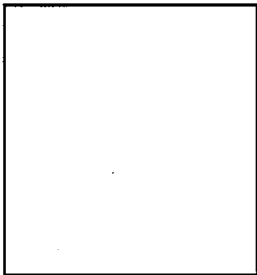
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Supervisor  
Direct: +61 7 3173 5563  
[Murray.Daniel@bdo.com.au](mailto:Murray.Daniel@bdo.com.au)

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**From:** O'Kearney, Glenn [<mailto:Glenn.OKearney@fticonsulting.com>]

**Sent:** 23 July 2015 10:23 AM

**To:** Murray Daniel

**Subject:** RE: Management Accounts for year ending 30 June 2015

Hi Murray

Unpaid and accrued as at 30 June 2015.

Regards

**Glenn O'Kearney**  
Senior Director | Corporate Finance/Restructuring

**FTI Consulting**

+61 7 5630 5205 direct | +61 7 5630 5299 fax  
[glenn.okearney@fticonsulting.com](mailto:glenn.okearney@fticonsulting.com)

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**From:** Murray Daniel [<mailto:Murray.Daniel@bdo.com.au>]  
**Sent:** Thursday, 23 July 2015 10:21 AM  
**To:** O'Kearney, Glenn  
**Subject:** RE: Management Accounts for year ending 30 June 2015

Hi Glenn,

Thanks for provide this information, to clarify can you confirm what period the below costs relate to.

Any questions let me know.

Regards,

**MURRAY DANIEL**  
Supervisor  
Direct: +61 7 3173 5563  
[Murray.Daniel@bdo.com.au](mailto:Murray.Daniel@bdo.com.au)

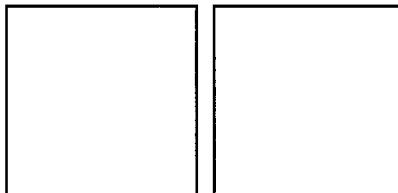
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**From:** O'Kearney, Glenn [<mailto:Glenn.OKearney@fticonsulting.com>]  
**Sent:** 22 July 2015 2:55 PM  
**To:** Murray Daniel  
**Cc:** Robson, Benjamin; John Somerville; David Whyte; Trenfield, Kelly  
**Subject:** RE: Management Accounts for year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

Dear Murray

Amounts are excluding GST.

- LM Investment remuneration and outlays:
  - Category 1: \$1,764,634
  - Category 2: \$1,248,759

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

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Regards

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

Glenn,

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

Thank you for your assistance.

Any questions let me know.

Regards,

**MURRAY DANIEL**

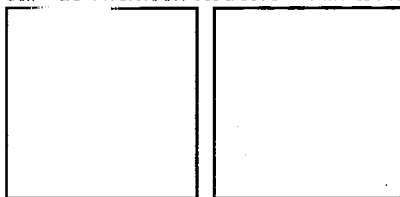
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**From:** Murray Daniel  
**Sent:** 8 July 2015 3:48 PM  
**To:** 'Glenn.OKearney@fticonsulting.com'  
**Cc:** John Somerville; David Whyte; Robson, Benjamin (Benjamin.Robson@fticonsulting.com)  
**Subject:** FW: Management Accounts for year ending 30 June 2015

Glenn

I refer to the attached email dated 22 January 2015 sent to Joanne Garcia of BDO, providing information to assist with the management accounts for half year ending 31 December 2014.

I am currently in process of preparing the June 2015 LM MIF Management Accounts. I understand from the December 2014 LM MIF Management Accounts, the total amount outstanding was \$3,394,747.

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Thank you for your assistance.

Any questions let me know.

Regards,

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**David Schwarz**

---

**From:** O'Kearney, Glenn <Glenn.OKearney@fticonsulting.com>  
**Sent:** Friday, 27 May 2016 2:59 PM  
**To:** David Whyte  
**Cc:** Park, John; John Somerville  
**Subject:** RE: LM First Mortgage Income Fund (Receivers and Managers Appointed)  
(Receiver Appointed)

Hi David

In relation to claims relating to the period prior to the date of the Order made 17 December 2015, as noted in our correspondence of 15 February 2016, our claims made to date do not include the Liquidators' remuneration and out of pocket expenses incurred post 1 October 2015 as these have not yet been invoiced. As such LMIM is not yet able to identify and prepare any further indemnity claim against FMIF in that regard. We are awaiting the decision of Jackson J on the matter heard before His Honour on 14 March 2016 before seeking to identify and prepare any further indemnity claim in relation to the Liquidators' remuneration and out of pocket expenses for reasons previously outlined in my email of 18 April 2016. We also expect there to be certain directions ordered in relation to LMIM's costs incurred in that matter. In that regard I note there may be consultant's fees incurred relating to the Liquidators' remuneration application (incurred prior to the date of the Order) that have not been claimed at this point on the same basis.

In relation to claims post the Order date of 17 December 2015, as noted in Russells' correspondence to Tucker & Cowen dated 25 May 2016, we propose to hold off submitting any further Administration Indemnity Claims or Administration Recoupment Claims on the basis that those claims will likely fall within existing categories that are before the Court.

Regards

**Glenn O'Kearney**  
Senior Director | Corporate Finance & Restructuring

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**From:** David Whyte [mailto:David.Whyte@bdo.com.au]  
**Sent:** Thursday, May 26, 2016 3:43 PM  
**To:** O'Kearney, Glenn  
**Cc:** Park, John; John Somerville  
**Subject:** RE: LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)

Glenn

Can you please respond to the below email.

Thanks

David

**DAVID WHYTE**  
Partner  
Direct: +61 7 3237 5887  
Mobile: +61 413 491 490  
[David.Whyte@bdo.com.au](mailto:David.Whyte@bdo.com.au)

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**From:** David Whyte

**Sent:** 6 May 2016 10:13 AM

**To:** 'O'Kearney, Glenn'

**Cc:** John Park ([john.park@fticonsulting.com](mailto:john.park@fticonsulting.com)); John Somerville ([John.Somerville@bdo.com.au](mailto:John.Somerville@bdo.com.au))

**Subject:** FW: LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)

Glenn

I refer to your email to John Somerville below and particularly in relation to the potential for further Administration Indemnity or Recoupment Indemnity Claims as defined in the attached Order of Justice Jackson dated 17 December 2015. Your comment seems surprising if it relates to any potential claims before the date of the order given the contents of clause 5 of the said order in that the Liquidators had to identify and must notify me of any such claims within sixty days. Can you please therefore clarify the Liquidators position in that respect and confirm there will be no further claims relating to the period prior to the date of the court order.

Regards

David

---

**From:** O'Kearney, Glenn [<mailto:Glenn.OKearney@fticonsulting.com>]

**Sent:** 18 April 2016 1:54 PM

**To:** John Somerville

**Cc:** Nicola Kennedy

**Subject:** RE: LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)

Hi John



I advise that there is no further update to the LM Investment Management Ltd (In Liquidation) (LMIM) indemnity claim against the LM FMIF to those claims outlined in our Further Amended Originating Application filed 16 December 2015 (matter last heard 14 March 2016) and those provided to date either directly by our office or by Russells pursuant to the regime under the Court Order made 17 December 2015 by Jackson J in Supreme Court of Queensland proceeding number 3508 of 2015.

We are awaiting the decision of Jackson J on the matter heard before His Honour on 14 March 2016 before seeking to identify and prepare any further 'Administration Indemnity Claim' or 'Recoupment Indemnity Claim', including any further claim for consultants; remuneration and outlays, and operational costs, given that decision may alter or in fact assist in agreeing the methodology under which LMIM might identify and prepare certain aspects of its indemnity claims against the LM FMIF going forward. We also expect there to be certain directions ordered in relation to LMIM's costs incurred in the matter last heard on 14 March 2016.

Once further claims are identified and prepared, these will be provided to your office in accordance with the regime as set out in the Order of 17 December 2015.

Regards

**Glenn O'Kearney**  
Senior Director | Corporate Finance & Restructuring

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**From:** John Somerville [<mailto:John.Somerville@bdo.com.au>]  
**Sent:** Wednesday, April 13, 2016 12:01 PM  
**To:** O'Kearney, Glenn  
**Cc:** Nicola Kennedy  
**Subject:** LM First Mortgage Income Fund (Receivers and Managers Appointed)(Receiver Appointed)

Hi Glenn

We are currently preparing our next update report to investors and would be grateful if you would provide details of your remuneration and outlays (categories 1-3), operational costs, legal advisors and loan recovery costs as at 31 March 2016.

Would you please provide this information by 18 April 2016. Many thanks

Regards

John

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

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Brisbane QLD 4000

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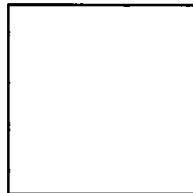
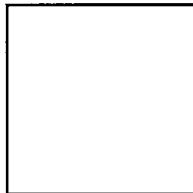
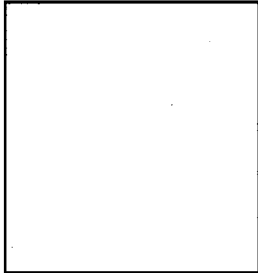
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UNSECURED CREDITORS	RATA	Advised	Claimed	Admitted	Rejected	Under Consid.	Distributed	Remaining	Control Value
<b>UNSECURED: CORPORATE CREDITORS</b>									
Trend Personnel	0.00	0.00	10,071.60	0.00	0.00	10,071.60	0.00	10,071.60	10,071.60
Web Design Magic Pty Ltd	0.00	0.00	2,324.40	0.00	0.00	2,324.40	0.00	2,324.40	2,324.40
William Partners	1.00	1.00	0.00	0.00	0.00	0.00	0.00	0.00	1.00
<b>Total Unsecured: Corporate Creditors:</b>	<b>1,055,197.00</b>	<b>1,081,055.00</b>	<b>23,315,694.04</b>	<b>0.00</b>	<b>0.00</b>	<b>23,315,694.04</b>	<b>0.00</b>	<b>23,315,694.04</b>	<b>23,315,699.04</b>
<b>UNSECURED: FUND CREDITORS</b>									
Asgard Capital Management Limited	0.00	0.00	7,354,498.75	0.00	0.00	7,354,498.75	0.00	7,354,498.75	7,354,498.75
Bell Gully	1,683.08	1,683.08	0.00	0.00	0.00	0.00	0.00	0.00	1,683.08
Box Advertising Pty Ltd	1,683.08	1,683.05	14,322.00	0.00	0.00	14,322.00	0.00	14,322.00	14,322.00
BT Portfolio Services Limited	0.00	0.00	14,530,114.00	0.00	0.00	14,530,114.00	0.00	14,530,114.00	14,530,114.00
Chandler Communication	4,068.88	4,068.88	0.00	0.00	0.00	0.00	0.00	0.00	4,068.88
Custom House Currency Exchange (Australia) Pty Ltd	0.00	0.00	1,622,954.47	0.00	0.00	1,622,954.47	0.00	1,622,954.47	1,622,954.47
Ernst and Young	10,539.17	10,539.17	158,896.51	0.00	0.00	158,896.51	0.00	158,896.51	158,896.51
Glenside Group (Qld) Pty Ltd	19,396.14	19,396.14	19,396.14	0.00	0.00	19,396.14	0.00	19,396.14	19,396.14
Host Capital Limited	0.00	0.00	15,259.35	0.00	0.00	15,259.35	0.00	15,259.35	15,259.35
InfoCapital N.V	0.00	0.00	7,463.30	0.00	0.00	7,463.30	0.00	7,463.30	7,463.30
Michael Edesess	0.00	0.00	20,000.00	0.00	0.00	20,000.00	0.00	20,000.00	20,000.00
Monaghan Lawyers	181,992.65	181,992.65	0.00	0.00	0.00	0.00	0.00	0.00	181,992.65
Norton Rose Fulbright Australia	46,757.00	46,757.00	409,668.85	0.00	0.00	409,668.85	0.00	409,668.85	409,668.85
Peter Raymond & Margaret Alison Moody	0.00	0.00	1.00	0.00	0.00	1.00	0.00	1.00	1.00
PKF Chartered Accountants	3,847.80	3,847.80	0.00	0.00	0.00	0.00	0.00	0.00	3,847.80
PricewaterhouseCoopers	0.00	0.00	86,562.00	0.00	0.00	86,562.00	0.00	86,562.00	86,562.00
Primus Compliance Group Pte Ltd	0.00	0.00	867.33	0.00	0.00	867.33	0.00	867.33	867.33
RWG Accountants and Advisors Pty Ltd	6,600.00	6,600.00	0.00	0.00	0.00	0.00	0.00	0.00	6,600.00
The Creative Partnership	5,697.00	5,697.00	9,286.26	0.00	0.00	9,286.26	0.00	9,286.26	9,286.26
Thomson Gear (A Firm)	10,450.00	10,450.00	0.00	0.00	0.00	0.00	0.00	0.00	10,450.00
We Love Creative Co	660.00	660.00	1,320.00	0.00	0.00	1,320.00	0.00	1,320.00	1,320.00
Western Union	4,494.00	4,494.00	0.00	0.00	0.00	0.00	0.00	0.00	4,494.00
WMS Chartered Accountants	9,350.00	9,350.00	0.00	0.00	0.00	0.00	0.00	0.00	9,350.00
<b>Total Unsecured: Fund Creditors:</b>	<b>307,218.80</b>	<b>307,218.77</b>	<b>24,250,609.96</b>	<b>0.00</b>	<b>0.00</b>	<b>24,250,609.96</b>	<b>0.00</b>	<b>24,250,609.96</b>	<b>24,473,096.37</b>
<b>UNSECURED: INVESTOR CLAIMS</b>									
Alison Pockett	0.00	0.00	62,490.68	0.00	0.00	62,490.68	0.00	62,490.68	62,490.68
Dean Percival & Emily Percival	0.00	0.00	62,490.68	0.00	0.00	62,490.68	0.00	62,490.68	62,490.68
Mr Ozawa	1.00	1.00	1.00	0.00	0.00	1.00	0.00	1.00	1.00
Sandeep Mand & Mayuki Mitsumori	600,000.00	600,000.00	600,000.00	0.00	0.00	600,000.00	0.00	600,000.00	600,000.00
The Percivals	1.00	1.00	1.00	0.00	0.00	1.00	0.00	1.00	1.00
<b>Total Unsecured: Investor Claims:</b>	<b>600,002.00</b>	<b>600,002.00</b>	<b>724,983.36</b>	<b>0.00</b>	<b>0.00</b>	<b>724,983.36</b>	<b>0.00</b>	<b>724,983.36</b>	<b>724,983.36</b>
<b>UNSECURED: TRADE CREDITORS</b>									
Clive Reed	0.00	0.00	1.00	0.00	0.00	1.00	0.00	1.00	1.00

Corporate Creditors - Manually entered (Verify if related to certain fund)  
Updated from documents provided from LMIM  
Entered from AP need to allocate / verify if correct

# Creditor Listing by Claim Type: 8974 - LM Investment Management Limited (Administrators Appointed) All Creditor Claim Types as at 7/31/2013

## PREFERRED (EMPLOYEE) CREDITORS

	WAGES	RATA	Claimed (POD)	AIF	Corporate	Investor claims	AIFCPL	Break-down				Total
								ASPF	MIF	CPAIF	KPAIF	
Skoggs, Michael (Mfr)	27,776.30	27,776.30	27,776.30	0.00	27,776.30	0.00	0.00	0.00	0.00	0.00	0.00	27,776.30
Sarah Williams	0.00	0.00	4,405.34	0.00	4,405.34	0.00	0.00	0.00	0.00	0.00	0.00	4,405.34
Total Wages:	27,776.30	27,776.30	32,181.64	0.00	32,181.64	0.00	0.00	0.00	0.00	0.00	0.00	32,181.64
TOTAL PREFERRED (EMPLOYEE) CREDITORS:	27,776.30	27,776.30	32,181.64	0.00	32,181.64	0.00	0.00	0.00	0.00	0.00	0.00	32,181.64

## UNSECURED: CORPORATE CREDITORS

ATO (Australian Taxation Office)	1,055,182.00	770,100.81	0.00	0.00	107,559.07	0.00	0.00	0.00	0.00	0.00	0.00	770,100.81
Autocorp No. 20 Pty Ltd (420 A claim)	0.00	9,466,168.61	0.00	0.00	11,000.00	0.00	0.00	0.00	0.00	0.00	0.00	11,000.00
Christallum	29,328.00	0.00	0.00	0.00	29,328.00	0.00	0.00	0.00	0.00	0.00	0.00	29,328.00
Draze Pty Ltd	1.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
EQ-HO Communications Ltd	0.00	5,208.95	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Energy Australia Pty Ltd	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Ernst and Young	0.00	312.80	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Foxal Pty Ltd	0.00	1,743.59	0.00	0.00	1,743.59	0.00	0.00	0.00	0.00	0.00	0.00	1,743.59
Grace Records Management	0.00	584.33	0.00	0.00	584.33	0.00	0.00	0.00	0.00	0.00	0.00	584.33
Green Design Interiors Plant Hire Pty Ltd	0.00	483,688.85	0.00	0.00	315,951.57	0.00	0.00	0.00	0.00	0.00	0.00	380,638.81
Norton Rose Australia	48,757.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,757.00
Hickley Lawyers	0.00	114,565.00	0.00	0.00	68,354.00	0.00	0.00	0.00	23,105.50	0.00	0.00	114,565.00
CSE (NSW) Telecommunication Pty Ltd	0.00	3,212.00	0.00	0.00	3,212.00	0.00	0.00	0.00	0.00	0.00	0.00	3,212.00
Isentia Pty Ltd	0.00	938.10	0.00	0.00	938.10	0.00	0.00	0.00	0.00	0.00	0.00	938.10
Kondaminta Pty Ltd and Calibre Capital Ltd In Their Capacity as	0.00	12,340,377.67	0.00	0.00	1.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Klein and Co	0.00	25,896.00	0.00	0.00	25,896.00	0.00	0.00	0.00	0.00	0.00	0.00	25,896.00
Webdesign Magic Pty Ltd	0.00	1,772.10	0.00	0.00	1,772.10	0.00	0.00	0.00	0.00	0.00	0.00	1,772.10
LM New Zealand	2,717.00	0.00	0.00	0.00	2,717.00	0.00	0.00	0.00	0.00	0.00	0.00	2,717.00
Phos & Venkatesh Lawyers	0.00	68,358.54	0.00	0.00	68,358.54	0.00	0.00	0.00	0.00	0.00	0.00	68,358.54
PKF Chartered Accountants	0.00	22,084.15	0.00	0.00	22,084.15	0.00	0.00	0.00	0.00	0.00	0.00	22,084.15
ShredX Pty Ltd	0.00	84.47	0.00	0.00	84.47	0.00	0.00	0.00	0.00	0.00	0.00	84.47
Trend Personnel	0.00	10,071.60	0.00	0.00	10,071.60	0.00	0.00	0.00	0.00	0.00	0.00	10,071.60
William Partners	1.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Unsecured: Corporate Creditors:	1,133,996.00	23,271,138.57	0.00	0.00	689,277.82	0.00	0.00	0.00	23,105.50	0.00	0.00	1,483,027.30

## UNSECURED: FUND CREDITORS

BT Portfolio Services Limited (Investor claim)	0.00	14,530,114.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asgard Capital Management Limited (Investor claim)	0.00	7,354,498.75	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Bell Gully	1,683.08	0.00	1,683.08	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1,683.08
Box Advertising Pty Ltd	1,209.60	14,322.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1,593.53
Computare	48,812.81	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	48,812.81
Chandler Communication	23,044.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	23,044.00
Glendale Group (Old) Pty Ltd	19,396.14	19,396.14	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	19,396.14
Ernst and Young	10,539.17	181,898.51	0.00	0.00	0.00	0.00	0.00	0.00	158,898.51	0.00	0.00	169,437.68
Michael Eades	0.00	20,000.00	6,866.57	0.00	0.00	0.00	0.00	6,866.57	0.00	0.00	0.00	16,133.43
Onyx Partners	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
RWG Accountants and Advisors Pty Ltd	13,200.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	13,200.00
The Creative Partnership	5,697.00	3,463.65	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	9,160.65
Thomson Lawyers	1.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

THE CHARTERED ACCOUNTANTS												59,161.39
The Custom House	0.00	1,822,954.47	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1,804,949.76	18,004.71
We Love Creative Co	1,320.00	1,320.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1,822,955.47
Western Union	4,494.00	4,494.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	680.00
WMS Chartered Accountants	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	4,494.00
Total Unsecured: Fund Creditors:	385,686.25	23,800,862.04	9,348.78	1.00	2.00	0.00	9,268.71	104,780.33	0.00	676,789.69	1,616,063.89	24,642.04
												2,398,787.36
<b>UNSECURED: ADVISORS</b>												
Adelaide Investment & Insurance Group	123,629.16	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Adrian Wealth Management	2,045.48	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Advice Financial	6,708.24	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Advice Professionals (Australia)	97,250.12	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AdviserFirst Ltd	6,203.08	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Advocate Advisory Pty Ltd	17,237.94	17,237.94	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Aecodia Private Wealth	2,319.59	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AES International	21,305.48	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Affinia Financial Adviser (Pivotal)	5,375.02	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Amity Consulting Group Ltd	1,246.91	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Amity Global Wealth	2,099.01	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Amity Global Wealth	1,723.61	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Alan Clarke Financial Services Ltd/ANZ	161,286.68	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Albion Capital Strat	507.30	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Alexander Beard Group	3,249.51	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Alliance Partnership	6,742.14	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Allied Financial Solutions Pty Ltd	58,823.26	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Alpha Wealth Advisory Services Pty Ltd	10,000.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Alpha Wealth Financial Services Pty Ltd	11,319.40	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Alpha Wealth Financial Services Infocus	875.36	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Amici International	2,860.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AMP Financial Planning Pty Limited	13,823.48	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Anderson's Investment Services Pty Ltd	1,404.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Andrew & Anita Solom	12,894.50	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Andrew Caddick T/as	247,559.39	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Andrew Robinson	3,706.61	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Andrew Robinson ATF Mackenzie Alex Robinson	40,777.89	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Andrew Walters & Sharon Hyslop	871.98	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Anthony Smalley Financial Consultant	2,247.31	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
ANZ Singapore	27,021.78	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
ANZ Singapore	1,849.73	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
ANZ Singapore (Pty) Ltd	2,368.68	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
ANZ Wealth Management Ltd	1,139.25	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
APOGEE Financial Planning	1,758.78	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Applaby Global Investments Ltd	1,680.78	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Arck Wealth Management	1,484.17	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Ark Total Wealth Pty Limited	394.61	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
ASB Securities Limited	732.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asset Licensee Pty Ltd	688.90	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Ashley Law	24,120.62	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asia Offshore Invest	7,533.88	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asian Global International	10,665.99	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AsiaPac Investment Consultants-P Nears	1,194.64	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asset & Investment Management Services	15,612.28	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asset Management Int	75,063.70	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Asset Management Associates Ltd	1,952.12	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Australia Financial Planning Pty Ltd	13,116.16	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Australia Financial Planning Pty Ltd	2,359.19	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Australia Financial Planning Pty Ltd	297.04	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Australian Financial Planning Group P/L	68,804.36	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Australian Financial Services Limited	23,692.97	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Australian Unity Personal Financial Services Ltd	8,089.60	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AWAUT ATF Absolute Wealth Advisors Unit Trust	7,571.64	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AWMI Ltd T/A Argemum Wealth Management Ltd	2,398.72	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
AXA Financial Planning Limited / AMP		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

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	RATA	Claimed (POD)	AIF	Corporate	Investor claims	AIFCPL	ASPF	MFF	CPF	MIF	CPAIF	ICPAIF	Total
The Fry Group	5,825.11	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
The Personal Wealth	3,827.91	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
The Salisbury Group Pty Limited	3,063.98	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thisle Financial Services Ltd TIA Shore Associates	27,829.48	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thor Financial Serv	870.52	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Thornion Group (Australia) Pty Ltd	37,457.27	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Three Sixty Financial Inc	12,763.10	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Tim Whitley Via H&S	211.95	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Titelium Planners Pty Ltd	399.34	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Tom Forster Consultan	145.16	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Topnotch Asia	47,302.44	217,410.72	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Financial Solutions Australia P/L	66,393.60	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Portfolio Management Pty Ltd	349.04	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Wealth Management	729.44	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Transact Wealth Group Ltd	28,465.07	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Transact Wealth-Melisey	8,516.23	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Trinity Solutions Ltd	1,358.02	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
TTG (HK) Limited	18,779.85	16,779.55	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Unity Financial Partners SRL	140.73	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Vantage Consulting Co Ltd	2,808.78	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Venary Securities Pty Ltd	7,468.71	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Vojtech Penacek IZ	2,653.86	2,655.45	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Warren Borlase Insurance & Financial Planning	1,061.99	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Warrington Scott Financial Consultants Pty Ltd	835.12	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Ways to Wealth Limited	90.08	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WBS Financial Management	1,255.46	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealth Building Strategies	19,253.79	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealth Management Group Ltd	20,383.75	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealth Managers Pty Ltd	44,133.43	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealth Plus Solutions Pty Ltd TIA Asquith Financial	7,879.13	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WealthDesign Ltd	21,262.79	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealthaura Pty Ltd	135,673.66	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealthvine Pty Ltd (Arthur Graham)	53,530.85	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wealth & Wise Ltd	9,021.87	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wentworth Financial Services Pty Ltd	7,061.52	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
West Auckland Wealth Management	2,439.69	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Western Pearl Limited	517.25	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Westminster Financial Services	8,645.07	23,338.38	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wheseler Investment Advisors Pty Ltd	2,839.39	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WHK Financial Planning Pty Ltd	66,530.31	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WHK Financial Services	12,259.36	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WHK FP-Northern NSW	12,658.82	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WHK Prescott	31,558.14	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
WHK Rutherford Financial Planning	348.47	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
World Wide Broker (T)	287.59	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Worldwide Broker-Netherlands	2,222.25	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Worldwide Broker-Portugal	174.70	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Worldwide Broker-S	5,870.59	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Wright Planning Pty Ltd	2,684.28	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Yew Khoo Chang	578.17	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Ying Li Investment Management	9,773.01	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Total Unsecured: Advisors:	9,256,651.19	8,853,951.68	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
UNSECURED: CORPORATE CREDITORS													
TOTAL UNSECURED CREDITORS:	10,814,008.78	55,887,634.63	8,348.76	701,480.46	2.80	0.00	9,262.71	885,435.37	0.00	888,875.06	1,916,053.99	24,442.04	3,823,976.38
Grand Total:													
28/05/2013 2:24 PM													

# Secured Creditors

Payables outstanding from 30 June 2015 work paper			
		PERIOD	NET GST
FTI	WIP		3,013,393.00
FTI - Legal	WIP		375,249.00
FTI - Loan Recov	Invoice 8793		229,373.52
Payables outstanding from 30 December 2015 work paper			
SUPPLIER	INV NO	PERIOD	NET GST
FTI Fees	additional from 30 June 2015	Refer to workpaper	208,234.48
FTI Legal Fees	Additional from 30 June 2015	Refer to workpaper	385,388.00
			593,622.48
			4,211,638.00

# Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

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Our reference: Mr Schwarz / Mr Ziebell

5 April 2017

Your reference: Mr Tiplady

Mr Ashley Tiplady  
Russells Lawyers  
Brisbane Qld 4000

Email: [atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)

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David Schwarz.  
Justin Marschke.  
Daniel Davey.

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Geoff Hancock.  
Alex Nase.  
Paul McGrory.

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

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM")  
LM First Mortgage Income Fund (Receivers & Managers Appointed) (Receiver Appointed) ("FMIF")  
Advisor Commissions

We refer to the Order of Justice Jackson made on 17 December 2015 and to the regime for dealing with claims for indemnity by LMIM which is established under that Order.

In the affidavit of Mr John Park sworn and filed on 28 January 2016 in Queensland Supreme Court proceeding no. 3508 of 2015, Mr Park refers to a category of creditors referred to as "advisors" at paragraph 48. These are, as you know, financial advisors of the members of the funds (including the FMIF) who claim commissions based upon investments in those funds. At paragraph 49, Mr Park said that he had not yet formed a final view on the question as to whether the advisors' claims might have a right of indemnity out of funds other than the MPF.

We understand that claims by those advisors are potentially substantial.

On 21 February 2017, Mr Whyte inquired of Mr Park and Ms Kelly Trenfield as to whether a view had been formed in relation to whether claims for advisor commissions might potentially be the subject of a claim for indemnity from the FMIF. Mr Whyte referred to an update that had been provided by your clients to members of the Cash Performance Fund, in which it was said that the view had been taken that advisor commissions in respect of that fund are an unsecured liability of LMIM only. We are instructed that Mr Whyte was informed in an email from Ms Trenfield that your clients intend to take a consistent position across all funds, including the FMIF, regarding advisor commissions.

It is not clear to us whether that statement was intended to be an indication of a binding determination having been made by your clients about that. We would be grateful if you could confirm whether your clients have taken a view that they will not be making any claim upon the FMIF for indemnity in respect of any claims for advisor commissions. If the email from Ms Trenfield to Mr Whyte was only in the nature of an indication of their present intention, but the position of your clients remains subject to further advice being taken and consideration being given to the issue, please tell us. We do not suggest that would be an unreasonable position.

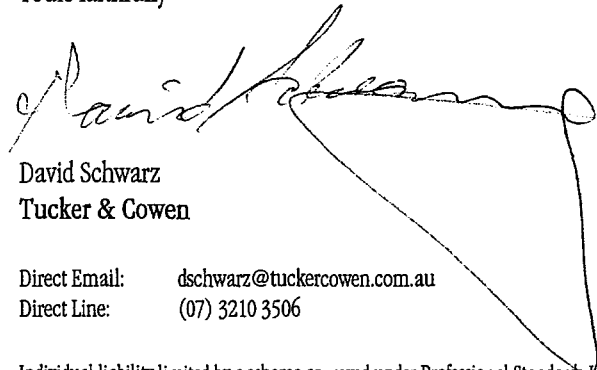
However, if your clients have in fact formed a view (presumably upon advice) that advisor commission claims cannot be sheeted home to the FMIF by a claim for indemnity, and if your clients do intend to take that position (such that our client



may discount the prospect of any claims for indemnity from the FMIF in respect of those commissions) please let us know. That is of course relevant to information to be provided to members of the FMIF and may be relevant to steps our client may take in the future.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Schwarz', with a long, sweeping horizontal stroke extending to the right and a vertical line dropping down from the end.

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.

**David Schwarz**

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**From:** Ashley Tiplady <atiplady@russellslaw.com.au>  
**Sent:** Friday, 7 April 2017 11:19 AM  
**To:** David Schwarz  
**Cc:** Mitch Ziebell  
**Subject:** RE: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Advisor Commissions ~20131259~

Dear David

I have now taken instructions on the query raised in the letter attached to your email below.

I am instructed that the liquidators of LM Investment Management Ltd (in liq)(receivers and managers appointed) have formed the view that the advisor commissions are an unsecured claim against LMIM and as such no claim will be sought as an indemnity against LM FMIF or the other funds.

Yours faithfully

**RUSSELLS**

**Ashley Tiplady**  
*Partner*

Direct 07 3004 8833  
Mobile 0419 727 626  
[ATiplady@RussellsLaw.com.au](mailto:ATiplady@RussellsLaw.com.au)

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**From:** Alison Woodbury [<mailto:awoodbury@tuckercowen.com.au>] **On Behalf Of** David Schwarz  
**Sent:** Wednesday, 5 April 2017 10:24 AM  
**To:** Ashley Tiplady  
**Cc:** David Schwarz; Mitch Ziebell  
**Subject:** LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) - Advisor Commissions

Mr Tiplady

Please see attached, forwarded on behalf of David Schwarz.

Regards

**Alison Woodbury**  
Personal Assistant

E: [awoodbury@tuckerowen.com.au](mailto:awoodbury@tuckerowen.com.au)

D: 07 3210 3517 | T: 07 300 300 00 | F: 07 300 300 33

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