SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS1146 / 20

Applicant: **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**

AND

First Respondent: **PETER CHARLES DRAKE & ORS**

AND

First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) AS RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 & ANOR**

OUTLINE OF SUBMISSIONS OF TWO BENEFICIARIES: LM INVESTMENT MANAGEMENT LTD (IN LIQ) ("LMIM") AS RESPONSIBLE ENTITY OF THE LMCPAIF AND THE LMICPAIF AND OF LMIM IN EACH CASE BY ITS LIQUIDATOR, MR PARK

Contents

Liquidator's material

- Affidavit of John Richard Park filed 17 April 2020, Court document 21
- Affidavit of Millicent Kathryn Russell sworn 21 May 2020

Overview

1. There are three options open to the Court, namely:-

   (a) to give advice that the Receiver is justified in making and pursuing the appeal;

   (b) to give advice not to proceed; and

   (c) to decline to give any advice at all.

2. The Liquidator's position is that the Court ought to decline to give advice, on the following two jurisdictional grounds and five discretionary grounds:

   (a) The jurisdiction to give advice is not enlivened, in that the Applicant/trustee does not seek advice for itself but for the benefit of Mr Whyte which is not within the scope of s 96 and, in any event, does not afford any protection to the Receiver by s 97 (**Jurisdictional Ground 1 – Incorrect purpose and no protection afforded**);

   (b) The jurisdiction to give advice is not enlivened, because there is no "question" and no clear proper purpose identified for the advice to be given (**Jurisdictional Ground 2 – Lack of a "question"**);

   (c) Has the Receiver satisfied the Court that he should proceed with the Appeal? (**Discretionary Ground 3 – Proceeding with the Appeal?**);

   (d) This is not the forum to exculpate the Receiver (or LMIM) from liability for prosecuting litigation that may not be necessary for the winding up of the FMIF, or reasonable or proper (**Discretionary Ground 4 – Pre-judging propriety of the litigation**);

   (e) Have the beneficiaries (and the Liquidator) been adequately consulted (**Discretionary Ground 5 –Lack of consultation**);

   (f) Whether the appeal is commercially justifiable (**Discretionary Ground 6 –Commerciality**); and

   (g) It is inappropriate to provide advice to a professional trustee who has resources and ability to get independent legal advice (**Discretionary Ground 7 – Advice to a professional trustee**).

3. There is one preliminary issue arising out of the Receiver's refusal to provide to the Liquidator LMIM's legal advice about prospects of the appeal. Until all advice is provided, and the Liquidator has an opportunity to consider it, the application for advice should be adjourned, or alternatively dismissed with no advice provided.

4. There is a central theme that runs across a number of the grounds. That is, the Receiver has already determined to proceed with, and indeed has already commenced, the Appeal.[1] In that circumstance, both as a matter of the Court's jurisdiction being enlivened and as a matter of exercise of the discretion that it has, the Court ought not to provide the advice sought. This is addressed, for ease of reference, within Jurisdictional Ground 2.

Relevant background facts

Definitions

5. For the purposes of these submissions, the following definitions are adopted, as consistently as possible with the definitions used in the affidavits of Mr Whyte and Mr Park:

   (a) **Appeal** means the current appeal filed CA14258/2019 from the Primary Judgment;

   (b) **Application** means the originating application commencing this proceeding (BS 1146/20);

   (c) **Appointment Order** means the order of Justice Dalton appointing the Receiver, made in BS 3383 of 2013;[2]

   (d) **Director Proceedings** are proceedings BS 12317/14, in which LMIM, acting by Mr Whyte, sued the directors of LMIM, inter alia;

   (e) **Feeder Funds** are the three registered managed investment schemes being LM Institutional Currency Protected Australian Income Fund (**LMICPAIF**), the LM Currency Protected Australian Income Fund (**LMCPAIF**) and the Wholesale First Mortgage Income Fund (**WFMIF**);

---

[1] And not just a "holding" appeal pending receipt of judicial advice – the Notice contains ten substantive grounds with approximately 40 sub-grounds

[2] See Affidavit of Whyte filed 31 January 2020, CFI- 2, at bundle page 1

(f) **First Whyte Affidavit** is the affidavit of Mr David Whyte filed 31 January 2020 (CFI-2);

(g) **FMIF** is the LM First Mortgage Income Fund;

(h) **Liquidator** is Mr John Park, managing director of FTI Consulting (Australia) Pty Ltd;

(i) **LM Feeder Funds** are the two Feeder Funds of which LMIM is the responsible entity, being the LMICPAIF and the LMCPAIF;

(j) **LMIM** is LM Investment Management Ltd (in liq)(receiver appointed), that is the responsible entity of the FMIF and two of the three Feeder Funds, being the LMICPAIF and LMCPAIF;

(k) **Primary Judgment** is the decision of Jackson J in the Director Proceedings handed down on 22 November 2019;

(l) **Receiver** is Mr David Whyte, a partner of BDO Australia Limited;

(m) **Second Whyte Affidavit** is the affidavit of Mr David Whyte filed 4 February 2020 (CFI-8);

(n) **Whyte Remuneration Affidavit** is the affidavit of Mr David Whyte filed 7 May 2020 in BS3383/15.

LMIM and the Receivership

6. The (former) business of LMIM is described in the Primary Judgment at [19] to [30].

7. The position of the Receiver is as described, in part, in the First Whyte Affidavit at [4] to [8], subject to the following qualifications:

(a) At paragraph 2 of the 21 August 2013 Order, Mr Whyte is "*appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution*";

(b) At paragraph 7(b) of the 21 August 2013 Order, Mr Whyte is, relevantly, authorised to "*bring, defend or maintain any proceedings on behalf of FMIF in the name of [LMIM] as is necessary for the winding up of the FMIF in accordance with clause 16 of the constitution, …*"

(c) Whilst Mr Whyte has authority to bring legal proceedings, the Order limits this authority to being legal proceedings that are "**necessary** for the winding up ..."

(d) Relevantly, at paragraph 3(b) of the 21 August 2013 Order, Mr Whyte is entitled to be indemnified out of the assets of the FMIF in respect of any **proper** expenses incurred in carrying out the Appointment.[3]

The Director Proceedings

8. The Director Proceedings are as described in the Second Whyte Affidavit, subject to the following qualifications:

(a) Paragraph 10 is incorrect, as the Order that was actually made on 28 April 2016 was that "*the liquidators and solicitors for the seventh defendant [*which is LMIM*] be excused from further appearance*",[4] which is not the same as the seventh defendant being excused. The seventh defendant remained a party to the proceedings, and was awarded its costs on 28 February 2020;

(b) Prior to this Application in relation to the conduct of the Appeal, the Receiver never sought or obtained s 96 advice in relation to the Director Proceedings.

9. It is apparent from the Primary Judgment that the Receiver's claim as made in the Director Proceeding was comprehensively dismissed. The claim failed on factual and legal grounds.

10. The Receiver pursued the claim to a trial without seeking s 96 advice in advance. Such conduct raises at least three questions; namely, were the Director Proceedings "necessary", were the expenses incurred by the Receiver "proper" and ought any costs payable by LMIM to the successful defendants be paid out of the trust property (the scheme property of the FMIF). Those questions cannot be determined in this (summary) Application. This is developed in the consideration of Discretionary Ground 4 below.

Reliance on legal advice and notice of appeal

---

[3] Emphasis added.
[4] CFI-91 in the Director Proceedings.

11. The Receiver swears that on receiving the Primary Judgment, he sought legal advice and having considered the advice, he instructed his legal advisors to file the Notice of Appeal.[5] It seems that the advice was verbal.[6] The Appellant is LMIM, not the Receiver. Presumably, any written advice was given to LMIM. The Receiver does not depose to the legal advice given orally; and he refuses to provide LMIM's written legal advice; hence, the Liquidator cannot know what advice was given during the telephone calls or in writing.

12. The Notice of Appeal is a comprehensive document, raising 10 grounds of appeal, with approximately 40 sub-grounds.

13. The Receiver has formed a firm view to proceed with the Appeal.

Jurisdiction

14. Advice is sought on the Application:

    (a) under s 96 of the *Trusts Act 1973* (Qld);[7]

    (b) alternatively, under s 601NF of the *Corporations Act 2001* (Cth);[8]

    (c) alternatively, under the inherent jurisdiction of the Court.[9]

15. As to the second of these, the Receiver is not a person entitled to bring an application under s 601NF, by operation of s 601NF(3). That basis of jurisdiction for the Application may therefore be ignored.

16. As to the third of these, it is questionable whether the Court has an 'inherent jurisdiction' to give judicial advice to a trustee because the jurisdiction to give such advice (that is, without first committing the trust property to general administration by the Court) has always been statutory. In *Macedonian*, the High Court expressly set aside the question of whether the Court has an inherent jurisdiction to give judicial advice to a trustee.[10]

17. The s 96 jurisdiction is considered below.

---

[5] Second Affidavit of Whyte at paragraphs 15 and 16.
[6] See Whyte Remuneration Affidavit at bundle page 173.
[7] Trustee Act 1973 (Qld), s 96.
[8] *Corporations Act 2001* (Cth), s 601NF(2).
[9] OA, para 5.
[10] *Macedonian Orthodox Community Church of St Pitka Inc v His Eminence Petar, the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [34] (text in footnote 47 of the judgment) and [37].

Relevant legal principles

Historical primer

18. The historical context of provisions such as s 96 is important to its exercise.[11]

19. Since 1859,[12] a trustee has been able to apply for judicial advice "on any question respecting the Management or Administration of the Trust Property or the Assets", thereby enabling the Court to resolve uncertainty in the administration of a trust by ordering that a trustee was "justified in" engaging in, or "at liberty to" pursue, certain conduct (if the Court was so satisfied).

20. The reason why the statutory provision enabling trustees to file a summary petition to obtain judicial advice was first enacted in England in 1859[13] (and analogues of it populated in Australian jurisdictions thereafter) was because the Court of Chancery had no inherent jurisdiction to give judicial advice to a trustee and was needed to avoid expensive suits for general administration.[14]

21. As trustees are generally entitled to be indemnified out of a trust property for costs *reasonably and properly incurred*, a 'question' arises for a trustee (and then the Court in giving judicial advice) as to whether a trustee is so justified in commencing or defending litigation involving the trustee (*qua* trustee). The classic 'question' (which arose in *Macedonian* and can be traced to the famous case of *Re Beddoe*) is whether the trustee would be justified in using trust money to defend litigation brought by beneficiaries against the trustee. *Re Beddoe* was not itself a case in which a trustee properly sought judicial advice regarding litigation – rather, it stands as a reminder as to the serious consequences if a trustee takes litigation without first obtaining any such advice:

> 'a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion [...] and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his *cestui que trust* unless under very exceptional circumstances.'[15]

---

[11] *Macedonian* at [37]-[44]; *Re Late Chow Cho-Poon* [2013] NSWSC 844, [6]-[7]. The history of the equivalent NSW section is set out by the High Court in *Macedonian*: at [33]-[53].
[12] *Law of Property Amendment Act* 1859 (UK) (commonly known as "Lord St Leonard's Act"), s 30. *Macedonian* at [33]-[53]. A provision had earlier been enacted with respect to charitable trustees: *An Act for the better Administration of Charitable Trusts 1853* (UK), Preamble, s 16.
[13] *Law of Property Amendment Act 1859* (UK), s 30; see also *Macedonian* at [37].
[14] Parliamentary Debates (House of Lords, 11 June 1857), vol 145, col 1557.
[15] *Re Beddoe* [1893] 1 Ch 547 (CA) at 557.

> 'To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people.'[16]

22. The first of these passages from *Re Beddoe* was quoted with approval by the High Court in *Macedonian*, observing "that the warning that trustees who become involved, or wish to become involved, in litigation should seek the court's sanction is the significant, and in later years influential, aspect of *In re Beddoe.*"[17] In *Macedonian*, the High Court also observed the dual purpose of the judicial function of giving advice to trustees as follows:

> 'In short, provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.
>
> It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust.'[18] (Emphasis added.)

23. In *Ban v Public Trustee of Queensland* [2015] QCA 18, the Queensland Court of Appeal approved the above passage from *Macedonian* and held that those principles apply equally to the Queensland provision (s 96).[19]

24. The Court will be guided by doing what is in the best interests of the beneficiaries.[20] Any actions proposed to be taken by a trustee must be considered through this lens.

25. The benefit to the trustee of obtaining advice is protection, by operation of s 97 of the *Trusts Act*, in the future, other than for acts of fraud or wilful concealment.

---

[16] *Re Beddoe* at 562.
[17] *Macedonian* at [47]-[48].
[18] *Macedonian* at [71]-[72]. Considering *Trustee Act* 1925 (NSW), s 63.
[19] At [55] to [56]. See also *Commissioner of Taxation v Thomas* (2018) 264 CLR 382
[20] *Macedonian* at 93-94, [69]-[72].

Jurisdictional threshold – trustee in "genuine doubt" must apply for their own protection

26. Under ss 96 and 97, the applicant for judicial advice must be a trustee to attract the associated protection and 'the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument'[21] Morrison JA (with whom Holmes and Gotterson JJA agreed) observed in *Ban* that '[t]he right to approach the court in this way has been held to apply where the trustee is in genuine doubt as to the question to be answered.'[22]

A convenient gathering of the modern principles

27. The High Court observed eight points relevant to giving of judicial advice.[23]

28. The principles especially relevant to the present application are as follows.

29. First, a trustee owes a duty of full and frank disclosure to the Court of all relevant information. In *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All E R 198, at 201, Lord Oliver stated:

> 'it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally. The court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course is either to dismiss the application or adjourn it until full and proper information is provided.'[24]

30. All relevant information must be provided in an impartial way, the trustee being disinterested in the outcome; if the trustee champions a particular course of action, the Court ought to decline giving advice and leave the trustee to undertake the proposed course of conduct bearing the consequences of that decision, including as to a disallowance of expenses not properly incurred.[25]

---

[21] *Ban* at [54(c)], citing *Macedonian* at [58]. Note: the Qld provision, in fact, goes on to provide, further than that which is provided in the NSW provision, that an application may be made 'or respecting the exercise of any power or discretion vested in the trustee': *Trusts Act* 1973 (Qld), s 96(1).
[22] *Ban* at [57] (emphasis added), citing *Marley* at 201; *Re Australian Pipeline Ltd* [2006] NSWSC 1316, at [17]; *Tsaknis v Lilburne* [2010] WASC 152, [37]–[38]; *Re Application by Marilyn Joy Cottee* [2013] NSWSC 47 at [32]–[35]; *Re Perpetual Investment Management Ltd (as Responsible Entity for 10 Schemes Listed in the Summons)* [2014] NSWSC 784, at [70].
[23] *Macedonian* at [54]-[76]; *Cho-Poon* at [184]-[200].
[24] *Marley* at 201.
[25] *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1224 to 1225; *Application of Uncle's Joint Pty Ltd ACN 148 176 792* [2014] NSW 321, [30]–[32], [37]; *Application by Alan Maxwell Frost* [2014] NSWSC 597.

31. Second, trustees are entitled to be indemnified for expenses *properly incurred.*[26]

32. Third, the Court is not 'bound to give judicial advice merely because a trustee has a right to apply for it'.[27] In *Re Application of Perpetual Trustee Co Ltd* [2003] NSWSC 1185, at [8], Young J said, 'the interpretation of [judicial advice] legislation over the last 75 years is that if the court considers that it is an inappropriate case to give advice, it is at liberty to give no advice and to dismiss the summons'.

33. Relevantly, the Court may decline to give judicial advice where:

(a) a person seeks advice not in their capacity *qua* trustee but some other capacity (as where the directors of a trustee are also directors of other companies in respect of which trust investments are made but the question upon which advice is sought is really for those persons *qua* directors[28]);

(b) the matter upon which advice is sought is essentially a question involving commercial or practical considerations, as opposed to legal issues, "upon which the trustee is in a far better position to decide than this court";[29]

(c) there is likely to be a large expenditure on legal costs in running an appeal and 'common sense dictates that no appeal be made';[30]

(d) the advice lacks any real utility;[31]

(e) there is insufficient material to enable the Court to answer the relevant questions asked of it on the application for judicial advice;[32]

(f) the beneficiaries have not been afforded an opportunity to be heard.[33]

34. Fourth, the Court looks beyond simply whether litigation is arguable or has some prospect of success to consider 'whether litigation is, or is not, justified' having regard to various factors. This is especially so where the relevant litigation is not an

---

[26] *Re Grimthorpe* [1958] Ch 615, 623 ('they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred').
[27] *Cho-Poon* at [43]; *Baymill Investments Pty Ltd v Drewlock Pty Ltd* [2019] VSC 827, [79].
[28] *Edwards v Attorney-General* (2004) 60 NSWLR 667 (NSWCA), [107]-[108].
[29] *Re Camperdown Prime Pty Ltd* [2018] NSWSC 106, [11]-[12]; also *Re Application of Perpetual Trustee Co Ltd* [2003] NSWSC 1185, [20]-[23], [28]; *Application by Perpetual Trust Services Ltd as responsible entity of Momentum AllWeather (A$) Absolute Return Fund* [2012] NSWSC 758, [47]-[51].
[30] *Re Corneal* [1994] QSC 288 at p 5.
[31] *Re Sinnamon* [1940] QWN 41, [7]; *Re Application of Perpetual Trustee Co Ltd* [2003] NSWSC 1185, [20]-[23], [28].
[32] *Re Lemon Tree Passage and Districts RSL and Citizens Club* (1987) 11 ACLR 796, 799.
[33] *Alsop Wilkinson v Neary* [1995] 1 All ER 431, 434, 436.

internal trust dispute (e.g. where the trustee is sued for breach of trust (as in *Macedonian*)) but is litigation that the trustee himself decides to pursue against third parties. In *Plan B Trustees v Parker* [2013] WASC 216 at [37] (in which Edelman J considered that the relevant litigation was not justified), the relevant factors were observed to be:

> '(i) the prospects of success;
>
> (ii) the known means of the other party to satisfy any judgment;
>
> (iii) the potential for the litigation to deplete the trust estate;
>
> (iv) the costs should the application be unsuccessful, and whether those costs are proportionate to the issues and to the significance of the case;
>
> (v) the irrecoverable costs even if the application is successful;
>
> (vi) the nature of the case and issues raised and what will be gained if the action is to succeed; and
>
> (vii) any public interest factors in the case of a charitable trust.'

Consideration

Preliminary point – Non-provision of the legal advice?

35. The Liquidator asked, on 17 February 2020, for copies of any legal advice, and stated that he would accede to any reasonable regime to maintain confidentiality.[34] The Receiver refused to provide the advices, citing confidentiality and legal privilege and the NSW Court of Appeal and High Court decisions in *Macedonian* (without reference to page or paragraph number said to be relevant).[35] The Liquidator responded, on 3 March, noting that *Macedonian* did not decide the issue and pointed to two (single judge) decisions which did consider the issue, expressly and in favour of production (being *Plan B* at [42] and *Wood v Wood (No. 4)* [2014] WASC 393 at [98] to [135]). The Liquidator also pointed out that the applicant company was LMIM, being the same entity that the Liquidator acts for, and that there is clearly a common interest between the parties, at least in this respect.[36]

---

[34] Affidavit of Park at bundle page 1.
[35] Affidavit of Park at bundle page 3.
[36] Affidavit of Park at bundle page 5.

36. There was no response from the Receiver.

37. The Liquidator wrote again, on 8 April,[37] and (with respect) reasonably asked again for the advice and indicated that if the advice supported the position taken by the Receiver in pressing ahead with the Appeal, then the Liquidator "*will not oppose your client's application …*".

38. The Receiver again refused, by letter dated 16 April.[38]

39. There are two issues, namely:

(a) whether the legal advice is privileged, as such; and

(b) how can the beneficiaries properly be heard, without having seen the legal advice.

40. As to the first of these issues, the principles are as set out in *Plan B* and *Wood (No 4)* above. The modern view is that, as beneficiary, LMIM is entitled to the legal advice, to consider it and to be able to make submissions at the hearing.

41. As observed above, the Appeal is not a proceeding in which the trustee is being sued by the beneficiaries for breach of trust, so no question arises of how much disclosure must be made to the beneficiaries to enable them to be properly heard with respect to the relief sought in the Application. Any claim by the Receiver to litigation privilege cannot be maintained in this case against the beneficiaries, who are friendly parties with a common interest in the outcome of the Appeal. Cases where the primary dispute is between trustee and beneficiary are distinguishable from cases where the trustee has sued a third party.

42. In furtherance of the desirability of consulting beneficiaries, any legal opinion obtained by a trustee ought to be disclosed by them to beneficiaries, especially where the subject matter of the advice does not involve a dispute between them but involves a third party dispute taken on their behalf.[39]

43. In any case, if the trustee wished to maintain privilege in the legal advice obtained by it vis-à-vis the beneficiaries, it 'must establish not only that the disputed documents were privileged, but that the privilege was [its] personally, and not that

---

[37] Affidavit of Park at bundle page 6.
[38] Affidavit of Park at bundle page 8.
[39] *Chow Cho-Poon* at [8].

of the trustee of the trust.'[40] The trustee has not established that the privilege was its personally.[41] Nor could it maintain privilege in the advice against the beneficiaries. Even then, if the privilege belonged to the company LMIM in its own right, then such a claim could not be maintained against the Liquidator.

44. As regards litigation privilege, the legal advice obtained from counsel as to the Appeal is privileged as against the parties to the Appeal who have interests opposed to that of the trustee. Critically, however, the beneficiaries:

(a) are not parties to the Appeal; and

(b) have a common interest in the outcome of the Appeal (noting that the liquidator has sworn that, at least as a general proposition, he would welcome a successful appeal[42]).

45. There is a common interest privilege over the legal advice and the Liquidator has indicated that he will abide any reasonable confidentiality regime.

46. Accordingly, under neither category of privilege (litigation privilege or legal advice privilege), can the Receiver refuse to provide the legal advice (or other related documents) he obtained with respect to the Appeal.

47. On this basis, the application ought to be adjourned to require the advice to be provided, and LMIM be put in a position to be properly heard.

48. If the Receiver persists in refusing to provide the advices, then the Court will not be able to obtain the informed view of LMIM and the Court should decline, on that basis alone, to provide any advice.

Jurisdictional Ground 1 – Incorrect purpose and no protection afforded

49. It is submitted that the Receiver has not enlivened the jurisdiction of the Court to give the advice because the company LMIM is the applicant, yet the Application purports to provide advice to the Receiver, which elides the roles of company and the Receiver as its officer.

---

[40] *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, [6], citing *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd* [2011] SASC 90 ; (2011) 275 LSJS 166, [40] (White J); *Schreuder v Murray (No 2)* [2009] WASCA 145, (2009) 41 WAR 169, [94]; *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16, [31].

[41] *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, [7], [27], [35]-[36] (Brereton J).

[42] Affidavit of Ms Russell, sworn 21 May 2020, at bundle page 9

50. There is confusion on the face of the Application, in that the advice is sought by the company LMIM, which is the trustee, yet the relief is addressed to the position of the Receiver personally.[43] The Receiver's solicitors have confirmed this, in their letter dated 15 May 2020, in which they state that "... protection is sought for the benefit of Mr Whyte".[44]

51. This confusion highlights the jurisdictional problem that it is not in fact the trustee who is applying for advice, but the Receiver, as an officer of the trustee. That is, the Receiver has caused LMIM, as trustee, to bring the Application at its expense, but in reality he seeks relief for his own personal benefit in respect of his personal conduct on behalf of LMIM as receiver. By framing the Application in this way, LMIM has not properly enlivened s 96 of the *Trusts Act* 1973 (Qld) because the person seeking the benefit of the advice is not the trustee and it is the trustee alone who can get judicial advice.[45] It is to be remembered that it is the trustee who obtains the protection under s 97 of the *Trusts Act*, not some third party such as a director or, in this Application, a Court appointed receiver.

52. On this basis alone – that is, due to the 'elision of roles' as between the applicant and the person (i.e. Mr Whyte) the judicial advice is intended to benefit - the Court may not give any advice as its jurisdiction has not been enlivened; alternatively as a matter of discretion.

Jurisdictional Ground 2 – Lack of a "question" that enlivens the jurisdiction

53. It is further submitted that the Receiver has not enlivened the jurisdiction of the Court to give the advice because there is no matter in which the Receiver is in 'genuine doubt'.[46]

54. The Receiver swears that in his judgment, "*I consider that it is reasonable and appropriate and in the interests of the FMIF unitholders to pursue the Appeal*".[47] This is repeated in the Statement of Fact as being "*On considering the advice received from his legal advisors, Mr Whyte formed the view that, on balance, it was appropriate to appeal the Judgment*".[48]

---

[43] The particulars of the applicant specified in the OA reaffirm that LMIM is the applicant.
[44] See Gadens letter dated 15 May 2020, as exhibited to the affidavit of Ms Russell sworn 21 May 2020
[45] See *Edwards v Attorney-General* (2004) 60 NSWLR 667 (NSWCA), [104]-[108] (Young CJ in Eq (with whom Mason P agreed)) (declining to give advice where directors and trustees had elided their roles).
[46] *Ban* at [57], citing *Marley* at 201; *Ban* at [54(c)], citing *Macedonian* at [58].
[47] Second affidavit at paragraph [33].
[48] Statement of Facts at paragraph 8.

55. On its face, that demonstrates that he has made the decision to proceed. In that event, the Court's jurisdiction is not enlivened: *Ban* at [54(c)] and [57].

Discretionary Ground 3 – Proceeding with the Appeal

56. The fact that the Receiver has determined to proceed with the Appeal is also a discretionary factor against the giving of any advice. He has received legal advice and is in no doubt whether to proceed. He puts before the Court volumes of material. Perhaps someway short of the "bundle of documents about a meter high" in re *Lemon Tree Passage & Districts RSL and Citizens club Co-operative Ltd* (1986) 11 ACLR 796 at 797, but this Application bears the hallmarks of the problems identified by Young J in that case. That is, the liquidator had an obligation to place before the Court the necessary materials and it is not helpful unless it can be set out within small compass. The Receiver has not done that.

57. For the same reasons as set out in *Lemon Tree*, the Court ought to decline to provide any advice.

58. The Receiver has given some consideration to the costs expended and the costs to pursue the appeal, as set out in his Second Affidavit at [18] to [32]. But the material is silent as to the merits of any appeal.

Discretionary Ground 4 – Pre-judging the propriety of the Receiver's conduct?

59. As noted in paragraph 7 above, the Receiver is entitled to expenses properly incurred in respect of his work, which would include for the conduct of legal proceedings that are "necessary for the winding up of the FMIF in accordance with clause 16 of its constitution …".

60. There is a serious doubt – which cannot be resolved on this summary application - as to whether the Receiver's claims in the Director Proceedings and the Appeal (which are for, and only for, compensation under s 1317H of the Corporations Act[49]) are 'Scheme Property', which, by cl 16.7(a), had to be 'realised' in the winding-up. Such a claim does not appear to be 'Scheme Property', which is defined, narrowly, as meaning:-

> '… assets of the Scheme including but not limited to:
>
> (a) contributions of money or money's worth to the Scheme; and

[49] See the relief claimed in the Notice of Appeal, para 3, at p 65 of Vol 1 of the Affidavit of Mr Couper

(b) money that forms part of the Scheme assets under the provisions of the Law; and

(c) money borrowed or raised by the RE for the purposes of the Scheme; and

(d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and

(e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d)'

61. In light of the Receiver's conduct of the Director Proceedings, including the factual and legal misconceptions identified in the Primary Judgment, questions arise as to the consequence of LMIM and the Receiver failing to obtain:-

(a) authority to institute the Director Proceedings at all (if, which is at least arguable, it was not authorised by the Appointment Order); or

(b) judicial advice that LMIM was justified in instituting and prosecuting the Director Proceedings to trial (noting that trustee litigation is often authorised in stages[50]).

62. Hence, questions now arise as to whether the Receiver is entitled to:

(a) claim remuneration and expenses for an appeal from such failed litigation; and

(b) pay from the FMIF any costs ordered to be paid by it in the Director Proceedings.

63. The Receiver has not applied for the latter relief, which would entail quite different relief and different considerations to that raised by this Application for judicial advice, as to which no notice has been given to beneficiaries.

64. That is not a question that can (or should) be determined on the present application. It may well be a complex exercise, involving a consideration of, for example, any early legal opinions he had received. Yet, if the court gives the judicial advice that is sought, s 97 of the Trusts Act may well operate to impact on the members of the FMIF to the extent of any right of indemnity being afforded to LMIM out of the

---

[50] *Re Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* [2005] NSWSC 558, [70]; *In re Mortiz* [1960] Ch 251, 255.

FMIF, in circumstances where the Appeal was unauthorised, or the expenses incurred therein were not reasonable or proper.

65. Hence, the Court should exercise its discretion in a way that does not, in any way, pre-determine whether the expenses incurred by Mr Whyte in the Director Proceeding (at first instance) were properly incurred; or whether LMIM has right of indemnity for legal costs ordered against it in the Director Proceedings or the Appeal, by now lending its imprimatur to sanctioning the appeal.

66. The Receiver has, for the reasons earlier set out, determined to proceed with the Appeal. Having so determined, and being in no doubt about his proposed course of action, he may cause LMIM to proceed to do so; but he does not need judicial advice (to LMIM) which might have a side wind benefit to him personally.

67. The Receiver is, in our submission, in a position of conflict of interest and duty here. His duty is to act in the best interests of the beneficiaries. He has determined to perform that duty by deciding to appeal. The Application appears however to have been made to provide him with some form of personal protection for his decision to appeal. He has several interests that conflict with this duty, being firstly in respect of his exposure to costs (and refund of costs and remuneration improperly paid out) and secondly, perhaps to a lesser extent, his interest in earning further remuneration during the conduct of the Appeal.

68. The existence of these conflicts is a reason why the Court ought to decline to exercise its discretion to provide advice, and leave the Receiver to follow his pre-determined course.

69. There is a final difficulty with pre-judging the propriety of the Appeal, by giving the direction the Receiver seeks. He was appointed, under the power conferred by s 12 of the *Civil Proceedings Act 2011* (Qld), as receiver of the assets of the Scheme Property of the FMIF by way of a direction under s 601NF(2) of the Corporations Act.

70. The Receiver has not provided any security,[51] such that the beneficiaries do not have immediate recourse to anything for any default by the Receiver; they should not be subjected to the risk of compounded disadvantage, by the operation of s 97 of the *Trusts Act*.

---

[51] Notwithstanding UCPR 268. The Liquidator takes no point as to his conduct in this respect; but the fact remains that there is no security.

Discretionary Ground 5 –Lack of consultation with the Liquidator

71. LMIM as RE of the two LM Feeder Funds, is in the position of a beneficiary of the FMIF. The two LM Feeder Funds hold together 130,053,430 units in the FMIF. [52] The FMIF collectively consists of 492,125,624 units.[53] Hence, LMIM as RE for the two LM Feeder Funds represents approximately 26% of the FMIF. The WFMIF represents approximately 20%. Thereafter, the balance 54% is held by approximately 4,600 individual investors.

72. As a beneficiary, indeed the largest, of the FMIF, LMIM is entitled to not only be consulted, but to be provided with the opportunity to be heard on the Application. It has not been consulted but does exercise that right to be heard on the Application.

73. Where, as here, the units are held by a dispersed ownership (across some 4,600 unitholders), it is submitted that it is appropriate that major unitholders with concentrated unit holdings ought, as a matter of practicality, to be consulted more fully than that which is provided for in the orders effecting substituted service, especially where an entity represents a substantial unitholding.

74. Despite repeated requests, however, the Receiver has not been forthcoming with the provision of any documents or information relating to the advice sought or the appeal in general.

75. The principles about consultation are clear, and are set out in *Alsop Wilkinson v Neary* and *Chow Cho-Poon*, as explained above.

76. The failure of the Receiver to engage with, and explain his position to allay any concerns of the Liquidator is a significant discretionary factor against the provision of any advice.

Discretionary Ground 6 – Commerciality

77. The Second Whyte Affidavit, at [18] to [32], addresses some of the considerations set out by Edelman J in *Plan B.*[54] As to these, the Liquidator makes the following submissions.

---

[52] Affidavit of Park at paragraph 4.
[53] Remuneration affidavit of Whyte at bundle page 211.
[54] See paragraph 34 above.

78. As for the prospects of success, the Receiver's affidavit is silent as to this issue. This silence provides another reason for the Court not to provide the judicial advice sought.

79. As for the means of the other party to satisfy any judgment, they are unknown. The Receiver acknowledges that any insurance "*has likely been significantly eroded*" and that there is a risk that the individual directors have structured their affairs such that little may be recovered. In those circumstances, there is no evidence in support of any realistic recoveries and that is a further reason for the Court not to provide the judicial advice sought.

80. As for the potential for the Appeal to deplete the trust estate, the Receiver acknowledges a depletion of at least $650,000. As to that, Mr Couper broadly estimates[55] $150,000 for the Appellant's legal costs and estimates, with a very brief explanation, that the legal costs for the four sets of defendants will be a total of $500,000. But $650,000 is, on any view, a very substantial sum; yet the Receiver's evidence does not contain:

(a) Any detail about the bases for Mr Couper's opinion or any breakdown of the costs, either for the Appellant's solicitor and own client costs of $150,000 or $500,000 for the respondents' costs 'calculated on the standard basis'; or

(b) Any explanation of the complexities of the Appeal, including how long it will take (remembering that there are some 40 sub-grounds), whether there have been or will be Notices of Contention etc; or

(c) Any independent estimate by an expert Costs Assessor.

81. The Receiver does not address the issue as to whether the legal costs are proportionate to the issues and to the significance of the case. This difficulty is evident from the difference between Mr Whyte's estimate that the contingent liabilities associated with the Director Proceedings were, in March 2019, $8.2 million, including $7.5 million under an adverse costs order.[56] The difficulty is highlighted by the difference between the two estimates and the brevity of the evidence to support the current estimate.

---

[55] See paras [44] – [48] of the first affidavit of Mr Couper, CFI-3

[56] See *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233 at [102]

82. The Receiver alludes to the effect on distributions to investors if there is a recovery of $5 million. But that figure is pure speculation. It also does not take into account the other litigation that the Receiver is conducting. In that regard, the most illuminative fact is that the Receiver retained approximately $37 million after the interim distribution of $32 million in October 2019. That figure of $37 million is to be contrasted with his earlier evidence that his "realistic worst case scenario might amount to $21,773,000, approximately", "possible contingent liabilities".[57] Why he retained $37 million as against, say, $22 million, is unexplained.

83. The Receiver says nothing in his affidavit, or the Statement of Facts, about his own remuneration of having run the litigation or the anticipated remuneration if an appeal proceeds. That is a relevant factor as being a "cost to the FMIF". That is also relevant since, if the Receiver disclosed this, the Court (and the beneficiaries) would have some idea of the "profit" that the Receiver will make when the Appeal goes ahead.

84. Furthermore, the primary judge did not deal in the Primary Judgment with the potential exculpatory provisions of s 1317S of the Act[58] and stated that it would be necessary to identify the precise factual basis of the particular liability before any meaningful consideration could be given to the potential operation of s 1317S. Thus, if the Receiver were successful in the Appeal, the matter would need to be remitted back to the Trial Division for further factual determinations and consideration of s 1317S. This is recognised in the Notice of Appeal at Alternative Order 4. Despite that, the Receiver makes no reference in his affidavit to the costs of that process, which could involve a further hearing, including evidence and submissions. The Receiver's material is silent as to these legal costs and any associated remuneration. It is also silent as to the legal prospects of the s 1317S defences being successful and the substantive claim being dismissed upon the consideration of those defences.

85. Taking the above factors together, the Receiver has not established a commercial basis for the Court to provide any advice.

---

[57] Ibid, at [83] and [89]
[58] See Primary Judgment at paragraph [286].

Discretionary Ground 7 – Advice to a professional trustee

86. LMIM is clearly in the position of a professional trustee. It is a long way from the volunteer referred to in the early history of exercises of the judicial advice jurisdiction.

87. The Receiver has received remuneration of some $16,117,736 since commencement of the receivership up to November 2019.[59] With respect to remuneration, he makes bi-annual claims.

88. As for legal advice, his engagement of legal advisors is unfettered and he need seek no approval in advance or in retrospect for such payments. In the six month period 1 November 2019 to 30 April 2020, he paid legal fees of $1,756,635.86.[60] That is nearly $300,000 per month, on average. He has effectively uninhibited access to funds to pay for legal advice.

89. He says that he has received legal advice about the prospects of the Appeal, but refuses to either give any indication of what is in it or provide it to the Liquidator.

90. As a professional trustee, and on the basis of the principles set out in *Edwards* at [104], the Court ought not, in the exercise of its discretion, provide advice that is unnecessary to a professional trustee with unlimited access to funds for legal advice.

Summary and Orders

91. In all of the above circumstances, the Court ought to:

(a) Adjourn the Application to allow the Receiver to provide the legal advice about the prospects of Appeal (and his confidential affidavit) to the Liquidator to read and consider;

(b) Alternatively, if the Receiver maintains his resistance to that course, dismiss the Application without providing any advice, on the basis that the beneficiaries have not had a right to be heard;

(c) Alternatively, decline to provide any advice, for the lack of jurisdiction and for the discretionary grounds set out above.

J W Peden QC
D C Clarry
Counsel for the Liquidator
22 May 2020

---

[59]. Whyte Remuneration affidavit at paragraph [20]
[60] Whyte Remuneration affidavit at paragraph [238]