

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 3508/15

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

First Applicant: JOHN RICHAD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE REPOSIBLE 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 REPOSIBLE 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

LIQUIDATOR'S OUTLINE OF SUBMISSIONS IN RESPECT OF THEIR APPLICATION FOR REMUNERATION FILED 15 FEBRUARY 2022

LIST OF MATERIAL

Court File Index (CFI)	Description	Date Filed
CFI-320	Application	15/02/2022
CFI-321	Affidavit of Kelly-Anne Lavina Trenfield and Exhibit KAT-13 (Affidavit of Trenfield)	15/02/2022
CFI-323	Affidavit of Renee Lobb	07/03/2022



OUTLINE OF SUBMISSIONS

Filed on behalf of the First Applicant

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CFI-37 CFI-38 CFI-39 CFI-40	Affidavit of John Richard Park and Exhibit JRP-1 (January 2016 Affidavit of Park)	28/01/2016
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CFI-139 CFI-140	Affidavit of John Richard Park and Exhibit JRP-8	7/08/2018
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CFI-144	Supplementary Affidavit of John Richard Park and Exhibit JRP-9	13/08/2018
CFI-174 CFI-175	Affidavit of John Richard Park and Exhibit JRP-10	12/11/2018
CFI-303 CFI-304	Affidavit of Kelly-Anne Lavina Trenfield and Exhibit KAT-12	12/02/2021

INTRODUCTION AND BACKGROUND

1. The administration of the winding up of the affairs of LM Investment Management Ltd (**LMIM**) has been complex. LMIM was the responsible entity of six registered managed investment schemes, the trustee of an unregistered managed investment scheme, and held assets and conducted a funds management business in its own right. There have been numerous insolvency practitioners appointed variously as trustee, controller or receiver across the different funds. The largest fund, the First Mortgage Income Fund (**FMIF**) has over 4,500 members.
2. The winding up is now significantly advanced, save principally for some significant litigation which remains to be completed by the court appointed receiver of the FMIF (**the Receiver**) and final distributions. By this application, the liquidator of LMIM, Mr Park, seeks orders fixing his remuneration and for approval to draw some of the sum fixed from the various funds for the 12 months beginning 1 November 2020, including a prospective amount for the work necessary to wind up two of the funds, the AIF and the ASPF.
3. Information as to the factual background to the winding up of LMIM (including definitions for the acronyms used in these submissions) is set out in detail at paragraphs 6 to 15 of the January 2016 Affidavit of Park.
4. The liquidator has brought three previous applications for the approval of his remuneration:

- (a) *Park & Muller (as liquidators of LM Investment Management Ltd) (No 2) v Whyte* [2018] 2 Qd R 413; [2017] QSC 229 (**First Remuneration Decision**); and
 - (b) *Park v Whyte (No 4)* (2019) 2 Qd R 412; [2019] QSC 245 (**Second Remuneration Decision**);
 - (c) an application filed 12 February 2021 (CFI-301) and determined by Wilson J on 31 May 2021 (corrected on 1 June 2021) in an unreported decision (**Third Remuneration Decision**).
5. The application which lead to the Third Remuneration Decision was more straightforward because the approach to the categorisation of work in this administration had already been dealt with in the First and Second Remuneration Decisions.
6. This application is simpler again because, save in respect of the prospective remuneration, it deals with only one year of remuneration and because Mr David Whyte, the court appointed receiver responsible for the winding up of the FMIF, has decided not to appear in opposition to the application.

THE REMUNERATION SOUGHT

7. It is necessary to understand how FTI have categorised their work, and how this Honourable Court has previously approved of the categorisation of work. The categories set out in the application are:
- (a) **Category 1** – being work which is directly attributable to one of the Funds;
 - (b) **Category 2** – being work which is attributable to the funds management business of LMIM and, therefore, attributable to the Funds as a collective without being directly attributable to any particular Fund;
 - (c) **Corporate Remuneration** – being work which is attributable to LMIM in its own corporate capacity or work which would have had to be done in the winding up of any company that is not attributable to the Funds either individually or collectively.
8. There has, on the previous remuneration applications, been a third category relating to certain controllerships, which is not relevant to this application.
9. The application seeks remuneration totalling \$141,931.90 across the various categories and Funds plus a maximum of \$132,000 in prospective remuneration. More specifically, the application seeks orders:

- (a) fixing the liquidator's Corporate Remuneration for the period from 1 November 2020 to 31 November 2021 (**the Relevant Period**) in the amount of \$5,550.05 (including GST);
 - (b) fixing the liquidator's Category 1 remuneration in relation to the Funds for the Relevant Period in the total amount of \$92,112.90 (including GST);
 - (c) permitting him to draw that Category 1 remuneration from each relevant Fund, as follows:
 - (i) from the AIF – \$22,536.80 (including GST);
 - (ii) from the FMIF – \$18,315.00 (including GST);
 - (iii) from the ASPF – \$17,976.20 (including GST);
 - (iv) from the ICPAIF – \$7,266.60 (including GST);
 - (v) from the CPAIF – \$26,018.30 (including GST);
 - (d) fixing the liquidator's Category 2 remuneration for the period from 1 July 2018 to 31 October 2020 in the sum of \$44,268.95 (including GST);
 - (e) permitting him to draw that Category 2 remuneration from each of the non-Feeder Funds in equal proportion;
 - (f) permitting him to draw a sum for Category 1 remuneration in relation to the finalisation of the winding up of each of the AIF and the ASPF in the amount of \$66,000 (including GST) per Fund.
10. Consistent with Justice Jackson's decision in the Second Remuneration Decision,¹ while the liquidator has sought an order for his Corporate Remuneration to be fixed in a particular amount, no order is sought that that remuneration be paid from any of the Funds.
11. Similarly, in the First Remuneration Decision, Justice Jackson held that Category 2 remuneration should be apportioned equally between the non-Feeder Funds.² This application is brought on the same basis.

PRINCIPLES

12. The liquidator's claim to have the remuneration which is determined to be reasonable paid from the assets of the Funds is made pursuant to what Justice Jackson described as

¹ Second Remuneration Decision, 423 [36].

² First Remuneration Decision, 466-467 [251]-[258].

the *Berkeley Applegate* principle.³ In essence, the Court has an inherent equitable jurisdiction to allow remuneration to a person who has done work for the benefit of the beneficiaries of the trust, which extends to the liquidator of a corporate trustee.⁴

13. The function of the court in fixing or determining the remuneration of the first applicant as liquidator is informed by the statutory criteria of reasonableness, having regard to the list of considerations to be taken into account.⁵ The statutory criteria are found in s.473(10) of the *Corporations Act 2001* (Cth), as it was prior to the amendments which came into effect on 1 March 2017 relating to the *Insolvency Practice Schedule (Corporations)*, being Schedule 2 to the current version of the Act.⁶
14. Those factors relevantly include:
 - (a) the extent to which the work performed by the liquidator was reasonably necessary;
 - (b) the period during which the work was performed by the liquidator;
 - (c) the quality of the work performed by the liquidator;
 - (d) the complexity of the work performed by the liquidator;
 - (e) the extent (if any) to which the liquidator was required to deal with extraordinary issues;
 - (f) the value and nature of the property dealt with by the liquidator;
 - (g) whether the liquidator was required to deal with one or more receivers;
 - (h) the number, attributes and behaviour of the company's creditors;
 - (i) if the remuneration is ascertained on a time basis, the time which is properly taken by the liquidator to complete the work.
15. One important factor, which has been described as the 'underlying theme' of the relevant statutory factors, is the concept of proportionality:⁷

“The question of proportionality in terms of the work done as compared with the size of the property or activity the subject of the insolvency administration or the benefit or gain to be obtained from the work is an important consideration in determining overall reasonableness...”

³ First Remuneration Decision, 428-436 [70]-[108]; *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32.

⁴ *Re North Food Catering Pty Ltd* [2014] NSWSC 77, [9].

⁵ First Remuneration Decision, [63].

⁶ A practically identical list of factors now appears in subdiv 60-12 of the Schedule.

⁷ *Templeton v Australian Securities and Investments Commission* (2015) 108 ACSR 545; [2015] FCAFC 137 553-554; [31]-[32] (Besanko, Middleton and Beach JJ).

16. The work which is done must be proportionate to the difficulty or importance of the task in the context in which it needs to be performed.⁸
17. To those general principles, a few specific matters may be added:
- (a) the procedure of approving a liquidator's remuneration is a summary one in which the rules of evidence are ordinarily not strictly observed. The Court must determine for itself whether the remuneration claimed is fair and reasonable and the absence of a contradictor does not detract from the Court's duty in this respect;⁹
 - (b) being a summary procedure, the Court does not usually undertake a 'line by line' analysis of the liquidator's time sheets – the essential purpose of the information to be provided on the summary procedure is to enable a person interested in the fund from which fees will be drawn to ascertain whether there are matters to which objection should be taken;¹⁰
 - (c) the liquidator's views as to what is reasonable are relevant but not determinative – one does not gainsay the considered oath of an officer of the court, but neither does one uncritically accept the opinion of a person interested in the outcome of the application;¹¹
 - (d) in principle, work in relation to the calculation and presentation of earlier applications for remuneration is recoverable under the *Berkeley Applegate* principle.¹²
18. In applying those broadly applicable principles in complex administrations however, there is no touchstone or independent measure of reasonableness other than as a matter of judicial impression.¹³
19. In other contexts when approving a liquidator's remuneration under the statutory regime, Courts have been prepared to set a maximum amount for prospective future remuneration of the liquidator, particularly where the end of the winding up is at hand, in order to avoid the costs of future applications.¹⁴ There is no reason in principle why

⁸ *Conan as liquidator of Rowena Nominees Pty Ltd (rec and mngr appointed)(in liq) v Adams* (2008) 65 ACSR 521; [2008] WASCA 61 (**Conlan**), 533 [47] (McLure JA).

⁹ *ASIC v Groundhog Developments Pty Ltd & Ors* [2011] QSC 263, [13] (Dalton J); *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 (**Venetian Nominees**).

¹⁰ *Re Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd)* [2001] WASC 230, [24]-[27] (Owen J) (**Oakleigh Acquisitions**).

¹¹ *Owen (in the matter of Rivercity Motorway Pty Ltd) v Madden (No 2)* [2012] FCA 312, [26] (Logan J) (**Rivercity Motorway**).

¹² Second Remuneration Decision, 424-425, [45]; *Re RMGA Pty Ltd* [2012] NSWSC 678, [14].

¹³ *Rivercity Motorway*, [20]

¹⁴ *Re Idylic Solutions Pty Ltd* (2016) 115 ACSR 581, 606-607; [2016] NSWSC 1292 [81]-[82] (Black J); *Re Angstrom Assets Ltd (in liq)* [2014] NSWSC 1779, [8] (Black J); cf *Poulter as liq of Haulton Construction Services Pty Ltd (in liq)* [2013] VSC 366, [49].

a similar approach ought not be applied to the exercise of the Court's equitable jurisdiction.

REMUNERATION GENERALLY

20. The liquidator is a Senior Managing Director of the firm FTI Consulting (**FTI**).¹⁵ A detailed explanation of the time recording system utilised by FTI is provided by paragraphs 26 to 44 of the Affidavit of Trenfield. Ms Trenfield is also a Senior Managing Director, who has the day to day conduct of the liquidation of LMIM, under Mr Park's supervision.¹⁶
21. Relevantly:
- (a) the system is designed to ensure compliance with the applicable industry code (**ARITA Code**) which requires tasks to be broken up into particular categories and provides guidelines and templates as to how information in relation to remuneration is to be presented;¹⁷
 - (b) time is recorded on a daily basis by the relevant person entering the duration of the time spent on a task and a description of the task by reference a six-minute unit;¹⁸
 - (c) the tasks which are performed are allocated and categorised by use of a system of job codes and tasks, which is regularly reviewed by Ms Trenfield and staff members of FTI to ensure it is appropriate;¹⁹
 - (d) a task will be entered as Category 1 work for a particular fund where it is identified as being clearly referable to that particular fund;²⁰
 - (e) a task will be entered as Category 2 work where it is identified as general funds management work which is not clearly referable to a particular fund;²¹
 - (f) Ms Trenfield and other senior staff members at FTI have periodically carried out manual reviews of all the time entries to ensure that they were correctly allocated and there was no duplication.²²

¹⁵ January 2016 Affidavit of Park, [2].

¹⁶ Affidavit of Trenfield, [2].

¹⁷ Affidavit of Trenfield, [27]-[30].

¹⁸ Affidavit of Trenfield, [31].

¹⁹ Affidavit of Trenfield, [32].

²⁰ Affidavit of Trenfield, [36]-[37].

²¹ Affidavit of Trenfield, [38]-[43].

²² Affidavit of Trenfield, [45]-[48].

22. There are some features of the winding up of LMIM generally which, in combination with the specific matters set out in relation to the categories claimed, should lead the Court to conclude that the amounts claimed are fair and reasonable:
- (a) the administration of the affairs of LMIM has been a complex and difficult one, involving thousands of investors, many creditors and the appointment of numerous insolvency practitioners to differing roles (with the associated need to liaise with those other practitioners);
 - (b) the work for which remuneration is sought was that which the liquidator considered necessary from time to time and work which was not necessary was not done;
 - (c) the quantum of remuneration sought in this application is much lower than in previous applications, reflecting:
 - (i) the shorter time period covered by this application;
 - (ii) the continued gradual winding down of the affairs of LMIM;
 - (d) as set out above, the work performed has been recorded in accordance with well-established practices under a system of recording time costing and carefully reviewed by senior insolvency practitioners;
 - (e) the work has, wherever possible, been delegated to appropriately qualified staff with the skill and experience to carry out the necessary work, resulting in work being undertaken by staff at an hourly rate proportionate to each task;²³
 - (f) Ms Trenfield has reviewed all of the work undertaken, the time spent on each task and the quantum of remuneration sought for approval and deposes to her view that each task was necessary, undertaken efficiently and required for the purposes of the liquidation.²⁴

CATEGORY 1 REMUNERATION

23. Category 1 remuneration is work which is directly referable to a particular Fund. That being the case, it would be inequitable to permit the beneficiaries of those Funds to take the benefit of the work without allowing remuneration to the liquidator for it.
24. In addition to the matters set out in paragraph ~~22-23~~ above, the Court should conclude that the Category 1 remuneration sought by the liquidator in respect of each Fund is reasonable because:

²³ Affidavit of Trenfield, [139].

²⁴ Affidavit of Trenfield, [140].

- (a) in respect of the FMIF:
- (i) the principal tasks which were carried out included work in relation to Court proceedings (including the Third Remuneration Application, a costs order in favour of the FMIF, and reviewing the FMIF receivers' applications for approval of his own remuneration), and responding to creditors and investors of the FMIF;²⁵
 - (ii) FTI has endeavoured to limit correspondence and meetings with the Receiver only to those matters necessarily arising because of the dual appointments;²⁶
 - (iii) the quantum sought is modest (\$18,315 including GST), reflecting the careful controls put in place to ensure that only work which is necessary for the FMIF is undertaken;
 - (iv) Mr Whyte, the person responsible for winding up the FMIF, has made no objection to the quantum of the liquidator's claim;
- (b) in respect of the AIF:
- (i) the principal tasks which were carried out included financial reporting and audit work specific to the AIF, liaising with AIF investors and their advisors and general fund administration tasks;²⁷
 - (ii) the nature of the assets held by the AIF, which included significant foreign currency reserves and loans secured by mortgages, added to the complexity of the affairs of LMIM;²⁸
 - (iii) Ms Trenfield has reviewed the work undertaken and has sworn that each task was necessary, undertaken efficiently, and required for the purposes of the liquidation;²⁹
- (c) in respect of the ASPF:
- (i) the principal tasks which were carried out included financial reporting and audit work specific to the ASPF, liaising with ASPF investors and their advisors and general fund administration tasks;³⁰

²⁵ Affidavit of Trenfield, [86].

²⁶ Affidavit of Trenfield, [87(a)].

²⁷ Affidavit of Trenfield, [89], [94].

²⁸ Affidavit of Trenfield, [95].

²⁹ Affidavit of Trenfield, [96].

³⁰ Affidavit of Trenfield, [103], [107].

- (ii) the nature of the assets was relatively complex, involving different investments in ASX listed investment series with differing investors, fixed interest returns and maturity dates;³¹
 - (iii) Ms Trenfield has reviewed the work undertaken and has sworn that each task was necessary, undertaken efficiently, and required for the purposes of the liquidation;³²
- (d) in respect of the Feeder Funds:
- (i) the principal tasks which were carried out included financial reporting and audit work specific to the ICPAIF, liaising with ICPAIF investors and their advisors and general fund administration tasks;³³
 - (ii) it is apparent from the descriptions of the tasks undertaken that only the minimum necessary work to maintain the Feeder Funds has been undertaken;
 - (iii) Ms Trenfield has reviewed the work undertaken and has sworn that each task was necessary, undertaken efficiently, and required for the purposes of the liquidation.³⁴

CATEGORY 2 REMUNERATION

25. Category 2 work relates to the funds management business of LMIM generally. In that way, the work is for the benefit of all of the Funds, without being specifically attributable to any particular Fund.
26. In terms of reasonableness, many of the same considerations set out above should lead the Court to conclude that the Category 2 remuneration is fair and reasonable.
27. The principal tasks identified as Category 2 work were work in respect of proceedings commenced against LMIM as responsible entity of the funds (in a general sense), general administration tasks and work in relation to what is called the 'Directions Application'.³⁵
28. Ms Trenfield has reviewed the work undertaken in relation to Category 2 and has sworn that each task was necessary, undertaken efficiently, and required for the purposes of the liquidation.³⁶

³¹ Affidavit of Trenfield, [108(a)].

³² Affidavit of Trenfield, [108(c)].

³³ Affidavit of Trenfield, [115], [120], [123], [128].

³⁴ Affidavit of Trenfield, [121(b)], [129(b)].

³⁵ Affidavit of Trenfield, [131], [136].

³⁶ Affidavit of Trenfield, [138(b)].

29. The basis for the claim for Category 2 remuneration is the same as that approved in the First Remuneration Decision.³⁷

PROSPECTIVE REMUNERATION

30. The liquidator intends to wind up both the AIF and ASPF by 30 June 2022.³⁸ In each case, it will be necessary for the winding up of each Fund for the liquidator to:³⁹
- (a) complete the Fund's financial accounts and the final audited accounts for the year ended 30 June 2022 to accompany the ASIC Form 5138 required to be lodged on completion of the Fund wind up;
 - (b) complete all business activity statements to 30 June 2022;
 - (c) determine and satisfy all costs to the AIF;
 - (d) calculate the final distribution and manage the logistics of paying the distribution in multiple currencies;
 - (e) correspond with all investors, including by updating the website, in relation to the final distribution to be paid from the Fund.
31. In relation to the AIF, Ms Trenfield swears to her belief in the reasonableness of the cap on remuneration for the finalisation of the Fund based on:⁴⁰
- (a) the small proportion of the cap to the remaining assets of the Fund (0.84%);
 - (b) her belief that the cap represents a conservative estimate of the time necessary for the AIF to be properly wound up;
 - (c) the fact that processing distributions to 714 unitholders in multiple currencies will be a time consuming task.
32. In relation to the ASPF, Ms Trenfield swears to her belief in the reasonableness of the cap on remuneration for the finalisation of the Fund based on:⁴¹
- (a) the small proportion of the cap to the remaining assets of the Fund (11.98%);
 - (b) her belief that the cap represents a conservative estimate of the time necessary for the ASPF to be properly wound up;

³⁷ At [119], [247]-[257] and [284]-[295].

³⁸ Affidavit of Trenfield, [97], [109]

³⁹ Affidavit of Trenfield, [98], [110].

⁴⁰ Affidavit of Trenfield, [100].

⁴¹ Affidavit of Trenfield, [110].

- (c) the fact that processing distributions to 118 unitholders in multiple currencies will be a time consuming task.

CONCLUSION

33. For those reasons, the Court should make the orders sought by the application.

S C Russell

Counsel for the liquidator

12 April 2022