

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS 1146/20

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**

AND

Second Respondent: **LISA MAREE DARCY**

AND

Third Respondent: **EGHARD VAN DER HOVEN**

AND

Fourth Respondent: **FRANCENE MAREE MULDER**

AND

Fifth Respondent: **SIMON JEREMY TICKNER**

AFFIDAVIT

I, **SCOTT COUPER** of c/- Gadens Lawyers, Level 11, 111 Eagle Street, Brisbane in the State of Queensland, Solicitor, state on oath:

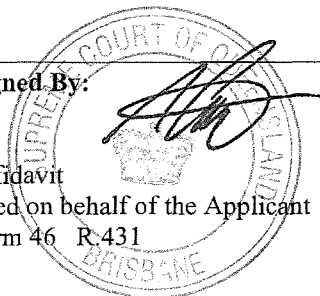
1. I am a partner in the employ of Gadens Lawyers, the solicitors for the Applicant instructed by David Whyte, the court appointed receiver of the property of the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**).
2. I have the carriage of this matter on behalf of the Applicant. I am authorised to swear this affidavit on behalf of the Applicant.

Director Proceedings

3. Mr David Whyte of BDO was appointed receiver of the property of the FMIF on 8 August 2013 by orders of this Honourable Court in proceeding 3383 of 2013.
4. The Applicant caused Supreme Court proceeding 12317/14 ("**the Director Proceeding**") to be commenced by LMIM as RE of the FMIF by claim filed on 19 December 2014, against LMIM in its own right, the MPF Trustee and former directors of LMIM.
5. The Director Proceeding as against the First, Second, Third, Fourth and Sixth Defendants (collectively, "**the Director Defendants**") proceeded to a trial before His Honour Justice Jackson commencing on 1 April 2019 and finishing on 9 April 2019 ("**the Trial**").

Signed By:

Affidavit
Filed on behalf of the Applicant
Form 46 R:431



Witnessed By:

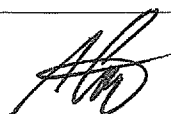
CLAUDIA JANE DENNISON
SOLICITOR
GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SZC:JSO: 201401822

6. All of the Director Defendants had been a director of LMIM prior to Mr Whyte's appointment as receiver of the FMIF.
7. The claim as against the Fifth Defendant did not proceed. The Fifth Defendant was not served with the claim and no relief has been sought against him.
8. By order made on 28 April 2016 the Seventh Defendant was excused from further appearance in the proceeding with no order as to costs.
9. The Applicant's claim against the Eighth Defendant was settled between the parties prior to the trial.
10. His Honour Justice Jackson delivered judgment in the Director Proceeding on 22 November 2019 dismissing the Applicant's claim in its entirety ("**the Judgment**").
11. Exhibited hereto and marked "SC-1" is a true copy of the Judgment of this Honourable Court in the Director Proceeding.
12. The following orders were made by His Honour Justice Jackson on and after 22 November 2019 concerning the Director Proceeding:
 - (a) Order of 22 November 2019:
 - (i) The plaintiff's claim be dismissed.
 - (ii) The parties file written submissions as to costs within seven days.
 - (b) Order of 6 December 2019:
 - (i) The plaintiff pay the first, second, third, fourth and sixth defendant's costs of the proceeding.
13. The Applicant filed a Notice of Appeal appealing the Judgment on 20 December 2019. Exhibited hereto and marked "SC-2" is a true copy of the Applicant's Notice of Appeal filed on 20 December 2019 in the Supreme Court of Queensland Court of Appeal Registry with Appeal number 14258 of 2019.
14. The Respondents to the Notice of Appeal are the Director Defendants who defended the Director Proceeding and participated in the trial of the proceeding.

Director Proceeding – Pleadings and Submissions

15. For the benefit of the Court in considering the Applicant's application for Judicial Advice I refer to the following true copies of the most recent pleadings of the parties the subject of the trial of the Director Proceeding:
 - (a) The Fifth Further Amended Statement of Claim as filed on 3 April 2019 and dated 2 April 2019 ("**5FASOC**") exhibited hereto and marked "SC-3".
 - (b) The Amended Defence of the First Defendant filed on 3 April 2019 exhibited hereto and marked "SC-4".
 - (c) The Amended Defence of the Second Defendant filed on 3 April 2019 exhibited hereto and marked "SC-5".

Signed By:



Witnessed By:



CLAVONIA JANE
DENNISON
SOLICITOR

- (d) The Amended Defence of the Third Defendant filed on 4 April 2019 exhibited hereto and marked "SC-6".
 - (e) The Amended Defence of the Fourth Defendant filed on 4 April 2019 exhibited hereto and marked "SC-7".
 - (f) The Amended Defence of the Sixth Defendant filed on 4 April 2019 exhibited hereto and marked "SC-8".
 - (g) The Amended Reply of the Plaintiff to the Amended Defence of the First Defendant filed on 4 April 2019 exhibited hereto and marked "SC-9".
 - (h) The Amended Reply of the Plaintiff to the Amended Defence of the Second Defendant filed on 4 April 2019 exhibited hereto and marked "SC-10".
 - (i) The Amended Reply of the Plaintiff to the Amended Defence of the Third Defendant filed on 4 April 2019 exhibited hereto and marked "SC-11".
 - (j) The Amended Reply of the Plaintiff to the Amended Defence of the Fourth Defendant filed on 4 April 2019 exhibited hereto and marked "SC-12".
 - (k) The Amended Reply of the Plaintiff to the Amended Defence of the Sixth Defendant filed on 4 April 2019 exhibited hereto and marked "SC-13".
16. For the benefit of the Court I also exhibit true copies of the closing submissions of each party at the trial as follows:
- (a) Closing Submissions of the Plaintiff exhibited hereto and marked "SC-14".
 - (b) Closing Submissions of the First Defendant exhibited hereto and marked "SC-15".
 - (c) Closing Submissions of the Second Defendant exhibited hereto and marked "SC-16".
 - (d) Closing Submissions of the Third and Fourth Defendants exhibited hereto and marked "SC-17".
 - (e) Closing Submissions of the Sixth Defendant exhibited hereto and marked "SC-18".
17. Further to the closing submissions of the Plaintiff referred to in paragraph 14(a) above I also refer to the document entitled "Findings Sought by the Plaintiff" exhibited hereto and marked "SC-19".

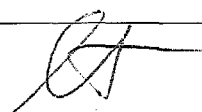
Evidence and documents relevant to the Appeal

18. I do not believe there to have been any dispute between the parties at trial as to the following propositions:
- (a) The total amount to be paid by Gujarat pursuant to the settlement was approximately \$45.5 million (the "**Settlement Proceeds**").
 - (b) The amount of the Settlement Proceeds was less than the amount of the debt owing to PTAL under the FMIF-Bellpac Loan.

Signed By:



Witnessed By:




CLAUDIA JANE O'CONNOR
SOLICITOR

- (c) Ultimately, the Settlement Proceeds were divided between the FMIF and the MPF in the ratio of 65:35 and on or about 21 June 2011 \$15,546,147.85 was paid to the MPF account. The remainder sum was paid to the FMIF.
- (d) LMIM as trustee for the MPF provided the funds to pursue the Gujarat Proceedings.
19. Central to the issues in dispute in the Director Proceeding is:
- (a) In what capacity MPF provided the monies to dispute the litigation (ie whether as a litigation funder or as second mortgagee); and
- (b) Consequently how, when and why the 65:35 distribution of the Settlement Proceeds between LMIM in its capacity as RE for the FMIF and LMIM in its (former) capacity as trustee for the MPF was arrived at instead of a full 100% distribution to the FMIF.
20. The FMIF Product Disclosure Statement dated 10 April 2008. Exhibited hereto and marked "SC-20" is a true copy of the FMIF Product Disclosure Statement being 'Exhibit 1' in the trial of the proceeding.
21. Exhibited hereto and marked "SC-21" is a true copy of the FMIF Compliance Plan dated 16 March 2011 signed by each of the Director Defendants ("**2011 Compliance Plan**") being 'Exhibit 34' in the trial of the proceeding.
22. The FMIF Compliance Plan dated 28 November 2008 ("**2008 Compliance Plan**") contained similar text to the 2011 Compliance Plan. Exhibited hereto and marked "SC-22" is a true copy of the 2008 Compliance Plan being 'Exhibit 4' in the trial of the proceeding.
23. Exhibited hereto and marked "SC-23" is a true copy of the LMIM "Conflicts Management Policy" being 'Exhibit 5' in the trial of the proceeding.
24. Exhibited hereto and marked "SC-24" is a true copy of the email of 17 February 2009 and the attachment to the email being 'Exhibit 93' and 'Exhibit 94' respectively in the trial of the proceeding.
25. Exhibited hereto and marked "SC-25" is a true copy of an email dated 19 July 2010 from Ms Chalmers to "303 Commercial Lending" subject "Notes from Asset Management Meeting 14.7.10" attaching an excel spreadsheet entitled "Asset Mment Meeting list of loans". The email was 'Exhibit 10' and the spreadsheet was 'Exhibit 11' in the trial of the proceeding.
26. Exhibited hereto and marked "SC-26" is a true copy of the email being 'Exhibit 12' in the trial of the proceeding.
27. Exhibited hereto and marked "SC-27" is a true copy of an email of 18 August 2010 being 'Exhibit 13' in the trial of the proceeding.
28. Exhibited hereto and marked "SC-28" is a true copy of an email of 20 August 2010 being 'Exhibit 14' in the trial of the proceeding.
29. Exhibited hereto and marked "SC-29" is a true copy of an email chain being 'Exhibit 15' in the trial of the proceeding.

Signed By:



Witnessed By:



CLAUDIA JANE DENISON
SOLICITOR

30. Exhibited hereto and marked "SC-30" is a true copy of an email chain of 25 August 2010 being 'Exhibit 16' in the trial of the proceeding.
31. Exhibited hereto and marked "SC-31" is a true copy of an email chain of 30 and 31 August 2010 being 'Exhibit 17' in the trial of the proceeding.
32. Exhibited hereto and marked "SC-32" is a true copy of an email chain of 21 October 2010 being 'Exhibit 19' in the trial of the proceeding.
33. Exhibited hereto and marked "SC-33" is a true copy of an email of 11 November 2010 being 'Exhibit 21' in the trial of the proceeding.
34. Exhibited hereto and marked "SC-34" is a true copy of an email chain of 12 November 2010 being 'Exhibit 22' in the trial of the proceeding.
35. Exhibited hereto and marked "SC-35" is a true copy of an email chain of 22 November 2010 being 'Exhibit 23' in the trial of the proceeding.
36. Exhibited hereto and marked "SC-36" is a true copy of an email of Mr Tickner of 22 November 2010 being 'Exhibit 24' in the trial of the proceeding.
37. Exhibited hereto and marked "SC-37" is a true copy of an email of 24 November 2010 being 'Exhibit 25 and 89' in the trial of the proceeding.
38. Exhibited hereto and marked "SC-38" is a true copy of the MPF-Bellpac Loan statements from 26 June 2006 to 28 October 2011 being 'Exhibit 37' in the trial of the proceeding.
39. Exhibited hereto and marked "SC-39" is a true copy of a Loan Summary document for the MPF-Bellpac Loan dated 12 December 2011 for the period 1 January 2004 to 12 December 2011 being 'Exhibit 39' in the trial of the proceeding.
40. Exhibited hereto and marked "SC-40" is a true copy of an excel spreadsheet entitled "Loan repayment worksheet.xls" showing the balance of assigned loans over time being 'Exhibit 116' in the trial of the proceeding.
41. Exhibited hereto and marked "SC-41" is a true copy of an advice from WMS Chartered Accountants addressed to Mr Monaghan dated 7 March 2011 being 'Exhibit 32' in the trial of the proceeding.
42. Exhibited hereto and marked "SC-42" is a true copy of an advice from Allens Arthur Robinson dated 28 March 2011 sent by email from John Beckinsale / Amy Hoban to David Monaghan, Monaghan Lawyers. The advice was 'Exhibit 35' in the trial of the proceeding.
43. On 14 June 2011 the Director Defendants executed a deed entitled "Deed Poll" recording their decision as to the appropriate division ratio of 65:35 from the anticipated settlement proceeds from the Gujarat Proceedings as between the scheme property of FMIF and the trust property of the MPF. Exhibited hereto and marked "SC-43" is a true copy of the Deed Poll being 'Exhibit 36' in the trial of the proceeding.

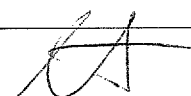
Costs

44. The total costs of the FMIF of the Director Proceeding, including all disbursements, was approximately \$2 million. That included that part of the Director Proceeding against the MPF, which was settled prior to trial.

Signed By:



Witnessed By:



CLAUDIA JANE DENNISON
SOLICITOR

45. I estimate that the costs of the Appeal to the FMIF would be approximately \$150,000.
46. The Director Defendants were represented by four sets of legal representatives, including senior and junior counsel in each case. I expect that the costs of each set of legal representatives individually was less than the costs of the FMIF. One reason for that is that the FMIF needed to respond to and deal with four sets of responsive pleadings, where as each of the Director Defendants had only one set of pleadings to contend with.
47. Having regard to the issues raised at trial and my experience in commercial litigation, I expect that the total recoverable costs of the Director Defendants of and incidental to the Director Proceeding would be at least \$2 million, but potentially more.
48. I estimate that the collective costs of the Director Defendants in resisting the Appeal, calculated on the standard basis, may be approximately \$500,000. That takes into account that there will again likely be four sets of legal representatives for the five Director Defendants.

ALL THE FACTS and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit.

SWORN by **SCOTT COUPER** on this 31st)
 day of January 2020 at Brisbane in the)
 presence of:)
)
)
 CLAUDIA JANE DOUMISON)
 Solicitor)



SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER:

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**
AND
Second Respondent: **LISA MAREE DARCY**
AND
Third Respondent: **EGHARD VAN DER HOVEN**
AND
Fourth Respondent: **FRANCENE MAREE MULDER**
AND
Fifth Respondent: **SIMON JEREMY TICKNER**


CERTIFICATE OF EXHIBIT

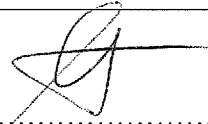
INDEX TO EXHIBITS

VOLUME 1 OF 5

Exhibits "SC-1" to "SC-6" to the affidavit of **SCOTT COUPER** sworn at Brisbane on this 31st day of January 2020.

Exhibit	Description	Page No.
Judgment and Notice of Appeal		
SC-1	Judgment of Justice Jackson of 22 November 2019	1-58
SC-2	Notice of Appeal filed 20 December 2019 number 14258 of 2019	59-67
Pleadings and Submissions		
SC-3	Fifth Further Amended Statement of Claim filed 3 April 2019	68-96
SC-4	Amended Defence of the First Defendant filed 3 April 2019	97-145


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Deponent

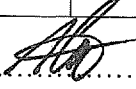

.....
Solicitor

CLAUDIA JANE PENNISON

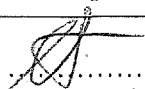
Certificate of Exhibit
Filed on behalf of the Plaintiff Applicant
Form 47 R.435

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SZC:JSO:201401822

Exhibit	Description	Page No.
SC-5	Amended Defence of the Second Defendant filed 3 April 2019	146-206
SC-6	Amended Defence of the Third Defendant filed 4 April 2019	207-261



 Deponent



 Solicitor CLAUDIA JANE DENNISON

"SC-1"

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Ltd (receiver apptd) (in liq) v
Drake & Ors* [2019] QSC 281

PARTIES: **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)

v

PETER CHARLES DRAKE

(first defendant)

and

LISA MAREE DARCY

(second defendant)

and

EGHARD VAN DER HOVEN

(third defendant)

and

FRANCENE MAREE MULDER

(fourth defendant)

and

JOHN FRANCIS O'SULLIVAN

(fifth defendant)

and

SIMON JEREMY TICKNER

(sixth defendant)

and

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

(seventh defendant)

and

**KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

(eighth defendant)

FILE NO/S: BS12317/14
 DIVISION: Trial Division
 PROCEEDING: Trial
 DELIVERED ON: 22 November 2019
 DELIVERED AT: Brisbane
 HEARING DATE: 1,2,3,8 and 9 April 2019
 JUDGE: Jackson J
 ORDER: **The judgment of the court is that:**

- 1. The plaintiff's claim is dismissed.**
- 2. The parties file written submissions as to costs within seven days.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – DUTIES OF OFFICERS OF RESPONSIBLE ENTITIES – Where the plaintiff was the responsible entity of a registered managed investment scheme – Where the plaintiff was also trustee of an unregistered scheme - Where the defendants were the directors of the responsible entity – Where the custodian of the registered scheme lent monies to a borrower secured by first mortgage – Where the plaintiff as trustee of the unregistered lent monies to the borrower secured by second mortgage – Where the borrower contracted with a third party to sell and develop some of its property – Where the third party did not perform the contracts with the borrower - Where the borrower defaulted in repayment of both loans – Where proceedings were brought by the custodian, the plaintiff and the borrower against the third party – Where the unregistered scheme property funded the proceedings – Where the proceedings were settled - Where the settlement proceeds were divided between the registered scheme and the unregistered scheme by the plaintiff in the ratio of 65:35 – Where the defendants obtained external independent accounting and legal advice before deciding on the 65:35 division – Where the plaintiff alleged that the decision contravened s 601FD(b) or (c) of the Corporations Act – Where the plaintiff alleged that the contraventions caused the registered scheme to suffer loss of the whole of the settlement proceeds

Adler v Australian Securities and Investments Commission (2003) 179 FLR 1, cited
Agricultural Land Management v Jackson (No. 2) (2014) 48 WAR 1, cited

Allco Funds Management Ltd (receivers and managers appointed) (in liq) v Trust Company (RE Services) Limited [2014] NSWSC 1251, cited
Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656, cited
ANZ Executors and Trustees Co Ltd v Qintex Australia Ltd (receivers and managers appointed) [1991] 2 Qd R 360, cited
Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8) (2016) 336 ALR 209, followed
Australian Securities and Investments Commission (ASIC) v Drake (No2) (2016) 340 ALR 75, cited
Australian Securities and Investments Commission (ASIC) v Lewski (2018) 362 ALR 286, cited
Australian Securities and Investments Commission v Adler (2002) 168 FLR 253, cited
Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (receivers and managers appointed) (in liq) (controllers appointed) (No 3) [2013] FCA 1342, cited
Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq) (2017) 348 ALR 525, cited
Australian Securities and Investments Commission v Healey (2011) 196 FCR 291, cited
Australian Securities and Investments Commission v Mariner Corporation Ltd (2015) 241 FCR 502, cited
Australian Securities and Investments Commission v Maxwell (2006) 59 ACSR 373, cited
Australian Securities and Investments Commission v Rich (2009) 236 FLR 1, cited
Australian Securities and Investments Commission v Vines (2005) 55 ACSR 617, cited
AWA Ltd v Daniels trading as Deloitte Haskins & Sells (1992) 7 ACSR 759, cited
Berger v Lyster Pty Ltd [2012] VSC 95, cited
Breen v Williams (1996) 186 CLR 71, cited
Carmine v Ritchie [2012] NZHC 1514, cited
Commissioner of Taxation v Bargwanna (2012) 244 CLR 655, cited
Cowan v Scargill [1985] Ch 270, cited
Crossman v Sheahan [2016] NSWCA 200, cited
Daniels v Anderson (1995) 13 NSWLR 408; 16 ACSR 607, cited
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317, cited
Edge & Ors v Pensions Ombudsman & Anor [1998] Ch 512, cited
Gambotto v WCP Ltd (1995) 182 CLR 432, cited
Grimaldi v Chameleon Mining NL (No. 2) (2012) 200 FCR 296, cited
Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd (in liq) (1995) 18 ACSR 294, cited
Hutton v West Cork Railway Co (1883) 23 Ch D 654, cited
Jones v Dunkel (1959) 101 CLR 298, cited

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506, cited
Moody v Cox and Hatt [1917] 2 Ch 71, cited
Proficient Building Company Pty Ltd (2011) 87 ACSR 183, cited
Re Burton (1994) 126 ALR 557, cited
Re Idylic Solutions Pty Ltd [2012] NSWSC 1276, cited
Re VBN and Australian Prudential Regulation Authority and A Party Joined (2006) 92 ALD 259, cited
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, cited
Shafron v Australian Securities and Investments Commission (2012) 247 CLR 465, cited
Travel Compensation Fund v Tambree (t/as R Tambree & Associates) (2005) 224 CLR 627, cited
Trilogy Funds Management Ltd v Sullivan (No 2) (2015) 331 ALR 185, cited
Vines v Australian Securities and Investments Commission (2007) 73 NSWLR 451, cited
Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285, cited
Willett v Fletcher [2004] QCA 30, cited
Young v Murphy [1996] 1 VR 279, cited

Canada Business Corporations Act 1975, s 122
Civil Liability Act 2003 (Qld), s 11
Companies (Queensland) Code, s 229
Companies Act 1961 (Qld), s 124
Companies Act 1993 (NZ), s 131
Corporate Law Economic Reform Program Act 1999 (Cth)
Corporate Law Reform Act 1992 (Cth), s 17
Corporations Act 2001 (Cth), ss 9, 180, 181, 189, 210, 219, 220, 221, 411, 439C, 564, 601EA, 601EB, 601FA, 601FB, 601FC, 601FD, 601NF, 601ND, 1317DA, 1317H, 1317J, 1317S
Corporations Law, ss 232, 601FD, 1317HA, 1317HD
Managed Investments Act 1998 (Cth)
Trade Practices Act 1994 (Cth), s 52
Trustee Act 1925 (NSW), s 14B
Trusts Act 1973 (Qld), ss 23, 54, 72, 94, 96

COUNSEL:

D O'Brien QC and M Jones for the plaintiff
 G Beacham QC and A Nicholas for the first defendant
 P McQuade QC and J Davies for the second defendant
 P Freeburn QC and P Hay for the third and fourth defendants
 K Barlow QC and G Coveney for the sixth defendant

SOLICITORS:

Gadens for the plaintiff
 Bartley Cohen for the first defendant
 RBG Lawyers for the second defendant
 James Conomos Lawyers for the third and fourth defendants
 HW Litigation for the sixth defendant

Jackson J:

- [1] The program of statutory reforms of the *Corporations Law* in 1998 and 1999 covered a number of subject matters. One was the regulation of managed investment schemes, including the duties of the officers of a responsible entity.¹ Another comprised the obligations of the directors and other officers of a company.² The two subjects intersected in the statutory provisions that were introduced for the duties of the directors of a company that is the responsible entity of a registered managed investment scheme owed directly to the members of the scheme.³ This case concerns two of those duties, as now enacted in the *Corporations Act 2001* (Cth) (“CA”).
- [2] The plaintiff is the responsible entity⁴ of the LM First Mortgage Income Fund (“FMIF”). The FMIF is a registered⁵ managed investment scheme⁶. The defendants were the directors of the plaintiff before it entered into a creditors’ voluntary winding up.⁷ The FMIF is also being wound up under an order of the court.⁸ David Whyte was appointed for the purpose of ensuring that the FMIF is wound up in accordance with its constitution and any orders of the court.⁹ Mr Whyte was also appointed as the receiver of the scheme property¹⁰ of the FMIF and empowered to bring proceedings in its name as responsible entity. This proceeding is brought under that power.
- [3] The plaintiff’s claim is made under the CA for an order to compensate the FMIF for damage to the FMIF that resulted from the defendants’ alleged contraventions of a corporations/scheme civil penalty provision in relation to the scheme.
- [4] The corporations/scheme civil penalty provisions that the plaintiff alleges the defendants contravened are those contained in s 601FD(1)(b) and (c) of the CA. They provide that an officer of a responsible entity must:
- “(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer’s position;
- (c) act in the best interests of the members and, if there is a conflict between the members’ interests and the interests of the responsible entity, give priority to the members’ interests;”
- [5] A right to compensation for contravention of either provision is provided for by s 1317H(1) of the CA, as follows:
- “(1) A Court may order a person to compensate a ... registered scheme... for damage suffered by the ... scheme... if:

¹ *Managed Investments Act 1998* (Cth).

² *Corporate Law Economic Reform Program Act 1999* (Cth), Schedule 1.

³ *Corporations Law*, s 601FD(1).

⁴ *Corporations Act 2001* (Cth), s 9 definition “responsible entity”, s 601EA, s 601FA and s 601FB.

⁵ *Corporations Act 2001* (Cth), s 601EB.

⁶ *Corporations Act 2001* (Cth), s 9 definition “managed investment scheme” and Chapter 5C.

⁷ *Corporations Act 2001* (Cth), s 439C(c), although the fifth defendant is named as a party, the proceeding against him has not been prosecuted by the plaintiff

⁸ *Corporations Act 2001* (Cth), s 601ND(1).

⁹ *Corporations Act 2001* (Cth), s 601NF(2).

¹⁰ *Corporations Act 2001* (Cth), s 9 definition “scheme property”.

- (a) the person has contravened a corporation/scheme civil penalty provision in relation to the... scheme; and
 - (b) the damage resulted from the contravention.
- ..."

- [6] Simplified, the plaintiff's case is that LMIM was the responsible entity of the FMIF and also trustee of an unregistered scheme, named the "LM Managed Performance Fund" ("MPF"). Accordingly, it held the scheme property of the FMIF on trust for the members of the FMIF¹¹ and the trust property of the MPF on trust for the beneficiaries of the MPF.
- [7] As responsible entity of the FMIF, LMIM caused Permanent Trustee Australia Ltd ("PTAL") as custodian for LMIM as responsible entity of the FMIF initially to lend \$16 million to Bellpac Pty Limited ("Bellpac") ("FMIF-Bellpac loan") secured by a real property first mortgage over land known as Balgownie No 1 Colliery, Princes Highway, Russell Vale, near Wollongong in New South Wales ("Bellpac land") and a first ranking equitable charge over the assets and undertaking of Bellpac.
- [8] As trustee of the MPF, LMIM initially lent \$6 million to Bellpac ("MPF-Bellpac loan") secured by a real property second mortgage over the same land and a second ranking equitable charge over the assets and undertaking of Bellpac.
- [9] Subsequently, Bellpac entered into contracts for the development of the Bellpac land with Gujarat NRE Minerals Ltd ("Gujurat"), that included Gujarat becoming lessee of the land under a coal mining lease and carrying on coal mining operations for a time, followed by rehabilitation of some of the land and excision of the land to be developed with a view to its eventual sale as residential land or land suitable for residential development by Bellpac. Gujarat failed to perform or complete the contracts.
- [10] Bellpac defaulted in repayment of both the FMIF-Bellpac and MPF-Bellpac loans. PTAL as first mortgagee and chargee appointed receivers and managers of Bellpac's assets and property. Bellpac, by the receivers and managers, demanded that Gujarat perform the contracts.
- [11] Gujarat started a proceeding claiming it was no longer bound to do so and entitled to remain in possession of the Bellpac land under the coal mining lease. LMIM and Bellpac started a counter-proceeding claiming performance of the contracts by Gujarat or that they were entitled to possession of the Bellpac land. PTAL was added to the proceedings as a plaintiff and the relief claimed was expanded both as against Gujarat and other defendants. All the proceedings were consolidated or ordered to be heard together. I will describe them as the "Gujurat proceedings". Eventually, the Gujarat proceedings were settled.
- [12] The settlement was contained in three contracts, all executed and completed on the same day. By one of them, styled the "Deed of Settlement and Release" LMIM agreed to pay \$1.3 million to Coalfields (NSW) Pty Ltd ("Coalfields") and Coalfields agreed to withdraw caveats it had lodged over the Bellpac land. By another, referred to by the parties as the "Gujurat contract", PTAL as mortgagee exercising power of sale

¹¹ *Corporations Act 2001 (Cth)*, 601FC(2).

sold the Bellpac land to Gujarat for \$10 million. By the third, styled the "Deed of Release" Gujarat agreed to pay \$35.5 million to PTAL and the parties, including LMIM, agreed to mutual releases and to discontinue the Gujarat proceedings. All parties gave mutual releases of all the claims made against the others in the proceedings.

- [13] The total amount to be paid by Gujarat under the three contracts was approximately \$45.5 million ("settlement proceeds"), which was less than the amount of the debt owing to PTAL as custodian for LMIM as responsible entity of the FMIF upon the FMIF-Bellpac loan at the time of settlement.
- [14] The settlement proceeds were divided in the ratio of 65:35, as between the FMIF and the MPF, by LMIM acting through the defendants as the board of directors, so that \$15,546,147.85 million was received by LMIM as trustee of the trust property of the MPF and credited to the MPF's account. The remainder was received by PTAL as custodian for the scheme property of the FMIF and credited to the account of the FMIF.
- [15] Before entering into the three contracts that settled the Gujarat proceedings LMIM and the defendants as directors of LMIM executed a deed described by the parties as the "Deed Poll", recording their decision as to the division of the settlement proceeds as between the scheme property of FMIF and the trust property of the MPF.
- [16] That decision was made after LMIM and the defendants received external accounting and legal advice. In making their decision, the defendants took into account that LMIM as trustee of the MPF almost entirely funded the Gujarat proceedings from the trust property of the MPF, in circumstances where the scheme property of the FMIF did not have the cash resources to provide those funds, as well as other matters.
- [17] The 35 percent proportion of the settlement proceeds allocated to the MPF was arrived at, at least in part, by treating the position of LMIM as trustee of the MPF, in effect, as if it were a commercial litigation funder receiving a percentage proportion of the litigation recoveries.
- [18] The plaintiff alleges that the decision of the defendants as directors to divide the settlement proceeds and the receipt and crediting by LMIM as trustee for the MPF of its part of the division constituted a contravention by each of the defendants of either or both of 601FD(1)(c) ("duty to act in members' best interests") or (b) ("duty of care and diligence to members") of the CA.

Uncontentious facts

Parties and capacities

- [19] LMIM is duly incorporated as a public company.
- [20] At all material times, LMIM was, and it still is, the responsible entity of the FMIF.
- [21] At all material times, PTAL was appointed the custodian for LMIM as responsible entity of the FMIF pursuant to a custody agreement between it and LMIM dated 4 February 1999.
- [22] At all material times until April 2013, LMIM was trustee of the MPF.

- [23] From 31 January 1997 to 9 January 2015, the first defendant was a director of LMIM.
- [24] From 12 September 2003 to 21 June 2012, the second defendant was a director of LMIM.
- [25] From 22 June 2006, the third and fourth defendants were directors of LMIM.
- [26] From 18 September 2008 to 13 July 2012, the sixth defendant was a director of LMIM.

LMIM's funds management business

- [27] Prior to the events colloquially described as the "Global Financial Crisis", LMIM:
- (a) operated nine separate managed investment schemes or funds (including the FMIF and the MPF);
 - (b) as responsible entity of the FMIF had a "loan book" (a portfolio of investment loans) of up to \$1 billion and as trustee of the MPF had a loan book of up to several hundred million dollars;
 - (c) employed, through an administration company, around 120 to 130 staff; and
 - (d) operated a network of domestic and international offices, including two at the Gold Coast (Beach Road and Cavill Avenue), as well as offices in Sydney, Perth, Hong Kong, London, Auckland, Queenstown, Dubai, Johannesburg, Bangkok, Tokyo, Toronto and Seattle.
- [28] The nature of LMIM's funds management business was complex. It managed different managed investment schemes or funds with different objectives, investor bases and risk profiles. The business attracted investments from clients of financial advisers from around the world. The operations of the business entailed or required expertise of skills in finance, funds management, foreign exchange, property management, town planning, marketing, accounting and legal rights and obligations. In relation to the registered managed investment schemes, it operated in a highly-regulated environment.
- [29] LMIM had a tiered management structure and its directors and staff performed different functions and brought different skill sets and experience to the running of the business.
- [30] Summarising:
- (a) the board of directors provided strategic oversight and direction;
 - (b) each director had a specific area of responsibility within the company relevant to their skills and experience. The Product Disclosure Statement for the FMIF provided that "[e]ach executive is responsible to the Board for the operation of their own business unit";
 - (c) the board of directors did not manage the day-to-day business;
 - (d) the board of directors usually met four times per year and at other times as required;
 - (e) there were weekly senior LMIM management meetings open to all staff;

- (f) the main decision-making bodies governing the operations of the managed investment schemes and funds were the credit committee, the funds management committee, the compliance committee, the risk committee, the property asset management committee, the arrears management committee and the audit committee;
- (g) beneath the committees, the staff were organised into work teams or departments led by a team leader who was usually, but not always, a director;
- (h) the second defendant led the finance team, at different times David Monaghan and the sixth defendant led the property asset management team, the fourth defendant led the marketing team, the third defendant led the foreign exchange team and Mr Monaghan led the in-house legal team. The first defendant was the chief executive officer and the second defendant acted as his deputy.

Bellpac loans and securities

- [31] On 10 March 2003, PTAL as custodian and LMIM as responsible entity of the FMIF, entered into the agreements for the FMIF-Bellpac loan with Bellpac.
- [32] Pursuant to the FMIF-Bellpac loan agreements, PTAL as custodian for LMIM as responsible entity of the FMIF initially advanced \$16 million to Bellpac. As security for the loan, Bellpac granted to PTAL as custodian for the FMIF a first registered mortgage over the Bellpac land and a first ranking equitable charge.
- [33] The FMIF-Bellpac loan agreements were varied on a number of occasions between December 2003 and July 2008 and the amount of the loan was increased.
- [34] On 23 June 2006, LMIM as trustee of the MPF and Bellpac entered into the agreements for the MPF-Bellpac loan pursuant to which LMIM initially lent \$6 million to Bellpac. As security for the loan, Bellpac granted to LMIM as trustee for the MPF a real property mortgage and a second ranking equitable charge.
- [35] On or about 23 June 2006, various parties including PTAL as custodian and LMIM as responsible entity of the FMIF, and LMIM as trustee of MPF entered into a deed of priority.

Bellpac sale to Gujurat

- [36] On 21 October 2004, Bellpac, GPC Equipment Pty Ltd, Gujurat, Bounty Industries Australia Pty Ltd and Coalfields entered into a contract styled the "Land and Asset Sale Agreement" by which Bellpac agreed to sell to Gujurat and Coalfields certain assets including the Bellpac land.
- [37] On 3 December 2004, Bellpac, GPC Equipment Pty Ltd, Gujurat and Coalfields entered into agreements which amended the Land and Asset Sale Agreement, including a contract styled the "Remediation Licence Deed".
- [38] Subsequent to December 2004, a dispute arose between Bellpac and Gujurat. In April 2007, Bellpac commenced legal proceedings against Gujurat, and Gujurat filed a cross-claim.
- [39] In 2007 and 2008, Bellpac, Gujurat and a subsidiary of Gujurat, South Bulli Holdings Pty Ltd, executed three settlement deeds in relation to the disputes between those

parties, including a contract styled the “Deed of Settlement” dated 12 September 2007 and a contract styled the “Amendment Deed and Restated Settlement Deed” dated 23 July 2008.

The Gujurat proceedings

- [40] On 6 May 2009, PTAL as custodian for the FMIF appointed receivers and managers to Bellpac’s property.
- [41] On 13 May 2009, Gujurat issued a summons in the Supreme Court of New South Wales (“Gujurat summons”) against Bellpac claiming an injunction to restrain Bellpac from exercising rights or entitlements under the Remediation Licence Deed dated 3 December 2004, including enforcement of any rights or entitlements arising from an alleged purported rectification notice under that contract served by Bellpac on Gujurat on 24 April 2009.
- [42] On 7 July 2009, LMIM and Bellpac, by the receivers and managers appointed by PTAL, issued a summons in the Supreme Court of New South Wales (“LMIM summons”) against Gujurat claiming declaratory relief that the Deed of Settlement dated 12 September 2007 and the Amendment Deed and Restated Settlement Deed dated 23 July 2008 were made in breach of the terms in cl 6.1 of the equitable charge granted by Bellpac to LMIM and that those contracts were void and of no effect.
- [43] LMIM’s summons claimed an order that Gujurat procure the surrender or termination of the “Coal Lease” from the “Development Land” and “Retained Land” within the meaning of those terms in the Remediation Licence Deed. Further relief was claimed for a declaration that by conducting mining activities, Gujurat was in breach of the terms of the Remediation Licence Deed and for an order in the nature of an injunction that Gujurat cease mining activities on the Development Land and Retained Land, as well as damages.
- [44] On 22 July 2009, LMIM and Bellpac, by the receivers and managers appointed by PTAL, filed a statement of claim (“LMIM’s statement of claim”) for relief substantially the same as that sought in LMIM’s summons. The statement of claim alleged that:
- (a) Gujurat had breached the contracts between Bellpac and Gujurat comprised in the Land and Assets Sale Agreement and the Remediation Licence Deed;
 - (b) under the equitable charge, Bellpac was prohibited from dealing with its rights under the Land and Assets Sale Agreement and the Remediation Licence Deed without the prior written consent of LMIM;
 - (c) Gujurat was aware that it was necessary for Bellpac to obtain LMIM’s consent to any variation of the Remediation Licence Deed but that without obtaining that consent Bellpac and Gujurat, inter alia, entered into the Deed of Settlement dated 12 September 2007 varying those contracts and Bellpac and Gujurat, inter alia, entered into the Amendment Deed and Restated Settlement Deed dated 23 July 2008 also varying those contracts; and
 - (d) accordingly, the Deed of Settlement and the Amendment Deed and Restated Settlement Deed were void or unenforceable by Gujurat.

- [45] Up to this time PTAL, as custodian of the FMIF, was not a party to the proceedings, although Bellpac was acting through the receivers and managers appointed by PTAL.
- [46] Gujurat's summons was intended to establish its entitlement to continue its mining operations, that it was not required to remediate the Bellpac land and would have unfettered access to the parts described as the Development Land and the Retained Land, so long as the coal mining lease remained on foot. LMIM's summons and statement of claim were intended to achieve the opposite outcome.
- [47] LMIM's view was that the Bellpac land was unsaleable while Gujurat remained in occupation under the coal mining lease and that Gujurat was the only likely buyer.
- [48] On 30 November 2009, PTAL was joined as a plaintiff to LMIM's summons and statement of claim and PTAL made similar claims to those made by LMIM.
- [49] On 8 February 2010, LMIM, Bellpac and PTAL, as plaintiffs, filed a commercial list statement in the Supreme Court of New South Wales against Gujurat, Coalfields, Coal Contractors Australia Pty Ltd, and GPC Equipment Pty Ltd as defendants. The relief previously claimed against Gujurat by the statement of claim was altered. A declaration and damages for contravention of ss 51A and 52 of the *Trade Practices Act 1974* (Cth) and Gujurat's liability as a person involved in the contraventions under s 75B of that Act were claimed. Alternatively, the plaintiffs claimed damages for Gujurat tortiously interfering in the contractual relations between Bellpac and LMIM and Bellpac and PTAL under their equitable charges.
- [50] On 16 March 2010, Coalfields filed a cross-claim against Bellpac and Gujurat. On 25 June 2010, Gujurat filed a cross-claim against Bellpac, LMIM and PTAL.
- [51] Summarising, LMIM's claim as trustee of the MPF was not a claim to enforce its rights as second mortgagee or second chargee as such. In substance, it was a claim for relief as to the invalidity of contracts between Bellpac and Gujurat or for damages based on misleading or deceptive or unconscionable conduct or tortious interference with contractual relations by Gujurat. Bellpac's claim by the receivers and managers appointed by PTAL was for similar relief as to the validity of the contracts. From the time it was joined as a party to the proceedings, PTAL made a similar claim to LMIM's claim.

Funding the proceedings

- [52] From about July 2009 onwards, cash funds from the scheme property of the FMIF were not available to fund the proceedings or any settlement thereof.
- [53] LMIM as trustee for the MPF funded the proceedings and settlement thereof, almost entirely, and provided further funding for other recoveries, as follows:
- (a) MPF funded \$1,597,566.19, which included \$61,730.21 paid after LMIM as trustee of the MPF was credited with and received its 35 percent proportion of the settlement proceeds;
 - (b) Prior to receiving a proportion of the settlement proceeds, LMIM as trustee of the MPF also funded \$414,585.71 in respect of other recoveries, being proceedings to recover on the bonds issued by Gujurat and to sue the guarantor; and

- (c) After receiving its proportion of the settlement proceeds, LMIM as trustee of the MPF continued to provide funding in respect of those matters to an amount of \$524,289.40.

Settlement contracts and payments

- [54] On 9 November 2010, a non-binding heads of agreement was executed at a mediation between the parties to the Gujarat proceedings. The heads of agreement provided for the compromise of all the claims made by the parties in the proceedings.
- [55] Between 9 November 2010 and 2 June 2011, the parties continued to negotiate settlement of the Gujarat proceedings. The negotiations were protracted. Gujarat proved to be a difficult counter-party.
- [56] On or about 21 June 2011, the Deed of Settlement and Release, the Gujarat contract and the Deed of Release were executed. As previously summarised, under those contracts, at completion:
- (a) LMIM was to pay Coalfields the sum of \$1.3 million by bank cheque pursuant to the Deed of Settlement and Release;
 - (b) PTAL was to receive \$10 million pursuant to clause 16.7 of the Gujarat contract; and
 - (c) PTAL was to receive \$35.5 million pursuant to clause 7 of the Deed of Release.
- [57] LMIM as trustee of the MPF agreed to discontinue its claims and give a release from all claims to the other parties as part of the consideration for the payment by Gujarat of \$35.5 million under the Deed of Release. Accordingly, it was necessary for LMIM as trustee of the MPF to agree to the Deed of Release to settle the proceedings. As well, under the Deed of Settlement and Release, Coalfields agreed to remove the caveats it had lodged over the Bellpac land. Accordingly, it was necessary for LMIM to agree to pay Coalfields \$1.3 million under the Deed of Settlement and Release to settle the proceedings.
- [58] On 21 June 2011, Allens, as lawyers for the plaintiffs, directed Gujarat to pay the total amount of \$45.5 million to different payees at completion. LMIM as trustee for the MPF received a bank cheque on account of its proportion of the settlement proceeds at settlement.
- [59] The amount LMIM as trustee of the MPF received at completion (after adjustments) was approximately \$13.6 million. On the extended settlement date (8 September 2011), a further amount of approximately \$1.9 million was received.

Division of the settlement proceeds

- [60] On 1 December 2010, David Monaghan sent an email to the second defendant, copied to the sixth defendant, which stated:

“I have investigated the going rate for litigation funding. Advice from Allens is that they believe it is usually 30-35% of the recovered sum, but varies from transaction to transaction. They referred me to a reported case in which the figure was 30-45%, depending on when the recovery happened. If the recovery happened at or prior to mediation (as in our case) it was 30%. There were also other amounts charged, up to \$115,000

as a fee, plus I believe the actual outlays (paid in legal costs) could also be recovered.

In our case the settlement sum was effectively paid for the sale of the land, which must have had some value anyway, but I believe there is a good argument that the land was practically unsaleable if not sold to Gujarat, and Gujarat needed to be persuaded to buy it via the litigation. So perhaps you could say that the amount recovered was effectively the additional amount you have obtained over and above what would have been obtained from a straight sale of the land (eg by auction). It is difficult to know what the latter figure would be, but I think it could be somewhere around \$10M (an educated guess). On that basis I think there would be an argument that up to 30% of \$40M (being the recovered amount of \$50M less the value of the land assumed at \$10M) could be justified. That gives you a figure of \$16M.

These are very rough figures but give you a guide. It would be a good idea to have some sort of independent confirmation of what is reasonable. I think an accountant is the type of person you would ask to provide that confirmation.”

- [61] On 2 December 2010, Andrew Petrik of LMIM sent an email to the sixth defendant copied to the second defendant, the third defendant, Mr Monaghan and the first defendant referring to a presentation from “IMF funding” which denoted a range of litigation funding fees. Mr Petrik identified the quantum of funds contributions respectively by the FMIF and the MPF and stated that “MPF has contributed around 95% of funds for legal proceedings against Bellpac”.
- [62] On 3 December 2010, the second defendant instructed Mr Monaghan to contact Aaron Lavell at WMS to initiate obtaining an independent accountant’s report. The formal engagement of WMS was arranged by Mr Monaghan, in conjunction with the sixth defendant.
- [63] On 7 March 2011, LMIM received advice from WMS as to the appropriate proportion to be paid to LMIM as trustee of the MPF from the litigation settlement proceeds (“WMS report”).
- [64] On 14 March 2011, the second defendant advised the other directors of LMIM that she had instructed Mr Monaghan to seek further advice on the proposed division of funds from the settlement of the Bellpac proceedings. She held concerns that the WMS report was accounting advice only.
- [65] On 17 March 2011, Mr Monaghan instructed John Beckinsale, a partner of Allens, to proceed with the advice. Having identified the need for legal advice, Mr Monaghan was tasked with instructing Allens and framing the terms of the advice sought. Mr Monaghan’s instructions to Allens stated, in part:

“Please note that Alf Pappalardo and Bruce Wacker are acting in relation to documenting the settlement with Gujarat.

...

I am seeking an advice confirming that the proposed split of proceeds between the funds is legally acceptable given that LM is in a position of

conflict, being the trustee of both the FMIF and the MPF. I am happy to discuss the scope of the required advice with you further". (emphasis added)

- [66] On 28 March 2011, LMIM received advice from Allens ("Allens advice") that it was legally acceptable to divide the settlement proceeds between the FMIF and the MPF in the ratio of 65:35. The advice stated, by way of summary, that "[w]e consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict". That opinion was expressed to be subject to a number of matters detailed in the summary.
- [67] On 7 April 2011, Mr Monaghan provided a copy of the Allens advice to the second defendant and Mr Fischer under cover of an email which stated "there is a lot to wade through, but the conclusion is that the transaction is okay". That summary was sent on to the third defendant and the sixth defendant.
- [68] On 14 June 2011, LMIM and each of the directors executed a deed poll ("Deed Poll") that provided for the settlement proceeds to be divided 65 percent to the FMIF and 35 percent to the MPF ("ratio of 65:35").

The Deed Poll

- [69] The Deed Poll provided:

"BACKGROUND

...

- H. Shortly after LM commenced the litigation, redemptions from the FMIF were frozen which resulted in no new funds flowing in from investors and an obligation to remit borrower's payments to LM's former funder, the Commonwealth Bank. FMIF was in the position of being unable to provide funding for the litigation and of being unable to satisfy any adverse costs orders that might have been made against LM. Accordingly, the MPF has contributed the majority of the funding for the litigation (and certain other actions designed to recover funds from Gujarat or put pressure on it) amounting to approximately 91% of the total funding (the FMIF has contributed the remaining 9%)
- I. The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of the proceeds recovered by the litigation.

...

3. DIRECTORS CONCLUSIONS

3.1 After giving full and comprehensive consideration to all of the relevant issues, the Directors have concluded that:

...

(b) there is a need for the FMIF RE to reach agreement with the MPF Trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF Trustee.

...

(m) the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length – the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous – in giving consideration to this issue, the Directors considered the litigation funding practices in the open market.

(n) in light of the independent expert advice as well as a report that has been prepared in accordance with RG111 and RG112 has been received the Settlement Proposals are fair and reasonable and are approved.”

The Deed of Release

[70] The Deed of Release provided for:

- (a) mutual releases by the parties to the proceedings of all claims, including the claim brought by LMIM as trustee of the MPF; and
- (b) LMIM to execute consent orders that would dismiss the proceedings and, therefore, the claims brought by LMIM as trustee for the MPF.

[71] The Gujarat contract is referred to in the Deed of Release as the “Sale Contract” and defined in the Deed of Release as a “Transaction Document” any breach of which was excluded from the release (see cl 5.1, 6.1). It was not entered into irrespective of the Deed of Release or the Deed of Settlement and Release.

[72] The Deed of Release provided for Gujarat to pay the amount due under it to PTAL and did not provide for Gujarat to pay any sum to LMIM. However, the Deed of Release was entered into after the Deed Poll had been executed by LMIM and the directors and the instructions given to Gujarat for payment on settlement on the same day that the Deed of Release was entered into included the payment of a sum by bank cheque to LMIM.

[73] Before turning to the contentions or any further detail as to the facts, it is appropriate to consider the operation of the relevant sections of the CA in some detail.

Duty to act in members' best interests

[74] As previously stated, both relevant duties were introduced as part of Chapter 5C of the *Corporations Law* in 1998.¹² Not long afterwards, the duties of a director or officer of a company were amended,¹³ to include ss 180 and 181 of the CA in the following relevant form:

“180 Care and diligence—civil obligation only

Care and diligence—directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
- (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
- (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence)—it does not operate in relation to duties under any other provision of this Act or under any other laws.

- (3) In this section:

¹² *Managed Investments Act 1998* (Cth).

¹³ *Corporate Law Economic Reform Program Act 1999* (Cth), Schedule 1.

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

181 Good faith—civil obligations

Good faith—directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E)."

[75] None of the pre-1998 corporations or company law legislative provisions contained an express duty "to act in the best interests" of the company. That was first introduced by ss 601FC(1)(c) and 601FD(1)(c) of the *Corporations Law*, followed by s 181(a) of the *Corporations Law*.

[76] The origin of ss 601FD(1)(c) and the corresponding duty of a responsible entity under s 601FC(1)(c) lies in the 1993 report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee entitled "Collective Investments: other people's money".¹⁴ Paragraph 74 of the summary of recommendations recommended that the *Corporations Law* should impose an obligation on the operator of a collective investment scheme "to exercise its powers and perform its duties as operator in the best interests of investors rather than in its own, or anyone else's, interest, if that interest is not identical to the interests of the scheme investors." Paragraph 10.8 referred to the discussion paper released prior to the report and responses received by the reporters in relation to a proposal that "the law should impose on operators a duty to avoid conflicts of interests" and continued that the reporters had concluded that "the appropriate formulation of the test [was] that the operators must prefer the interests of investors over their own interests where any conflicts arise". The proposal at the time of the report was reflected in draft s 260AE, contained in volume 2 of the report, that would have prohibited an operator from the "exercise [of] its powers, or perform[ing] its duties... in the interest... of anyone else if that interest is not identical to the interests of the scheme investors generally." That draft section was not enacted.

[77] The *Managed Investments Bill 1988* (Cth) contained and introduced what became ss 601FC and 601FD of the *Corporations Law*. Paragraph 8.8 of the Explanatory

¹⁴ [1993] ALRC 65.

Memorandum to the Bill said about draft s 601FC(1) that the responsible entity of a managed investment scheme “will be subject to extensive statutory duties... [that] will reflect both the fundamental duties of a fiduciary, as well as certain of the duties currently imposed...”. Paragraph 8.18 of the Explanatory Memorandum said about draft s 601FD(1) that “the duties of officers of a responsible entity will reflect, in part, the duties owed by the responsible entity. These include the duties:... to exercise the appropriate degree of skill, care and diligence; to act in the best interests of the members...”

- [78] The origin of s 181 of the CA lies in the Corporate Law Economic Reform Program¹⁵ Proposals for Reform: Paper No 3 entitled “Directors’ Duties and Corporate Governance: Facilitating innovation and protecting investors”. Proposal No 2 of that paper was as follows:

“The Law should expressly recognise the oversight role played by directors and their reliance on delegates to manage their company’s day-to-day affairs. ...

The existing duty in subsection 232(2) to act *honestly* should be reformulated to capture the fiduciary principles that a director or other officer of a corporation must exercise their powers and discharge their duties:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose.”

- [79] The discussion within the text of the paper equated the pre-1998 provision (then s 232(2) of the *Corporations Law*) to the equitable duty or duties of directors,¹⁶ identified a potential inconsistency between the duty to act “honestly” and another section in the legislation at that time,¹⁷ referred to comparator “best interests” provisions in the companies’ legislation of New Zealand¹⁸ and Canada¹⁹ and recommended that the *Corporations Law* be amended to replace the duty to act honestly with a duty to act “in good faith in the best interests of the company and ... for a proper purpose”, as set out above.

- [80] Those CLERP proposals informed the *Corporate Law Economic Reform Program Bill* 1998 (Cth), which resulted in s 181 of the *Corporations Law* that is now s 181 of the CA. The Explanatory Memorandum to the Bill described the key features as including:

“Reformulating the existing duty to act honestly in subsection 232(2) to capture the fiduciary principles that a director or other officer of a corporation must exercise their powers and discharge their duties in good faith in what they believe to be in the best interests of the corporation and

¹⁵ Often abbreviated to “CLERP”.

¹⁶ Corporate Law Economic Reform Program Proposals for Reform: Paper No 3 entitled “Directors’ Duties and Corporate Governance: Facilitating innovation and protecting investors”, p 19.

¹⁷ Corporate Law Economic Reform Program Proposals for Reform: Paper No 3 entitled “Directors’ Duties and Corporate Governance: Facilitating innovation and protecting investors”, p 49.

¹⁸ *Companies Act* 1993 (NZ), s 131(1).

¹⁹ *Canada Business Corporations Act* 1975, s 122(1)(a).

for a proper purpose. Breach of this will continue to attract both criminal and civil consequences.”²⁰

- [81] I observe that the CLERP proposals also pre-dated the *Managed Investments Bill* 1998²¹ that introduced the provisions that became s 601FD(1) of the CA but that the report that resulted in the *Managed Investments Bill* 1998 was made some years earlier.
- [82] To some extent, s 601FD(1) of the *Corporations Law* was a hybrid, because it did not replace an officer’s duty to “act honestly” with a duty “to act bona fide in the best interests of the members”. Instead, s 601FD(1)(a) retained an express duty to “act honestly” while the first clause of s 601FD(1)(c) provided for a duty to “act in the best interests of the members”.²² In contrast, s 181 of the CA, as introduced in 1998, deleted the prior express duty to “act honestly” (then in s 232(2) of the *Corporations Law*) and replaced it with an obligation to exercise the powers and to discharge the duties “in good faith in the best interests” of the corporation.
- [83] The duty under s 601FD(1)(c) to act in the members’ best interests is a duty owed directly by a director to the members of the registered scheme. It crosses the divide under which usually a director of a corporate trustee owes duties to the corporation but not directly to the beneficiaries.²³
- [84] The statutory right to recover for a contravention of the duty to act in the members best interests or the duty of care and diligence to members arises as follows. Section 601FD(3) provides that a person who contravenes s 601FD(1), or is involved in the contravention, contravenes s 601FD(3). Section 1317DA provides that items 1 to 13 of the first column of the table in s 1317E(1) are “corporations/civil scheme penalty provisions”. Item 8 of the first column refers to s 601FD(3). As previously set out, s 1317H(1) provides that a court may order a person to compensate a registered scheme for damage suffered by the scheme if the person has contravened a corporation/scheme civil penalty provision in relation to the scheme and the damage resulted from the contravention. Section 1317J provides that either ASIC or the responsible entity for the scheme may apply for a compensation order under s 1317H. And s 1317H(4) provides that if anyone other than the responsible entity is ordered to compensate the scheme the responsible entity may recover the compensation on behalf of the scheme.
- [85] Returning to s 601FD(1)(c), as a matter of grammar, there are two clauses of that paragraph. The first clause provides that the officer must “act in the best interests of the members”. The second clause provides: “and, if there is a conflict between the members’ interests and the interests of the responsible entity, [the officer must] give priority to the members’ interests.” As a matter of ordinary meaning and grammar, the first and second clauses provide for separate duties.
- [86] So much was authoritatively decided by the High Court in *Australian Securities and Investments Commission (ASIC) v Lewski*²⁴ in the following passage:

²⁰ Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill* 1998 (Cth), 11 [4.2] and 17-18 [6.2]-[6.7].

²¹ See also the Explanatory Memorandum to the *Managed Investments Bill* 1998 (Cth), 15-17 [8.8]-[8.22].

²² The same structure was followed for s 601FC(1).

²³ *Young v Murphy* [1996] 1 VR 279.

²⁴ (2018) 362 ALR 286.

“Sections 601FC(1)(c) and 601FD(1)(c) each involve two separate duties of loyalty. The first is a duty to act in the best interests of the members. The second is to give priority to the members’ interests if there is a conflict between the members’ interests and the interests of the responsible entity.”²⁵

[87] As to the second duty, the plaintiff submits that in giving effect to the interests of the MPF, the defendants preferred the “interests of the responsible entity”, LMIM, to the interests of the members. In my view, on the proper construction of the provision, the interests of the responsible entity do not include the duty of the responsible entity as trustee of another trust to the beneficiaries of that trust.

[88] First, in my view, that is not the ordinary meaning of the words of the text: “interests of the responsible entity” in s 601FD(1)(c).

[89] Second, by way of context, s 601FC(1)(c) provides that the corresponding duty of a responsible entity, in exercising its powers and carrying out its duties, is that the responsible entity must “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”, supporting the view that the interests of the responsible entity in s 601FD(1)(c) are the responsible entity’s own interests.

[90] Third, nothing in the legislation of the CA prohibits one company from becoming the responsible entity of more than one registered scheme. If the “interests of the responsible entity” in the second duty included its duties as responsible entity of another registered scheme, and a conflict arose between the interests of the members of one scheme and the interests of the members of another scheme, s 601FD(1)(c) would simultaneously require the responsible entity to prefer the interests of the members of each scheme over the interests of the members of the other scheme, an apparently absurd result.

[91] Fourth, in my view, no case law authority supports the plaintiff’s construction. To the contrary, in *Allco Funds Management Ltd v Trust Co (Re Services) Ltd*,²⁶ the court said:

“Section 601FD does not assist. The section does not permit or exonerate breaches of fiduciary duty committed against another party, in this case AFML. The section provides that where there is a conflict between the interests of the members and those of the RE, the interests of the members must take priority. Section 601FD(1)(c) involves only a contest between the members and the RE. It has no field of operation where there is a conflict of interest between the RE and some other entity of which the director of the RE is also a director. It also has no impact on their fiduciary duties at general law.”²⁷

[92] Accordingly, in my view, the second duty in s 601FD(1)(c) does not apply to the questions raised by this case, because LMIM’s duties as trustee of the MPF were not “interests of the responsible entity” within the meaning of that duty. It follows that whether there was any contravention of the duty to act in the members’ best interests

²⁵ (2018) 362 ALR 286, 303 [70].

²⁶ [2014] NSWSC 1251

²⁷ [2014] NSWSC 1251, 45-46 [189].

in the present case turns on the operation of the first duty imposed under s 601FD(1)(c).

[93] None of the parties closely analysed that operation, as a matter of law. The Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998* described the corresponding changes made to introduce s 181 of the *Corporations Law* as “mirror[ing] the fiduciary duty of a director to act in what they believe to be in the best interests of the corporation and for proper purposes.”²⁸

[94] The plaintiff approached the duty to act in the members’ best interests as though it captured the equitable principle or rule that applies when a trustee or fiduciary is placed in a position or situation of conflict between duty and duty, a description coined by Professor Finn.²⁹ The equitable rule is described thus:

“But the mere acceptance of multiple ‘fiduciary’ engagements or employments is obviously not offensive in itself. It is the staple of the commission agent, the solicitor, the corporate trustee, the company director and the liquidator. The vice condemned by the courts only arises when the fiduciary, by his action or inaction in either or both of two relationships, brings about an actual conflict between the duties owed in each relationship.”³⁰

[95] The corporate trustee referred to by Professor Finn as at 1977 would have included companies then subject to the *Trustee Companies Act 1968* (Qld), companies not dissimilar to the licensed trustee companies now regulated by Chapter 5D of the CA.

[96] The plaintiff relied on *Moody v Cox and Hatt*³¹ as supporting its claim of breach of the duty to act in members’ best interests. That case concerned a solicitor who acted for both the vendor and purchaser in a contract of sale of land who failed to disclose to the plaintiff facts relevant to the value of the property that he knew when acting in the negotiation for the vendor. The court of appeal reasoned, by analogy, that because an attorney selling to his client is bound to disclose everything that may be material a solicitor must be under the same duty when acting for both vendor and purchaser. Lord Cozens-Hardy MR said:

“... if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say – which would be much better – ‘I cannot accept this business.’”³²

[97] That reasoning does not answer the problem presented in the present case, for reasons I will later discuss. But one thing it does illustrate is the proscriptive operation of a fiduciary duty. So far as “fiduciary” duties are concerned, there is an unresolved debate about whether all fiduciary duties are necessarily proscriptive, or whether there are prescriptive fiduciary duties as well. *Breen v Williams*³³ is thought by some to require acceptance that all true fiduciary duties are proscriptive, but there is a

²⁸ Explanatory Memorandum to the *Corporate Law Economic Reform Program Bill 1998*, 27 [6.7].

²⁹ Finn, *Fiduciary Obligations*, 1977, 252 [580].

³⁰ Finn, *Fiduciary Obligations*, 1977, 252-253 [581].

³¹ [1917] 2 Ch 71.

³² [1917] 2 Ch 71, 81.

³³ (1996) 186 CLR 71.

developing body of contrary opinion. Still, in *Breen v Williams*, the narrower view was pithily put by Gummow J, as follows:

“Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of another. Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.”³⁴

- [98] Professor Lionel Smith has captured the contrary approach and views in a recent article entitled “Prescriptive Fiduciary Duties”.³⁵ In part, the question may be a dispute as to which duties the label “fiduciary” is correctly applied, as a matter of taxonomy, rather than necessarily affecting the liabilities and available relief in the cases around which the arguments revolve.
- [99] For present purposes, however, the question is what is required by the statutory duty that an officer of a responsible entity must act in the best interests of the members, when the responsible entity operates the registered scheme and performs the functions conferred on it by the scheme’s constitution and the CA,³⁶ and in circumstances where the responsible entity in exercising its powers, and carrying out its duties, has a corresponding duty?³⁷
- [100] It is unnecessary in this case to decide whether the duty to act in the members’ best interests is positive in character, so as to oblige an officer to act to cause the responsible entity to exercise its powers or carry out its duties otherwise. That is unnecessary because in the circumstances of the present case there is no question that LMIM as the responsible entity did exercise its powers to operate the scheme³⁸ of the FMIF by deciding to divide the settlement proceeds, entering into the three contracts and receiving and crediting the relevant amounts in accordance with ratio of 65:35.
- [101] In other contexts, the protean nature of a duty to act in the best interests of the object of a power has been recognised. For example, the constitutional power of directors of a company to issue shares in the company is one that must be exercised for the benefit of the company as a whole.³⁹ Another example is the power of the general meeting of a company to amend the constitution to include a power to expropriate a member’s shares. In that context, the High Court abandoned the “test” of what is done “bona fide for the benefit of the company as a whole”⁴⁰ as “inappropriate, if not meaningless, where the amendment [is] proposed to adjust the rights of conflicting interests.”⁴¹

³⁴ (1996) 186 CLR 71, 137-138.

³⁵ L Smith, “Prescriptive Fiduciary Duties”, (2018) 37 UQLJ 261.

³⁶ *Corporations Act 2001* (Cth), s 601FB(1).

³⁷ *Corporations Act 2001* (Cth), s 601FC(1)(c).

³⁸ *Corporations Act 2001* (Cth), s 601FB(1).

³⁹ *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 289.

⁴⁰ As formulated in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671.

⁴¹ *Gambotto v WCP Ltd* (1995) 182 CLR 432, 443-444.

- [102] It must not be forgotten that s 601FD(1)(c) exists in the context of paragraphs (a) to (f) of s 601FD(1). The express duty of care and diligence to members provided for in paragraph (b), for example, suggests that the duty to act in members' best interests in paragraph (c) is not that. Similarly, the duty to act honestly in paragraph (a) suggests that that honesty is not the particular concern of the duty to act in the members' best interests in paragraph (c). The express obligations in paragraph (f) to take the steps a reasonable person would take to comply with the CA, the conditions of the responsible entity's Australian financial services licence, the scheme's constitution and the scheme's compliance plan suggest that those subjects may not be the concern of paragraph (c). The express obligations in paragraph (e) not to make improper use of the officer's position are, however, less easy to differentiate from what may be the remaining scope of the duty to act in the members' best interests in paragraph (c).
- [103] How, then, is a positive requirement to act in the "best interests of the members" of a registered scheme to be applied when the question raised is the conflict of interests of and possible adjustment of the competing rights of the members of one scheme with those of another scheme or trust fund?
- [104] The approach submitted by the defendants is to construe the duty to act in members' best interests as not applying to a director where the responsible entity has a conflicting fiduciary duty to the beneficiaries of another trust.
- [105] Another statement made by the High court in *Australian Securities and Investments Commission (ASIC) v Lewski*⁴² as to the duty to act in members' best interests was as follows:

"The Loyalty Duty requiring a director to act in the best interests of members is not purely subjective. As Bowen LJ said of the equitable progenitor from which this statutory duty was developed and adapted, otherwise a wholly irrational but honest director could conduct the affairs of the company by "paying away its money with both hands in a manner perfectly *boná fide* yet perfectly irrational". Although the duty is not satisfied merely by honesty, it is a duty to act in the best *interests* of the members rather than a duty to secure the best *outcome* for members. Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than "the success or otherwise of a transaction or other course of action". The purpose and terms of the Trust are the existing legal purposes and terms of the Constitution, not the purpose or terms that are honestly believed to exist.

The Loyalty Duty requiring a director to give priority to the members' interests in circumstances of conflict of interest is narrower in one respect than the equitable rule concerning conflict of interest and duty. It does not proscribe acts of a director that put herself or himself in a position of conflict. It only proscribes acts in the course of that conflict that do not give priority to the members' interests. Nevertheless, the duty is not satisfied by an honest or reasonable belief. A contravention occurs when a director prioritises her or his own interests over those of the members, no matter how honest or reasonable the director was in doing so."⁴³ (footnotes omitted) (emphasis added)

⁴² (2018) 362 ALR 286.

⁴³ (2018) 362 ALR 286, 304 [71]-[72].

- [106] The second part of this passage recognises that the second duty, namely the duty to give priority to members' interests, deals with acting in conflict of duty and interest, and that suggests that the first duty, the duty to act in members' best interests, does not.
- [107] Another point, appearing from the text of the statute, and made by the High Court in *Lewski* in the second part of the passage set out above, is that the duty to give priority to members' interests is not engaged by and does not prohibit an officer of the responsible entity from placing himself or herself in a position of conflict of duty and duty or duty and interest.
- [108] In my view, although described as a "Loyalty Duty" in *Lewski*, and although explained in some of the contextual materials leading up to its enactment as a fiduciary duty, the statutory duty under s 601FD(1)(c) to act in the members' best interests is not to be equated with a fiduciary duty, per se.
- [109] However, the duty to act in the members' best interests does have equitable origins, as explained in the first part of the passage from *Lewski* set out above, by the reference to the duty's "equitable progenitor". The reference there made is to the reasons of Bowen LJ in *Hutton v West Cork Railway Co.*⁴⁴ That case was not concerned with a fiduciary duty, but with the limits equity imposed on the scope of the constitutional power of a company in general meeting to vote remuneration to the directors retrospectively, in the light of the statutory provisions then in force, regulating that power.⁴⁵ The headnote referred to the power of a general meeting to expend a portion of the company's funds in gratuities, provided the grants "are made for the purpose of advancing the interests of the company",⁴⁶ but similar language does not appear in the judgments and there is no reference to the "best interests" of the company.
- [110] These historical strains of authority, and the statutory context and history, illustrate the disparate sources of and the associated risk of error in eliding the duty to act in members' best interests in the first duty under s 601FD(1)(c) with the duty to give priority to members' interests in the second duty under s 601FC(1)(c).
- [111] Accordingly, the starting point is not that on the proper construction of s 601FD(1)(c) the defendants were required to give priority to the members' interests of the FMIF in order to discharge the duty to act in the members' best interests. Second, there was no necessary breach of the duty to act in members' best interests simply because there was a conflict of duty and duty between LMIM's fiduciary duty to the members of the FMIF and LMIM's fiduciary duty to the members of the MPF.
- [112] The latter conclusion is reinforced by the provisions of the constitution of the FMIF that provide:

"29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE

⁴⁴ (1883) 23 Ch D 654.

⁴⁵ For modern comparators, see *Gambotto v WCP Ltd* (1995) 182 CLR 432, 439-447 and *ANZ Executors and Trustees Co Ltd v Qintex Australia Ltd (receivers and managers appointed)* [1991] 2 Qd R 360, 368-370.

⁴⁶ (1883) 23 Ch D 654.

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

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

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

[113] It is permissible to reduce the fiduciary obligations of a trustee in some situations. One is where the trust instrument makes provision for it. Another is where the beneficiaries give fully informed consent.

[114] In *Australian Securities and Investments Commission (ASIC) v Drake (No2)*⁴⁷ Edelman J said:

“Fiduciary duties are shaped, and can be modified, by the trust instrument or an underlying contract. For instance, in *Kelly v Cooper*... the Privy Council held that no breach occurred since the contract of agency envisaged that the fiduciary might have a conflict of interest. The decision in *Kelly v Cooper* was applied by Lord Browne-Wilkinson in *Henderson v Merrett* where his Lordship said that ‘[a]lthough an agent is, in the absence of contractual provision, in breach of his fiduciary duties if he acts for another who is in competition with his principal, if the contract under which he is acting authorises him so to do, the normal fiduciary duties are modified accordingly’: see also *Chan v Zacharia*... The decision in *Kelly v Cooper* has also been approved in Australia: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)*...; and *Backwell IXL Pty Ltd v Hogg*.”⁴⁸
(citations omitted)

[115] Clause 29, relevantly, was part of the trust instrument constituting the MPF and subject to any statutory prohibition, authorises LMIM as responsible entity to deal with itself as trustee of another trust. In this case, the MPF was another trust of which LMIM was trustee.

[116] As such, the obligation of the defendants to act in the best interests of the FMIF has to take into account the fact that the constitution of the FMIF expressly authorised LMIM:

- (1) to act as a RE for another trust, or fund;
- (2) to deal with itself as trustee of another trust; and

⁴⁷ (2016) 340 ALR 75.

⁴⁸ (2016) 340 ALR 75, [354].

- (3) to be interested in a contract or transaction with itself as trustee of another trust.
- [117] However, identifying that the scope of the duty to act in the members' best interests does not operate as proscriptively as the plaintiff submits still does not answer the question: what is the scope of the duty in a case like the present?
- [118] There is a comparator duty to act in the best interests of the beneficiaries of a trust. In 1985 in *Cowan v Scargill*,⁴⁹ Megarry V-C said that:
- “[it is] the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries.”
- [119] Ever since, some have accepted that as a statement of the law while others point to the absence of earlier authority for a general duty stated in terms of a duty to act in the best interests of the beneficiaries. Whether supported by earlier authority or not, it has proved influential in the drafting of some statutes, including, it seems, ss 181, 601FC(1)(c) and s 601FD(1)(c) of the CA. As well, there is now a comparator provision in general trusts legislation in this jurisdiction as to a trustee exercising a power of investment⁵⁰ or a court conferring additional powers on a trustee.⁵¹ And the concept or duty is picked up in some cases.⁵²
- [120] But there are significant arguments that the duty as formulated in *Cowan v Scargill* was ahistorical. The arguments are helpfully marshalled in two articles by M Scott Donald, “Best interests?”⁵³ and Professor Geraint Thomas, “The duty of trustees to act in the ‘best interests’ of their beneficiaries”.⁵⁴
- [121] This case is not the occasion to attempt a resolution of those arguments. However, they serve to explain why it is that although one can readily find statements as to the existence of an overarching duty of a trustee to act in the best interests of the beneficiaries of a trust, including in some leading text books, cases that have been resolved by reference to that duty and which explicate its meaning are elusive.
- [122] Where elsewhere might guidance be found? One possibility is where a trustee is bound to decide as between competing interests of beneficiaries under existing trust powers and structures.
- [123] First, it is to be noted that under s 601FC(1)(d) of the CA, a responsible entity is subject to a duty to “treat... fairly” members of a scheme who hold interests of different classes. That is a situation where individual “best interests” obligations to each class would conflict.
- [124] Second, the paradigm of this situation in trust law is to be found in the differing effects of an investment decision of a trustee as between the interests of beneficiaries who take in succession. An interest enjoyed first in time is advantaged by an investment decision that produces the highest income for distribution. An interest that is enjoyed

⁴⁹ [1985] Ch 270, 286-287.

⁵⁰ *Trusts Act 1973* (Qld), s 23(2)(a), introduced in 1999; cf *Trustee Act 1925* (NSW), s 14B(2).

⁵¹ *Trusts Act 1973* (Qld), s 94(1).

⁵² For example, *Berger v Lyster Pty Ltd* [2012] VSC 95, [67]-[85]; *Carmine v Ritchie* [2012] NZHC 1514, [66]; *Willett v Fletcher* [2004] QCA 30, [19] and *re Burton* (1994) 126 ALR 557, 559-560.

⁵³ (2008) 2 *Journal of Equity* 245.

⁵⁴ (2008) 2 *Journal of Equity* 177.

subsequent in time is advantaged by the preservation and maximisation of capital (including by retaining and transferring income to capital) for future distribution. This is a subject of considerable complexity. Historically, it has produced restrictions as to permissible lists or species of investment. Many of the restrictive rules have been relaxed nowadays. But there remains a duty of the trustee in making decisions as between the conflicting interests, usually expressed as a duty to act “fairly” as between the conflicting interests, or “impartially”.⁵⁵

- [125] It is worth noting that a duty of “impartiality” may be a difficult concept to apply as between conflicting interests. So in *Edge & Ors v Pensions Ombudsman & Anor*,⁵⁶ the court said:

“... dealing with the exercise of a discretionary power to choose which beneficiaries, or which classes of beneficiaries, should be the recipients of trust benefits. In relation to a discretionary power of that character it is, in my opinion, meaningless to speak of a duty on the trustees to act impartially. Trustees, when exercising a discretionary power to choose, must of course not take into account irrelevant, irrational or improper factors. But, provided they avoid doing so, they are entitled to choose and to prefer some beneficiaries over others.”⁵⁷

- [126] The result of this analysis of the meaning and context of the duty to act in the members’ best interests, in my view, is that none of the parties’ respective positions is entirely borne out. It would be an error, in my view, to construe the duty to act in members’ best interests as requiring an officer of a responsible entity necessarily to prefer the members’ interests to the interests of the members of another scheme or beneficiaries of another trust, where they conflict. Equally, in my view, it would be an error to construe the duty to act in members’ best interests as never applying if there is such a conflict.

- [127] Before going further, it will be necessary to consider the facts of this case more closely.

Duty of care and diligence to members

- [128] Before the amendments made in 1998⁵⁸ and 1999,⁵⁹ the relevant statutory duties of a director as an officer under the *Corporations Law*⁶⁰ were in a form that corresponded to the earlier *Companies Code*⁶¹ of this and other jurisdictions that, in turn, largely corresponded to the form of the duties contained in the *Uniform Companies Acts* of the early 1960s⁶² that contained a statement of a director’s duty of honesty and duty of reasonable care and diligence.

- [129] Immediately before the 1999 amendments, the *Corporations Law* provided that “[a]n officer of a corporation shall at all times exercise a reasonable degree of care and

⁵⁵ Heydon and Leeming, *Jacobs’ Law of Trusts in Australia*, 8 ed, [1711].

⁵⁶ [1998] Ch 512.

⁵⁷ [1998] Ch 512, 533.

⁵⁸ *Managed Investments Act 1998* (Cth).

⁵⁹ *Corporate Law Economic Reform Program Act 1999* (Cth), Schedule 1.

⁶⁰ *Corporations Law*, s 232(2) and (4).

⁶¹ *Companies (Queensland) Code*, s 229(2) and (4).

⁶² *Companies Act 1961* (Qld), s 124(1).

diligence in the exercise of his or her powers and the discharge of his or her duties”.⁶³ The *Companies Code* before that was in virtually the same terms.⁶⁴ The *Uniform Companies Act* section before the *Companies Code* provided that “a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office”.⁶⁵

- [130] The history of the legislative developments and the prior non-statutory law as to a director’s duty of care and skill were carefully traced in 2016 by Edelman J in *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)*.⁶⁶ I accept and rely on that analysis.
- [131] The parties made detailed submissions, with many references to cases, as to the principles according to which the duty of care and diligence to members operates. But the starting point in the present case is the text and context of s 601FD(1)(b) and the decisions upon it that are binding authority.
- [132] According to the text of s 601FD(1)(b), the duty is one of “care and diligence”, an expression not defined elsewhere in the CA but which has a long statutory history. The duty is owed by an officer of a responsible entity of a registered scheme. As such, it is informed by the powers and the duties of the responsible entity under Chapter 5C of the CA, the constitution of the registered scheme and the general law, including that the responsible entity is to operate the scheme⁶⁷ with the powers conferred by statute⁶⁸ and as the trustee of the scheme property under s 601FC(2). Also, as context, the responsible entity owes a corresponding duty in exercising its powers and carrying out its duties provided for under s 601FC(1)(b).
- [133] Those matters inform the subject of the duty that the officer must exercise with the required degree of care and diligence. That degree is measured by reference to the “degree” that a “reasonable person” would exercise. The reasonable person’s hypothetical conduct is measured by reference to an express condition, namely as if the reasonable person were “in the officer’s position”. This was described by the High Court in *Lewski* as “the degree of care that a reasonable person would exercise tailored to the circumstances of the... director.”⁶⁹
- [134] The terms of s 180(1) of the CA are not identical to, but correspond to, the considerations expressly raised by the terms of s 601FD(1)(b) and may be viewed as context for the construction of s 601FD(1)(b), keeping in mind the differences. An important difference is that a corporation is not the trustee of its property and the directors of a corporation are not responsible for managing the corporation’s affairs as a trustee, unless in circumstances where the corporation is a trustee of a trust. With these differences in mind, however, some assistance may be obtained from the High Court’s consideration of s 180(1) in *Shafron v Australian Securities and Investments Commission*⁷⁰ as follows:

⁶³ *Corporations Law*, s 232(4).

⁶⁴ For example, *Companies (Queensland) Code*, s 229(2).

⁶⁵ For example, *Companies Act 1961 (Qld)*, s 124(1).

⁶⁶ (2016) 336 ALR 209, 288-295 [413]-[445].

⁶⁷ *Corporations Act 2001 (Cth)*, s 601FB(1).

⁶⁸ *Corporations Act 2001 (Cth)*, s 601FB(2).

⁶⁹ (2018) 362 ALR 286, 303 [68].

⁷⁰ (2012) 247 CLR 465.

“The degree of care and diligence that is required by s 180(1) is fixed as an objective standard identified by reference to two relevant elements – the element identified in para (a): “the corporation’s circumstances”, and the element identified in para (b): the office *and* the responsibilities within the corporation that the officer in question occupied and had. No doubt, those responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.”⁷¹

- [135] The parties relied on a number of cases decided under s 601FD(1)(b)⁷² and a number of cases decided under s 180(1)⁷³ or its predecessor⁷⁴ as relevant to the requirements of the duty of care and diligence to members under s 601FD(1)(c). Some of those cases concerned whether and the extent to which an officer may rely upon the advice of others in making the impugned decision.⁷⁵ It is unnecessary to set out slabs from the cases referred to before turning more closely to the questions raised by the facts in the present case.

Causation under s 1317H

- [136] The plaintiff alleges that the damage that resulted from the defendants’ contraventions of the duty to act in members’ best interests or the duty of care and diligence to members was that the FMIF did not receive the amount that was received by LMIM as trustee for and credited to the MPF. That is to say, the damage was the amount of the settlement proceeds that PTAL as custodian for the FMIF did not receive. The plaintiff did not contend at this point that that amount formed part of the plaintiff’s scheme property before it was received by LMIM as trustee of the MPF. The issue between the parties is whether that damage resulted from the alleged breaches of duty, so as to entitle the plaintiff to an order for compensation under s 1317H of the CA.
- [137] A number of aspects of s 1317H have been said to be “curious”.⁷⁶ Of present relevance is that the section confers a power to compensate a “scheme”, which is not a legal entity. However, that has been construed to mean that a court may order the contravener or a person involved in the contravention to pay the amount of the

⁷¹ (2012) 247 CLR 465, 476.

⁷² *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, [187]; *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185, 228-231 [199]-[210]; *Allco Funds Management Ltd (receivers and managers appointed) (in liq) v Trust Company (RE Services) Limited* [2014] NSWSC 1251, [189]; *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (receivers and managers appointed) (in liq)(controllers appointed) (No 3)* [2013] FCA 1342, [532], [535]-[537]; *Re Idylic Solutions Pty Ltd* [2012] NSWSC 1276, [2456] and [2474].

⁷³ *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, [533]; *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, [170], [191]; *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, [307], [372], [434]-[435].

⁷⁴ *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, [7192]; *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 617, [731], [1070]-[1077]; *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451, 452; *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, [99], [101], [103].

⁷⁵ *Avestra* at [187]; *Healey* at [167]; *Maxwell* at [101] and [113]; *Vines* at [731].

⁷⁶ *Grimaldi v Chameleon Mining NL (No. 2)* (2012) 200 FCR 296, [625].

compensation to the responsible entity of the scheme who holds it as scheme property. Under the orders made for the winding up of the FMIF, however, the relevant person is Mr Whyte as receiver of the property of the FMIF.

- [138] It is necessary to consider what satisfies the requirement within s 1317H(1)(b) that “the damage resulted from the contravention”. It is appropriate to examine the statutory origins of s 1317H.
- [139] Prior to 1992, s 232(8) of the *Corporations Law* provided that a corporation could recover “loss or damage [suffered] as a result of [a] contravention” of that section. That section contained the duties of an officer to act honestly and to exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties.
- [140] In 1992, s 232(8) was replaced by ss 1317HA and 1317HD of the *Corporations Law* that were introduced as part of the introduction of a civil penalty regime for contravention of, inter alia, a director’s duties of honesty and care and diligence.⁷⁷ They provided for an order for recovery of compensation when “the corporation has suffered loss or damage as a result of [an] act or omission” contravening a civil penalty provision in “an amount equal to the amount of that loss or damage”.
- [141] The *Managed Investments Act* 1998 (Cth) amended s 1317HA, but it was the *Corporate Law Economic Reform Program Act* 1999 (Cth), which introduced s 1317H, in the same terms substantially as the current provision.
- [142] In *Adler v Australian Investments and Securities Commission*,⁷⁸ the court said of s 1317H:

“I do not think it necessary to further the debate over causation for the purposes of determining equitable compensation. I am respectfully unable to agree that analogy with equitable claims against fiduciaries influences the meaning and application of ‘resulted from’ in s 1317H. As Spigelman CJ observed in *O’Halloran v RT Thomas & Family Pty Ltd* (at 272) -

‘... the remedy of equitable compensation differs from damages at common law. It also differs from damages under a statutory regime where the court is concerned with, and confined by, the construction of the statute. Causation for purposes of s 212 of the *Corporations Law* will not involve the same analysis of causation as is required for breach of a fiduciary obligation.’

For s 1317H, the analogy with equitable claims against fiduciaries is all the more difficult because some civil penalty provisions in the Act do not involve contravention by a person standing in a fiduciary capacity.

In my opinion, the words “resulted from” in s 1317H are words by which, in their natural meaning, only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation. ...⁷⁹ (emphasis added)

⁷⁷ *Corporate Law Reform Act* 1992 (Cth), s 17.

⁷⁸ (2003) 179 FLR 1.

⁷⁹ *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, 156 [707]-[709].

- [143] In *Agricultural Land Management v Jackson (No. 2)*,⁸⁰ Edelman J said that *Adler* applied a “but for” approach as a negative criterion. The same “but for” approach has been applied as a negative criterion by the plurality of the High Court in relation to compensation of breach of statutory proscriptions of misleading or deceptive conduct. Further, in *Agricultural Land Management* the court explained that an analogy with equitable compensation would reach the same conclusion, because reparative compensation for a breach of fiduciary duty of the kinds raised in the present case would involve a negative “but for” criterion.⁸¹
- [144] A number of the parties urged that the question of causation should be resolved as a “practical matter” of “common sense”, relying on *March v E & MH Stramare Pty Ltd*.⁸² To decide this case, it is not necessary to analyse the role of “common sense” in answering the statutory question under s 1317H whether the alleged damage resulted from the alleged contraventions. However, a few observations may be made.
- [145] First, *March v E & MH Stramare* was a claim for damages for negligence at common law. It was in that context that the approach to a question of causation was said to be one of “common sense”, relying on earlier cases.⁸³ It should not be forgotten that in a common law action for damages for the tort of negligence, it was the jury’s function to find whether the alleged tort caused the alleged loss. Perhaps it is not surprising in that context that a direction to the jury as to the legal test to find whether the factual allegation was proved should engage or invoke a test of “common sense”. However, times have changed. The question as to causation in a claim for damages for financial loss alleged to be suffered by a defendant’s negligence is answered nowadays in this jurisdiction under the *Civil Liability Act 2003* (Qld). The statutory questions under that Act require a court to consider separately, whether the breach of duty was a necessary condition of the concurrence of harm (factual causation) and whether it is appropriate for the scope of liability of the person in breach to extend to the harm so caused (scope of liability).⁸⁴ The scope of liability element is the legal norm to be applied. The factual causation element requires a court to decide whether the breach was a necessary condition of the occurrence of the harm on the balance of probabilities as a matter of fact only. The statutory provision assigns no role to “common sense”.
- [146] The statutory provision in question in the present case is s 1317H(1) of the CA. The role of “common sense” and the “but for” approach to causation in that context were dealt with in two parts of *Agricultural Land Management*⁸⁵ as follows. First, as to the non-statutory law:

“In difficult cases the ‘sense’ of an answer is rarely common amongst judges. In the leading exposition of the common sense test in *March v E & MH Stramare Pty Ltd*, the ‘sense’ of the result was not ‘common’ between the five judges of the High Court of Australia (who allowed the appeal) and the majority of the Full Court of the Supreme Court of South Australia. This is one of the reasons why ‘common sense’ has been criticised as a test for causation. It is also why a number of High Court judgments have doubted whether ‘common sense’ can be a useful legal

⁸⁰ (2014) 48 WAR 1.

⁸¹ (2014) 48 WAR 1, 85-86 [451]-[452].

⁸² (1991) 171 CLR 506.

⁸³ (1991) 171 CLR 506, 515, 523, 525 and 531.

⁸⁴ *Civil Liability Act 2003* (Qld), s11(1).

⁸⁵ (2014) 48 WAR 1.

norm. It is important that ‘common sense’ be contextualised and supported by reasoned explanation so that it does not become a shroud which obscures teleological reasoning.

Within a ‘common sense’ approach it has been held that at common law the ‘but for’ test has an important role to play as a negative criterion. In other words, it is generally necessary, but not always sufficient, for the plaintiff to prove that the plaintiff’s loss would not have been suffered but for the defendant’s breach of duty.”⁸⁶

[147] I entirely agree with that passage. I observe, as well, that the lack of utility of “common sense” as a legal norm has been identified in the context of the recovery of alleged loss of damage suffered by a contravention of s 52 of the *Trade Practices Act 1994 (Cth)*⁸⁷ which is a useful comparator for consideration of the proper construction of s 1317H(1).

[148] At the risk of some repetition for clarity, the second relevant part of *Agricultural Land Management* specifically dealt with the application of a “but for” approach under s 1317H:

“In *Adler*, Giles JA applied a “but for” approach as a negative criterion. The same “but for” approach has been applied as a negative criterion by the plurality of the High Court of Australia in relation to compensation for breach of statutory proscriptions against misleading or deceptive conduct. Their Honours referred to “the essential question of causation” and spoke of “determining what action or inaction would have occurred if the true position had been known”.

The application of an analogy with equitable compensation reaches the same conclusion; as explained above, reparative compensation for a breach of fiduciary duty of this type should involve a negative “but for” criterion. Although Giles JA warned against the application of equitable analogies to s 1317H, it is hard to see why analogies cannot be drawn with the approach to causation taken to breaches of near-identical duties in equity. As I have explained, the meaning of causation is intimately connected with the character of the duty breached. Section 1317H provides remedies for provisions, many of which concern breaches of duties owed by directors. Those duties were historically recognised only in the Court of Chancery. Perhaps for this reason, Lee AJA observed in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* that it ‘may be thought that the words ‘as a result of’ or ‘resulted from’ imported the test applied in equity for linking a breach of duty in equity to loss or damage suffered.”⁸⁸ (footnotes omitted)

[149] It is necessary to identify with some precision and to analyse with some care the plaintiff’s case that its alleged loss resulted from the alleged contraventions.

[150] The hypothetical or counter-factual scenarios alleged by the plaintiff in the statement of claim are as follows:

⁸⁶ (2014) 48 WAR 1, 74-75 [393]-[394].

⁸⁷ *Travel Compensation Fund v Tambree (t/as R Tambree & Associates)* (2005) 224 CLR 627, [45].

⁸⁸ (2014) 48 WAR 1, [451]-[452].

- “45AA Had the first to sixth defendants complied with their duties...
- (a) LMIM as RE of the FMIF would have entered into the Deed of Release, the Deed of Release and settlement and the Gujarat Contract on the terms provided therein;
 - (b) LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the terms provided therein;
 - (c) The Deed Poll would not have been entered into;
 - (d) The first to sixth defendants would not have split the proceeds of settlement at the proceedings;
 - (e) The settlement payment would not have been made to LMIM as trustee of the MPF;
 - (f) All proceeds of the settlement of the proceedings would have been paid to LMIM as RE of the FMIF.
- 45AB In the alternative... , in respect of the breach of [the duty of care and diligence to members] had the first to sixth defendants complied with their duty...”
- (a) LMIM as RE of the FMIF would have entered into the Deed of Release, the deed and release and settlement of the Gujarat Contract on the terms provided therein;
 - (b) LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the terms provided therein;
 - (c) The Deed Poll would not have been entered into;
 - (d) The first to sixth defendants would have caused LMIM as trustee of the MPF to be reimbursed for the contribution it made to the funding of the proceedings together with interest at a commercial rate upon that amount;
 - (e) otherwise the proceeds of the settlement of the proceedings would have been paid to LMIM as RE of the FMIF.”

[151] The plaintiff alleges and submits that had the defendants not contravened their duties the defendants would have caused LMIM to enter into the same settlement transaction that was entered into by the three contracts, but there would have been no division of the settlement proceeds so that all of them would have been received by PTAL as custodian for the FMIF. That is, the defendants would have caused LMIM to enter into the Deed of Release and the Deed of Settlement and Release (including payment by LMIM of \$1.3 million to Coalfields) but not to decide to divide the settlement proceeds in any amount for the benefit of the MPF. The plaintiff submits the defendants would have done so because that was the only realistic opportunity to recover money in relation to the FMIF-Bellpac loan made by PTAL as custodian of the FMIF. The plaintiff submits the defendants had the power (presumably meaning

through LMIM as trustee of the MPF) to grant releases in respect of the MPF-Bellpac loan made by LMIM as trustee of the MPF.⁸⁹

- [152] In support of this conclusion, the plaintiff submits that had the defendants complied with their duties, they would have acted in a way which promoted and advanced the position of the FMIF over all other persons, including LMIM as trustee of the MPF. The plaintiff submits that had the defendants so acted, they would have faced the prospect of a claim by a new trustee or members of the MPF for breach of trust, but that cl 18.1(b)(ii) of the Constitution of the MPF would have excluded that liability. Under that clause, LMIM was not liable for any loss or damage arising out of a matter because in respect of the matter it acted “as required by law”. Lastly, the plaintiff submits that its case does not rely on there being a breach of trust by LMIM as trustee of the MPF, but concerns the conduct of the defendants as directors and their duties to members of the FMIF.
- [153] It will be observed that the plaintiff’s case on causation under s 1317H is primarily based on a positive duty of the defendants to act in the postulated hypothetical or counterfactual way, including that they were required to act to expose LMIM as trustee of the MPF to a claim for breach of trust by deliberately giving full priority to the interests of the members of the FMIF.
- [154] In the language of causation, the question is whether “but for” the alleged breaches of duty, the same settlement transaction would have been obtained, including that LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release and paid Coalfields \$1.3 million.
- [155] Two alternative scenarios are alleged as to the disposition of the settlement proceeds. First, all of the settlement proceeds would have been paid to PTAL as custodian for LMIM as responsible entity of the FMIF and none to LMIM as trustee of the MPF. That outcome is alleged as the counterfactual had either the duty to act in members’ best interests or the duty of care and diligence to members been complied with. Second, alternatively, but only in respect of the alleged breach of the duty of care and diligence to members, PTAL as custodian of the FMIF would have received the settlement proceeds except for an amount to reimburse LMIM as trustee of the MPF for the contributions it made to funding the Gujarat proceedings together with interest at a commercial rate. Each of those scenarios must be considered in turn.
- [156] On either scenario, there is no direct evidence that the defendants, or any of them, as directors of LMIM in its capacity as trustee of the MPF would have agreed to resolve to enter into the Deed of Release and the Deed of Settlement and Release or to pay Coalfields \$1.3 million if a lesser amount of the settlement proceeds were to be received by LMIM and credited to the account of the MPF.

Causation under the first scenario - all the settlement proceeds

- [157] Accordingly, the question of causation in fact resolves, first, to whether it should be inferred that the defendants as directors of the LMIM as trustee of the MPF would have caused LMIM to enter into the Deed of Release and Deed of Settlement and Release if all of the settlement proceeds were to be paid to PTAL as custodian for LMIM as responsible entity for the FMIF. The plaintiff does not shrink from the

⁸⁹ I observe that LMIM’s rights and claims made against Gujarat were not for this MPF-Bellpac loan.

submission that the defendants would have done so cognisant of the fact that to do so would or might have been a breach of LMIM's duty as trustee of the MPF.

- [158] The plaintiff's first scenario involves acceptance by LMIM as trustee of the MPF of nothing in return for its releases under the Deed of Release and Deed of Settlement and Release and agreement to pay Coalfields \$1.3 million, which makes the factual conclusion that LMIM would have entered into the transaction as trustee of the MPF on that basis *prima facie* unlikely.
- [159] But there is more to it than that. The plaintiff's first scenario assumes two further facts. First, that there was no understanding of the type alleged by the defendants that in funding the proceedings, LMIM as trustee of the MPF was to receive a share of the proceeds. Second, that LMIM as trustee of the MPF had been funding the proceedings as second mortgagee under the mortgages. Let those assumptions be accepted for the purpose of analysis.
- [160] From those assumed facts, it follows that in negotiating for and considering the proposed terms of the settlement, LMIM as trustee of the MPF, by the defendants, would have been aware that if the settlement proceeded, it would receive nothing. Second, they would have been aware that in funding the proceedings in the past, LMIM as trustee of the MPF had thrown good money after bad. Third, they would have been aware that in continuing to fund the solicitors and other expenses of progressing the settlement negotiations to a conclusion, on the terms of the Deed of Release, the Deed of Settlement and Release and the Gujarat contract, LMIM as trustee of the MPF was obtaining no benefit and was acting solely to assist LMIM as responsible entity of the FMIF. Fourth, they would have been aware that LMIM as trustee of the MPF had a duty to act in the best interests of the MPF and that it would be a breach of trust to use or to have used the trust funds of the MPF solely to benefit LMIM as responsible entity of the FMIF. Fifth, the defendants would have been aware that without LMIM as trustee of the MPF's agreement to the Deed of Release and Deed of Settlement and Release, including payment by LMIM to Coalfields of \$1.3 million, the settlement overall would not proceed.
- [161] It will be observed that the position of the defendants, as directors of LMIM as trustee of the MPF, in that analysis, concerns the relevant legal obligations and possible breach of trust of LMIM as trustee of the MPF, not those of the defendants individually. However, the defendants as directors undoubtedly owed both statutory duties and duties under the general law to LMIM as a company. As well, as individuals, they were exposed personally to the risk of liability for their involvement in any breach of trust by LMIM as trustee of the MPF, either as accessories for knowing assistance or for inducing the breach of trust.
- [162] The solution posited by the plaintiff to those hypothetical facts operating contrary to the likelihood that LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release is the possible protection of LMIM as trustee under cl 18.1(b)(ii) of the Constitution of the MPF. Clause 18.1 provided as follows:

"The following clauses apply to the extent permitted by law:

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

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

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

- (b) In particular, the Manager is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:
 - (i) it relied in good faith on the services of or information or advice from, or purporting to be from, any person appointed by the Manager;
 - (ii) it acted as required by Law; or
 - (iii) it relied in good faith upon any signature, marking or documents.”

[163] There may be a difficulty with the construction of cl 18.1(b)(ii). Because cl 18.1(b) opens with the words “In particular”, the provisions of that paragraph may be construed as operating only where the conditions of cl 18.1(a) are satisfied. By cl 18.1(a)(ii), cl 18.1(a) does not apply if LMIM acted without a belief held in good faith that it was acting in accordance with its duties (to the MPF). The facts of which the defendants would have been aware, as previously discussed, would make it difficult to satisfy that condition, particularly an awareness that, in effect, the funds of LMIM as trustee of the MPF were being wasted in progressing the settlement.

[164] However, that difficulty may be put to one side. Even if cl 18.1(b)(ii) is construed as operating independently, so that LMIM as trustee of the FMIF is not liable for any loss or damage arising out of a matter where in respect of that matter it acted as required by law, the question remains whether that relief from liability would have been engaged in the circumstances of the case. In my view, it would not. A trustee of a trust is not “required by law” to act in breach of trust because it is subject to an inconsistent duty, imposed by statute,⁹⁰ to act in the best interests of the members of a management investment scheme or to observe a duty of care and diligence to members of a managed investment scheme.⁹¹

[165] Once that conclusion is reached, the question remains whether LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the footing that all the settlement proceeds would go to PTAL as custodian for LMIM as responsible entity of the FMIF, as discussed above.

[166] In my view, there is no sufficient basis for finding, as a matter of inference and fact that the defendants, or a sufficient number of them, would have agreed to a resolution or decision as the board of directors of LMIM as trustee of the FMIF to do so, or that hypothetical directors acting reasonably, would have done so.

⁹⁰ *Corporations Act 2001* (Cth), s 601FC(1)(c).

⁹¹ *Corporations Act 2001* (Cth), s 601FC(1)(b).

- [167] The plaintiff did not allege that this is a case where the damage suffered as a result of the contravention constituted by the breaches of duty alleged was the loss of a valuable commercial opportunity⁹² for PTAL as custodian for the FMIF to receive all of the settlement proceeds. Accordingly, it is unnecessary to consider any question of that kind.

Causation under the second scenario - all the settlement proceeds except the amount funded from the MPF with interest

- [168] The second scenario alleged in paragraph 45AB of the statement of claim posits that the plaintiff as responsible entity for the FMIF suffered damage measured by the difference between the amount received by and credited to LMIM as trustee of the MPF and the amount that LMIM as trustee of the MPF contributed to fund the proceedings together with interest at a commercial rate. This damage is alleged to have resulted from the contravention of the defendants' breaches of the duty of care and diligence to members.
- [169] Again, there was no direct evidence of what the defendants would have done had they not decided as directors of LMIM as responsible entity of the FMIF to credit the higher amount of 35 percent of the settlement proceeds to LMIM as trustee of the MPF. Accordingly, again, the question is whether it should be inferred that LMIM as trustee of the MPF would have entered into the Deed of Release and Deed of Settlement and Release on the basis of the lower amount being received by and credited to LMIM as trustee of the MPF.
- [170] As with the first scenario, it is necessary to identify the facts on which the hypothetical decision would have turned with some precision. It is not entirely clear whether the plaintiff, on the second scenario, alleges that there was no understanding of the type alleged by the directors. However, let it be assumed that it does and that there was no such understanding. Second, let it also be assumed that the defendants were aware that LMIM as trustee of the MPF had been funding the proceedings on the footing that it was doing so as second mortgagee. Third, let it be assumed that the defendants were aware that the terms of the proposed settlement would not result in LMIM as trustee of the MPF receiving any amount as second mortgagee. Fourth, let it be assumed that the defendants were aware that it would be a breach of the duty of care and diligence to members of LMIM as responsible entity of the FMIF to agree to pay an amount calculated by reference to the expected return of a litigation funder who agrees to provide funding in advance of the prosecution of litigation of the kind involved in the proceedings.
- [171] If those are the relevant facts, in my view, it may be a reasonable inference that the defendants as directors of LMIM as trustee of the MPF would have agreed to enter into the Deed of Release and Deed of Settlement and Release in order to permit the settlement to proceed on the second scenario. Whether or not to do so would be a commercial decision to be made by LMIM as trustee of the MPF. In making such a decision as trustee, LMIM might have sought judicial advice,⁹³ but courts are reluctant sometimes to give such advice upon a commercial decision.

⁹² *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

⁹³ *Trusts Act 1973* (Qld), s 96.

- [172] The further prosecution of the proceedings, as the alternative to a settlement under which LMIM recovered the MPF's funds expended in prosecuting the proceedings to date, together with interest, would have exposed LMIM as trustee of the MPF to further risks. First, there may have been a risk that LMIM as trustee of the MPF would not be able to continue to fund the proceedings to judgment. Second, there were the risks that LMIM as trustee of the MPF may not succeed as plaintiff or defendant in the Gujarat proceedings and that, in any event, it may not succeed against a solvent party. Third, there was the risk that on the realisation of the mortgaged property, LMIM as trustee of the MPF and subsequent mortgagee and chargee to PTAL as custodian for the FMIF would receive none of the proceeds.
- [173] None of these questions was pursued, as a matter of fact, at the trial, in order to better inform the answer to the factual question whether the alleged damage resulted from the directors' alleged breaches of the duty of care and diligence to members, because the defendants but for their contravention of the duty of care and diligence, would have agreed to a division of the settlement proceeds of receipt by the MPF of the amount of the funding provided for the Gujarat proceedings with interest. The result is that the court is not well informed as to the degree of the likelihood or possibility that LMIM as trustee of the MPF would have agreed to enter into the Deed of Release and Deed of Settlement and Release in exchange for a division of the settlement proceeds that credited it with the amounts paid to fund the proceeding with interest.
- [174] In particular, the parties did not address whether LMIM as trustee of the MPF would have agreed to pay \$1.3 million to Coalfields in return for that division of the settlement proceeds. The plaintiff submits that the relevant amount of the costs that were funded by the MPF should be calculated by subtracting \$414,585.71 from the amount alleged and admitted in the pleadings of \$1,950,421.69. The plaintiff did not address why the defendants as directors would have agreed to enter into the three contracts and to pay Coalfields \$1.3 million in return for a counter-payment from the settlement proceeds of either \$1,950,421.69 or \$1,535,835.98 with interest.
- [175] In denying paragraph 45AB, the defendants raise a number of grounds, not all of a piece.
- [176] The first defendant alleges that settlement obtained under the Deed of Release, Deed of Settlement and Release and Gujarat contract was the compromise of a long running dispute, LMIM and its legal advisers considered that LMIM as trustee for the MPF had uncertain prospects of success in the proceedings, Gujarat was considered by LMIM and its legal advisers to be a difficult litigant and negotiator, the defendants formed the view that the settlement was the best settlement that could be achieved in relation to the proceedings, that expending further costs on litigating the proceedings was of no commercial value to LMIM as trustee for the MPF and that it is to be inferred that LMIM would not have taken any steps that created a risk that the settlement would not proceed. As well, the first defendant alleges that Gujarat would not have settled on terms which left claims made on behalf of LMIM as trustee for the MPF unresolved.
- [177] These allegations or grounds of defence made by the first defendant were not joined in by the other defendants. Their position, summarised, was that absent the agreement to divide the settlement proceeds in the ratio of 65:35, the proceedings would not have been settled.

Funding proceedings against Gujarat as second mortgagee

- [178] As mentioned, the plaintiff alleges that LMIM as trustee of the MPF funded the proceedings against Gujarat as second mortgagee. Whether that is the correct factual characterisation depends on a number of underlying circumstances and facts.
- [179] In April 2009, when the proceedings by and against Gujarat started, PTAL as custodian for the FMIF and lender to Bellpac was first mortgagee of the Bellpac land under a registered real property mortgage and first chargee of Bellpac's assets and undertaking under an equitable fixed and floating charge. LMIM as trustee of the MPF and lender to Bellpac was second mortgagee of the Bellpac land under a real property mortgage and second chargee of Bellpac's assets and undertaking under an equitable fixed and floating charge. In addition to their rights otherwise, *inter se*, a deed of priority regulated the rights of PTAL as first mortgagee and first chargee on the one hand and LMIM as second mortgagee and second chargee on the other.
- [180] Bellpac was in default under both the first mortgage and charge and the second mortgage and charge. PTAL as custodian for LMIM as responsible entity of the FMIF and LMIM as trustee of the MPF had issued notices of exercise of power of sale under the real property mortgages.
- [181] What were LMIM's rights as trustee of the MPF in relation to the secured property? As second mortgagee of the Bellpac land, LMIM was *prima facie* entitled to sell the Bellpac land. However, it could sell only subject to the first mortgage. Theoretically, LMIM as trustee of the MPF could have appointed a receiver to Bellpac, but the receivers and managers already appointed by PTAL as custodian for LMIM as responsible entity of the FMIF would take possession in priority.
- [182] An infirmity in the value of LMIM's security rights as second mortgagee and second chargee was that Gujarat held a coal mining lease over the Bellpac land, or part of it, that entitled Gujarat to possession of the Bellpac land until surrender or expiry of the lease.
- [183] However, LMIM as trustee of the MPF had no clear interest in Bellpac's claim and no interest in PTAL's claim. Whilst *prima facie* it was an expense "reasonably incurred"⁹⁴ for LMIM as trustee of the MPF to incur the costs of its claims in the Gujarat proceedings and to defend the cross-claims made against it, so as to increase or preserve its securities as second mortgagee and second chargee, it was not, *per se*, an expense reasonably incurred for it to incur the costs of PTAL as custodian for the FMIF to bring or defend similar claims or the costs of Bellpac, by its receivers and managers appointed by PTAL, where LMIM as trustee of the MPF would receive no particular benefit in doing so.
- [184] Further, as previously discussed, neither LMIM's claims nor its defences in the Gujarat proceedings were those usually brought by or against a second mortgagee or second chargee. No claim was made by LMIM against the mortgagor, Bellpac, and no claim was brought by Bellpac against LMIM.

⁹⁴ *Trusts Act 1973 (Qld)*, s 72.

- [185] It does not necessarily follow, therefore, that in funding almost the whole of the costs of the Gujarat proceedings, LMIM as trustee for the MPF was doing so as second mortgagee or second chargee.
- [186] There is no evidence that the defendants as the board of directors of LMIM considered whether it was proper for LMIM as trustee of the MPF and second mortgagee or chargee to fund the costs of Bellpac by its receivers and managers or of PTAL as custodian for the FMIF.
- [187] Before going further, it is appropriate to identify and consider the plaintiff's claim that the defendants contravened the duty of care and diligence to members more closely.

Alleged breaches of the duty of care and diligence

- [188] The plaintiff made an unwieldy number of allegations of contravention of the duty of care and diligence to members by the defendants in the statement of claim and did not ultimately make submissions in support of all of them, but did not abandon or apply to delete any of them either, except for the allegation that LMIM as trustee for the MPF was not a necessary party for the settlement transaction under the three contracts to proceed.
- [189] Accordingly, it is appropriate to group the many allegations for the purposes of identification and analysis. This was done by the third and fourth defendants' submissions and the other defendants conformed to that framework.
- [190] Summarising, the plaintiff alleges that the defendants:
- (a) failed to adequately read or consider the content of the Allens advice;
 - (b) failed to have proper regard or give adequate consideration to the fact that:
 - (i) PTAL sold the property to Gujarat as a mortgagee exercising power of sale;
 - (ii) the FMIF had priority; and
 - (iii) the MPF could not have prevented the sale of the property to Gujarat under the Gujarat Contract by refusing to provide a release of the MPF Mortgage over the property;
 - (c) failed to have proper regard or to give adequate consideration to whether there was no necessity for the FMIF to reach agreement with the MPF about sharing the proceeds because:
 - (i) LMIM as trustee for the MPF was not a party to the Deed of Release or the Gujarat contract;
 - (ii) there was no binding agreement; and
 - (iii) the agreement of LMIM as trustee of the MPF was not required in order for PTAL as custodian for the FMIF to perform the obligations under the Deed of Release and the Gujarat Contract;
 - (d) failed to have proper regard or give adequate consideration to the fact that:
 - (i) LMIM as trustee of the MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac;

- (ii) LMIM as trustee of the MPF had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF Bellpac loan; and
- (iii) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;
- (iv) PTAL was, as at 22 June 2011, owed \$52M by Bellpac.
- (e) failed to consider whether the MPF could be treated as if it was an arm's length litigation funder when it was a second registered mortgagee with second priority;
- (f) failed to consider whether it was appropriate to split the settlement proceeds in the ratio of 65:35;
- (g) failed to obtain independent advice as to whether in the circumstances:
 - (i) LMIM as trustee for the MPF could be treated as if it were an arm's length litigation funder;
 - (ii) it was reasonable for LMIM as trustee for the MPF to be paid in accordance with the division of the proceeds – an amount above the sum it had paid, or any amount at all;
 - (iii) it was in the interests of members of the FMIF to agree that LMIM as trustee of the MPF would be paid as per the ratio of 65:35 (an amount above what it had paid) or any amount at all;
- (h) took into account the Allens advice and the WMS report which, as they ought to have known, did not constitute the advice identified above;
- (i) in the circumstances, failed to have proper regard or give adequate consideration to the different interests of the members of the FMIF and the beneficiaries of the MPF;
- (j) acting reasonably, ought to have concluded the settlement of the Deed of Release and Gujurat contract could occur without the agreement of the MPF;
- (k) ought to have concluded that they need not reach an agreement with LMIM as trustee for the MPF about the sharing of proceeds for the settlement to occur;
- (l) the directors ought not to have concluded the proceeds split was fair to the FMIF;
- (m) ought not to have concluded the proceeds split was in the best interests of the FMIF's members;
- (n) ought not to have concluded the proceeds split was reasonable;
- (o) ought not to have concluded that LMIM as trustee of the MPF was in an analogous position to a litigation funder and that the settlement proposals would be reasonable on an arms-length basis;
- (p) ought not to have concluded the WMS report or the Allens advice justified the payment of any part of the settlement to the MPF;
- (q) ought to have determined that LMIM as trustee of the MPF had no entitlement to be paid the settlement, or no entitlement beyond reimbursement;
- (r) ought to have determined that the settlement payment was not in the interests of the members of the FMIF;

- (s) ought to have determined that the settlement payment would cause detriment, in the form of depletion of assets, to the FMIF (either if the payment was made at all or if the payment was beyond reimbursement); and
- (t) ought to have decided not to split the proceeds at all and to pay all the proceeds to FMIF.”

[191] Even summarised, the unnecessarily repetitive pleading of the approximately 20 categories of alleged contraventions is apparent.

[192] One allegation is that the defendants failed to adequately read or consider the content of the Allens advice. In substance, the plaintiff submits that because the defendants did not appreciate that the Allens advice, properly read, was inadequate to justify division of the settlement proceeds the defendants must not have read it or adequately read it. I reject that allegation even though some of the defendants could not say in evidence whether they had read the Allens advice. Having regard to the time that passed between March 2011 and when they gave evidence that is hardly surprising.

[193] Another allegation is that the defendants did not obtain their own independent advice as directors, separate from the Allens advice to LMIM. I reject that allegation too. Nothing in the circumstances prevented LMIM from obtaining external advice from Allens (or WMS) as independent advisors or required that the defendants individually or collectively must obtain separate advice.

[194] A third allegation is that the defendants ought not to have concluded that the Allens advice (or the WMS report) justified the payment of any part of the settlement to the MPF.

[195] The WMS Report was obtained on 7 March 2011. WMS, a firm of chartered accountants, were asked for their opinion as to a fair and reasonable split of the likely litigation proceeds to be received by FMIF and MPF. WMS concluded:

“In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm’s length transactions.”

[196] The Allens advice was obtained on 28 March 2011. The question asked of Allens was stated in the advice as follows:

“You have asked us whether it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, given that the RE is in a position of conflict (in its capacity as responsible entity for FMIF and in its capacity as trustee for MPF).”

[197] The answer given by Allens was:

“We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict, subject to the following matters...”

[198] The qualifications to the Allens advice were as follows:

“(a) We assume that in its capacity as responsible entity of the FMIF, the RE [LMIM] has considered all feasible options for the recovery of

the loan advanced by FMIF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of FMIF members (see paragraphs 25, 27, 53 and 56 below).

- (b) We assume that in its capacity as trustee of the MPF, the RE has considered all feasible options for the recovery of the loan advanced by MPF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of MPF members (see paragraphs 35 and 37 below.)
- (c) We assume that the decision by the RE in respect of the split will not be made in order to benefit the RE (or any of its associates) personally, for example, by ensuring that the effect of splitting the proceeds in a certain way results in the RE receiving more fees or some other benefit that would not have occurred had the split been done in a different way (see paragraphs 28 and 38 below).
- (d) The directors must be satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm's length. The WMS Chartered Accountants report makes it clear that "there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF". Consequently, the conclusion in the WMS Chartered Accountants report will be an important factor in the RE's decision in respect of the split of the litigation proceeds. However, the RE should not rely solely on the report. The directors of the RE must make "their own independent assessment of the relevant matters, and the advice from WMS Chartered Accountants does not replace "careful judgement by the directors". They should also consider the relevant factors referred to by ASIC In CP 142. See paragraphs 46 to 50 below.
- (e) The RE should ensure that it complies with any procedures in the FMIF compliance plan (or with any other procedures it has in place) in respect of conflicts of interest (see paragraphs 54 and 57 below).
- (f) We assume that the RE has not made any representations to the members in the FMIF or the MPF which are inconsistent with the proposal to split the litigation proceeds in the manner outlined in the report of WMS Chartered Accountants.
- (g) The directors of the RE must comply with their general law and statutory duties under the Corporations Act (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed)."

[199] The second defendant and sixth defendant, who were more closely involved in the Gujarat proceedings than the other defendants, did read and consider the WMS report and the Allens advice. The third and fourth defendants were less involved. The third

defendant relied on those who were more involved, including Mr Monaghan. The fourth defendant regarded both WMS and Allens as well-known competent and independent firms. His memory is that his understanding was that the advices were favourable to the proposed division of the settlement proceeds. In my view, it should be found that the defendants as directors did exercise independent judgment in considering the Allens advice.

[200] Another set of allegations is that had the defendants adequately considered the Allens advice they would have concluded that it did not justify the proposed division of the settlement proceeds.

[201] The plaintiff particularises, and relies upon, three grounds or areas for the allegation that the defendants failed to consider the content of the Allens advice, *viz*:

- (a) the alleged failure to identify the matters pleaded in paragraph 30H of the statement of claim;
- (b) the absence of any reference in the Deed Poll to the Allens advice, LMIM's Conflicts Management Policy or ss 601FC and 601FD of the CA; and
- (c) that the draft Deed Poll was circulated by Mr Monaghan and Ms Kingston to the defendants on or about 10 June 2011, ahead of its execution on 14 June 2011 (the implication being that the Deed Poll was only considered in a perfunctory way).

[202] As to the last of those grounds or areas, a number of the directors referred to a meeting at LMIM's boardroom on 14 June 2011, when Mr Monaghan went over the Gujrat proceedings, the proposed settlement and the terms of the Deed Poll. Again, not surprisingly given the interval of time that passed, not all of the defendants recalled the meeting or its detail, but I find that the meeting occurred and that the defendants gave consideration at the meeting to whether they should enter into the Deed Poll on the terms of the proposed division of the settlement proceeds.

[203] As to the second ground or area, namely the alleged absence of references in the Deed Poll to the Allens advice, the Conflicts Management Policy or ss 601FC and 601FD, in my view, no failure to consider the Allens advice should be inferred from those circumstances. That the Allens advice is not referred to in the Deed Poll is no evidence, one way or the other, as to whether it was read or taken into account by the defendants. That none of the Conflicts Management Policy, s 601FC, or s 601FD is referred to in the Deed Poll is no evidence as to the efficacy of the Allens advice, one way or the other, or whether it was read and considered by the defendants.

[204] As to the third ground or area, namely the failure to identify the matters pleaded in paragraph 30H of the statement of claim, that paragraph makes no fewer than seven distinct complaints about the content of the Allens advice, that the plaintiff alleges the defendants failed to identify. The extent and nature of the pleaded complaints invokes the oft-cited consideration that a question of negligence must not be viewed through the convenient prism of hindsight.⁹⁵ In my view, the plaintiff has disregarded that consideration in the presentation of its case.

⁹⁵ *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, 329 [34].

- [205] The first complaint is that the Allens advice does not say how the division of the settlement proceeds is in the best interests of the members of the FMIF. It will be observed that the point is based on the "best interests" of the members of the FMIF. The question Allens were asked to consider was whether the proposed division was legally acceptable, given that LMIM was in a position of conflict. Whether the division was commercially reasonable was not specifically the subject of Allens advice, nor whether it was fair as between the conflicting interests of the members of the FMIF and the beneficiaries of the MPF. The qualifications set out in paragraph [198] above demonstrate that, as do other paragraphs of the Allens advice. I reject that the Allens advice was deficient because it did not further opine on the question of the best interests of the members of the FMIF.
- [206] I would add that the evidence supports the conclusions that it was a reasonable view that continuation of the Gujarat proceedings was not a good option for PTAL as custodian for the FMIF and that compromise or settlement of the Gujarat proceedings would require settlement of LMIM's claims as trustee for the MPF as well as compromise or settlement of PTAL's and Bellpac's claims.
- [207] The second complaint is that the Allens advice stated in paragraph [56] that LMIM would need to be satisfied that the terms of the settlement and the proposed split of litigation proceeds did not unfairly put the interests of the FMIF ahead of the MPF, which misconstrued the effect of ss 601FC(1)(c) and 601FD(1)(c) of the CA. However, in my view, paragraph [56] does not purport to construe or state the effect of those sections.
- [208] The third complaint is that the Allens advice set out inconsistent conclusions but did not state how those inconsistencies were to be resolved. The thrust of the suggested inconsistencies is that the interests of the members of the FMIF and the beneficiaries of the MPF were irreconcilable. It is true to say, first, that it was in the interests of each set of beneficiaries that the full amount of the loan made from their property to Bellpac was repaid and, second, that their interests were in conflict in relation to obtaining that repayment from the proposed settlement proceeds. But it is a step too far, in my view, to say that no reconciliation could be reached. For example, had there been a separate responsible entity and trustee to consider the proposed settlement and the terms that might be acceptable to enter into the Deed of Release, Deed of Settlement and Release and the Gujarat contract, nothing precluded a commercial settlement by the responsible entity of the FMIF that allowed payment of part of the settlement proceeds to the trustee of the MPF, in order to obtain the trustee of the MPF's agreement to give the releases necessary under the Deed of Release and the Deed of Settlement and Release and payment by the trustee of the MPF to Coalfields of \$1.3 million that were necessary parts of the settlement transaction under the three contracts.
- [209] In my view, that LMIM was both the responsible entity of the FMIF and the trustee of the MPF did not make the conflicting interests irreconcilable. It required LMIM to proceed in a manner that was impartial and fair as between the conflicting interests.
- [210] Additionally, the plaintiff alleges and submits that the settlement proceeds were all part of the scheme property of the FMIF. The basis for the contention appears to be that the Deed of Release provided for payment of \$25.5 million of the settlement proceeds by Gujarat to PTAL and the Gujarat contract provided for payment of \$10 million of the settlement proceeds by Gujarat to PTAL. But to view the provision of

the Deed of Release as the determinant of the interests of the parties to the Deed of Release in those proceeds requires that two critical facts be overlooked: first, that a decision had been made by LMIM as responsible entity of the FMIF and by LMIM as trustee of the MPF as to the division of the settlement proceeds as set out in the Deed Poll before the Deed of Release and the Gujarat contract were entered into formally and settled; second, that the cheques provided at completion of the settlement included a cheque or cheques in favour of LMIM as trustee of and holder of the account of the MPF – that is the money intended to be received by LMIM as trustee and credited to the MPF was not received by PTAL as custodian of the FMIF before being transferred to the account of LMIM as trustee of the FMIF.

[211] The fourth complaint is that the Allens advice:

“referred at [16](e) to LMIM’s compliance plan, which contained the terms pleaded at paragraph 30G above, but did not state how the obligations imposed by sections 601FC(1) and 601FD(1) could be reconciled with the statement at [35] of the Allens Advice that LMIM must act in the best interests of the members of the MPF when making any decision regarding the split of the Settlement proceeds.”

[212] In substance, this complaint is the same as the third complaint and does not require further discussion, except to observe that the duty of a responsible entity to act in the best interests of the members of a registered scheme is not, per se, irreconcilably inconsistent with a power of the responsible entity to enter into a commercial compromise where the responsible entity may owe a conflicting fiduciary obligation to act in the best interests of the beneficiaries of another trust, depending upon the circumstances.

[213] The fifth complaint is that the Allens advice:

“stated at [57] that LMIM would need to ensure that it followed any procedures or policies it has established in accordance with section 912A(1)(aa) of the Act for managing conflicts of interest, but did not state how the proposed proceeds split could be reconciled with the matters pleaded at paragraph 30G [of the statement of claim].”

[214] However, there is no allegation that LMIM did not follow a procedure or policy it had established in accordance with s 912(1)(aa) of the CA. Paragraph 30G alleges that LMIM’s conflicts management policy provided that the duties under ss 601FC(1) and 601FD(1) override any conflicting duty of a director under Part 2D.1 of the CA. The Allens advice was not concerned with a conflict of those duties and did not misstate the effect of them. The plaintiff does not allege how any of the defendants breached their duty of care and diligence to members in relation to the alleged failure of the Allens advice to explain how the division of the proceeds could be reconciled with the priority to be given to the duties to the members of the FMIF.

[215] The sixth complaint is that the Allens advice:

“stated at [63] that the effect of section 601FD(2) of the Act may have been to impose fiduciary duties on LMIM to act in the best interests of members of the FMIF, but did not identify what those duties would be or that such duties would include a duty of undivided loyalty.”

- [216] This is an extraordinary allegation, first, because it charges the defendants with contravention of the duty of care and diligence to members for failing to identify an alleged deficiency in legal advice as to the possible effect of s 601FD(2) in relation to fiduciary duties. No basis was identified for a contention that the defendants who were not lawyers should have done so. Second, it is deficient even as a pure criticism of the legal advice, in my view. A failure to identify what the possible fiduciary duties might be could only be relevant if it was relevant to the matter of the advice. Any other discussion would have been irrelevant. The suggested failure to identify a fiduciary duty “of undivided loyalty” would not have assisted in the consideration of the particular questions for advice raised on the facts of the case as instructed to Allens. The thrust of paragraph [63] of the Allens advice was to warn as to the possible width of the statutory duties imposed under s 601FD(1) of the Act, by reason of the priority given to those duties under s 601FD(2). It was not necessary for Allens to go further, in my view.
- [217] The seventh complaint is that the Allens advice:
- “did not, when properly construed, reach an opinion that the proposed transaction was ‘legally acceptable’.”
- [218] Paragraph 16 of the Allens advice concluded that it was:
- “legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict”.
- [219] Whatever is connoted by the seventh complaint is imported by the words “when properly construed”. Whatever those words might be intended to mean, no question of construction of paragraph 16 is raised, in my view, so it is unnecessary to consider them further.
- [220] In my view, none of the seven complaints made in paragraph 30H of the statement of claim is a matter that the defendants failed to identify in contravention of the duty of care and diligence to members.
- [221] By the reply, the plaintiff alleges that LMIM’s instructions to Allens for the Allens advice were deficient in the respects alleged in paragraph 30C of the statement of claim. However, except for the subject of paragraph 30C(d)(iii), any issue as to the deficiency in their instructions would be a false issue as the alleged deficient instructions are not alleged to have given rise to a contravention by the defendants of the duty of care and diligence to members.
- [222] The exception in paragraph 30C(d)(iii) is that the instructions:
- “did not state that there was no binding express prior arrangement for the MPF to be paid any amount if the amount recovered in the litigation did not cover the whole of the debt owing to the FMIF.”
- [223] However, as previously discussed, the Allens advice stated:
- “The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE’s directors that it was appropriate for MPF’s contribution to be

recognised by providing MPF with a share of any proceeds recovered by the litigation.”

- [224] I am unable to comprehend the gravamen of the plaintiff's complaint on this allegation, except to the extent that there may be a difference of meaning between the expressions “no binding express prior arrangement” and “no formal agreement... despite it being the understanding...”. I do not think that, in context, any difference of meaning is conveyed by the Allens advice. Whatever the content of the express instructions, it does not appear that the Allens advice was based on a false assumption that there was any binding agreement made prior to the advice under which it was a term that LMIM as trustee of the MPF was entitled to a split of the settlement proceeds.
- [225] Accordingly, in my view, the defendants did not breach the duty of care and diligence to members in failing to consider that Allens were not given an instruction that there was no binding express agreement.
- [226] As previously stated, the plaintiff alleges, in addition to and apart from the alleged deficiencies in the Allens advice and the instructions given to Allens, that the defendants ought not to have concluded that the WMS report or the Allens advice justified the payment of any part of the settlement proceeds for the benefit of the MPF.
- [227] There is no basis for saying that the WMS report and the Allens advice did not support the conclusion that the proposed ratio of 65:35 was fair and reasonable, if the directors were satisfied that the proposed settlement with Gujarat and the other parties was in the best interests of the members and beneficiaries of both funds.
- [228] Repeating, the WMS report concluded that:
- “In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions.”
- [229] And the Allens advice concluded that:
- “We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict ...”
- [230] Based on the assumptions contained in them, the report and advice were unambiguously supportive of the proposed division of the settlement proceeds.
- [231] The plaintiff alleges that the defendants contravened the duty of care and diligence to members in failing to have proper regard to or to give adequate consideration to the fact that PTAL sold the property to Gujarat as mortgagee exercising power of sale, and that PTAL as first mortgagee for the benefit of the FMIF had priority over LMIM as second mortgagee. Another similar allegation is that the defendants failed to have proper regard to the circumstances that LMIM as trustee of the MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac and that LMIM as trustee of the MPF had originally funded the Gujarat proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF-Bellpac loan.

- [232] The sale by PTAL as mortgagee was of the Bellpac land. The purchase price of the land comprised only \$10 million of the total amount of \$45.5 million paid by Gujarat under the three contracts under which the Gujarat proceedings were settled.
- [233] I have previously discussed that it is an incomplete analysis to describe LMIM as funding the Gujarat proceedings as trustee of the MPF, because it fails to deal with the facts that PTAL and Bellpac, by the PTAL appointed receivers and managers, were plaintiffs and defendants in the Gujarat proceedings.
- [234] These questions are relevant to whether there was a contravention of the duty of care and diligence to members by the defendants and also to whether the alleged contravention caused the members of the FMIF to suffer any loss.
- [235] As previously stated, the plaintiff did not allege or attempt to prove or submit that Gujarat would have entered into some other series of contracts to settle the Gujarat proceedings apart from the three contracts that were made. The point is significant, on the facts, because Gujarat did not agree to pay the whole of the amounts payable under the three contracts as the purchase price of the Bellpac land under the Gujarat contract.
- [236] Accordingly, whether the defendants ought to have attempted to have achieved that result, and contravened the duty of care and diligence to members in not doing so, must be considered in the light of the prospect whether Gujarat would have been prepared to do so and the prospect of whether LMIM as trustee of the MPF could have agreed properly to release Gujarat and the other parties to the Gujarat proceedings and to pay Coalfields \$1.3 million.
- [237] The third and fourth defendants submit that, acting reasonably, the defendants were entitled to consider the circumstances in which the funds of the MPF were deployed and contributed to the successful recovery of the total amount of \$45.5 million on settlement of the Gujarat proceedings and for the sale of the Bellpac land to Gujarat. I agree. But that does not fully answer the allegation that the defendants failed to give proper consideration to the matters raised by these allegations.
- [238] The third and fourth defendants further submit that the defendants were entitled to make a decision based on more than simply the strict legal rights of the parties to the Gujarat proceedings. If, by that, it is meant that the defendants were entitled to make a decision involving a gift of the scheme property of the FMIF to LMIM as trustee of the MPF because it would be fair to do so, even though there was no entitlement to that property, I disagree. The constitution of the FMIF as the trust instrument gave no power to LMIM to give away the scheme property. The defendants as directors of LMIM cannot have had greater powers of disposition of the scheme property than LMIM as responsible entity had.
- [239] However, that is not how I characterise the relevant positions and rights of the parties, as previously stated. In any event, in my view, the defendants did not contravene the duty of care and diligence to members by failing give adequate consideration to the fact that PTAL sold the Bellpac land to Gujarat as a mortgagee exercising power of sale, and that PTAL as first mortgagee for the benefit of the FMIF had priority over LMIM as second mortgagee to the proceeds of that sale.

[240] The plaintiff alleges that the use by the defendants of the litigation funding analogy in reaching their decision as to the division of the settlement proceeds in the ratio of 65:35 was a contravention of the defendants' duty of care and diligence to members. Again, the allegation is put in various ways, namely:

- (a) the defendants failed to consider whether the MPF could be treated as if it was an arm's length litigation funder when it was a second registered mortgagee with second priority;
- (b) the defendants failed to obtain independent legal advice or other independent advice as to whether, in the circumstances outlined above, the MPF could be treated as if it were an arm's length litigation funder; and
- (c) the defendants ought not to have concluded that the MPF was in an analogous position to a litigation funder and that the settlement proposals would not be reasonable on an arm's length basis.

[241] Clause 3.1 of the Deed Poll records the defendants' considerations and conclusions as including:

“(m) the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length - the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous - in giving consideration to this issue, the Directors considered the litigation funding practices in the open market.”

[242] That is, the defendants were of the opinion that there was an analogy to be made between the facts of this case and an arm's length dealing between a litigant and a litigation funder. It is not in dispute that the division of the proceeds would have been reasonable if that were the case. That is not the thrust of the plaintiff's case on this point. The thrust is that there was no proper basis for the analogy between a commercial litigation funder and LMIM as funder of the Gujarat proceedings.

[243] It is apparent from what I have previously said that I do not consider it accurate to characterise LMIM's position as simply funding the Gujarat proceedings as second mortgagee. It was doing so, in part, for the benefit of Bellpac and for the benefit of PTAL. And its own claims were not those of a second mortgagee as such.

[244] However, it would be equally inaccurate and imprecise to draw a direct analogy between LMIM's position as funder of the Gujarat proceedings and that of a commercial litigation funder. LMIM was not just funding the litigation for the benefit of the members of the FMIF for a commercial share of the litigation proceeds payable to PTAL as custodian of the FMIF. Nor was it doing so for Bellpac, by the PTAL appointed receivers and managers, for the benefit of the FMIF. It was bringing its own claim for damages, as well, and was interested in the outcome of the proceedings by PTAL and Bellpac because it was the second mortgagee of the Bellpac land and second chargee of Bellpac's property.

- [245] The analogy between the position of LMIM as trustee of the MPF as funder of the Gujarat proceedings and a commercial litigation funder with no prior interest in the subject matter of the litigation is not a close analogy, in my view. Once that point in the analysis is reached, this allegation identifies itself as the strongest allegation of a possible contravention of the duty of care and diligence to members by the defendants.
- [246] That is because the measure of the division of the settlement proceeds was made at least in part by reference to the proportionate amounts that might have been appropriate in an arm's length dealing between a commercial litigation funder and a litigant. If the analogy is not a close one, the justification of the apportionment that was made may be weakened.
- [247] The precise question, at this point, is whether in those circumstances the evidence justifies the conclusion that the defendants contravened their duty of care and diligence to members in reaching the conclusion that the ratio 65:35 was appropriate.
- [248] The question of an analogy with a commercial litigation funding arrangement was referred to by LMIM internally, in the WMS report and in the Allens advice.
- [249] The internal references were made in the email from Mr Monaghan to the second and sixth defendants sent on 1 December 2010 and the email from Andrew Petrik to the sixth defendant, copied to the first, second and third defendants, as well as Mr Monaghan sent on 2 December 2010, previously set out.
- [250] WMS's report opined that:
- "In [e]ffect MPF's role was not dissimilar to a litigation funder."
- [251] WMS continued its analysis by referring to two particular litigation funders, although noting that the terms of litigation funding are typically established on a case by case basis. The rates identified were for "normal" ranges of between 20 or 30 percent and 45 percent.
- [252] WMS concluded that:
- "In our opinion, there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF. Accordingly, a range of MPF's entitlement between 30% to 40% would appear reasonable given the complexities in the matter and the fact it appears to be close to settling pre trial."
- [253] Allens advice provided that:
- "(d) The directors must be satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm's length. The WMS Chartered Accountants report makes it clear that 'there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF'. Consequently, the conclusion in the WMS Chartered Accountants report will be an important factor in the RE's decision in respect of

the split of the litigation proceeds. However, the RE should not rely solely on the report. The directors of the RE must make 'their own independent assessment' of the relevant matters, and the advice from WMS Chartered Accountants does not replace 'careful judgement by the directors'. They should also consider the relevant matters referred to by ASIC in CP 142...⁹⁶

- [254] However, Allens' advice as to the division of the proceeds was not based solely on the analogy between LMIM as the funder of the Gujarat proceedings and an arm's length commercial litigation funder. According to the Allens advice, it was also based, inter alia, upon the understanding of the directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation.
- [255] The statement of claim alleges in paragraph 30C(d)(iii) that there was no binding express prior arrangement that LMIM as trustee of the MPF would be paid any amount if the amount that LMIM as responsible entity of the FMIF recovered did not cover the whole of the amount owing by Bellpac to it. So stated, the allegation elides the legal relationships whereby PTAL was the relevant party to the Gujarat proceedings and was the lender to Bellpac and first mortgagee and charge of Bellpac's property. But the meaning is clear enough.
- [256] The statement of claim does not allege that the defendants did not have the understanding alleged in the defence, as a ground of the alleged contraventions of the duty of care and diligence. However, the defendants allege they had the understanding that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation in the defences and the plaintiff denies the understanding in the replies on the ground that the defendants had an expectation that the MPF-Bellpac loan would be repaid in part and possibly in full if LMIM and PTAL were successful in the Gujarat proceedings.
- [257] The defendants rely upon the terms of the WMS report, the Allens advice based on the instructions of LMIM and the Deed Poll signed by the directors as contemporaneous documents supporting the existence of the understanding.
- [258] Second, the defendants rely on the affidavit and oral evidence of the defendants as all supporting the existence of the understanding.
- [259] Against that evidence, the plaintiff relies on a number of facts as contrary to the understanding. First, the plaintiff points to the lack of contemporaneous documents supporting or referring to the understanding, before the time when instructions were given to WMS for the WMS report.
- [260] Second, the plaintiff relies on the absence of any reference to the understanding in a document entitled "ASIC Benchmark Disclosure Update for Investors" dated 2 September 2010. The defendants who gave evidence either did not recall reading the document (the third and fourth defendants) or were not asked about it (the second and sixth defendants). The plaintiff's apparent purpose in relying upon the document is that its terms are inconsistent with existence of the understanding. Although the understanding is not referred to in the document, I am not sure that its terms are

⁹⁶ The reference to CP142 is to ASIC Consultation Paper 142 dated October 2010.

inconsistent with the existence of the understanding. In any event, as at 2 September 2010, the terms of the proposed settlement of the Gujarat proceedings were not known.

- [261] Third, the plaintiff relied on emails passing between the sixth defendant and others, including Mr Monaghan, about the basis of the funding of the Gujarat proceedings by LMIM as trustee of the MPF.
- [262] On 17 August 2010, Mr Tickner wrote to Mr Grant Fischer (copied to the second defendant) asking:
- “Have we documented an agreement between MIF and MPF... if not I think we should formalise as soon as practicable”.
- [263] On 30 August 2010, Mr Tickner wrote to Mr Monaghan asking:
- “Can we amend any agreement we have in place for MPF to assist with litigation costs on Bellpac to also cover Statutory Charges...”.
- [264] The plaintiff also relied on other forensic points in support of its contention that there was no understanding, including that if there was an understanding it would have been documented, that it was illogical for LMIM as responsible entity for the FMIF to “enter in to an arrangement” to pay an unspecified amount for LMIM as trustee for the MPF to fund legal costs when LMIM as the trustee of the MPF was a substantial debtor of PTAL as custodian of the FMIF for a group of assigned loans, that the understanding was an unlikely commercial arrangement, that there was no evidence that the defendants informed the auditors of the understanding or explained it to Deutsche Bank as lender to the FMIF and that the amounts of the funds provided for the Gujarat proceedings were treated by LMIM as trustee of the FMIF as further advances or amounts payable on the MPF-Bellpac loan account. In assessing the relevant documents and the defendants’ evidence, I have not overlooked these points.
- [265] The matters relied on by the plaintiff are not enough, in my view, to reject the defendants’ evidence as to the existence of the understanding. I acknowledge that some of their evidence on the point was vague. Also, it is not to be ignored that the understanding is evidence of the states of mind of the defendants that it is in their interests to give and difficult to contradict. It is quite possible that the defendants believed that they had the understanding at the time when they gave evidence but that their beliefs are mistaken and the product of reconstruction.⁹⁷ Further, the absence of two relevant witnesses should not go unnoticed. The first defendant did not give evidence. The plaintiff submits it should be inferred that his evidence would not have assisted his case.⁹⁸ Second, Mr Monaghan, who was closely involved in the Gujarat proceedings as a lawyer advising LMIM was not called by any of the parties to give evidence. However, no inference is more readily drawn against the defendants because of that, because the plaintiff might have called Mr Monaghan.⁹⁹
- [266] Even so, after all, it is not inherently unlikely that the defendants expected that LMIM as trustee for the MPF would be acknowledged in any settlement for almost entirely funding the Gujarat proceedings. And it must not be forgotten that the plaintiff’s

⁹⁷ Compare *Chappel v Hart* (1998) 195 CLR 232, 272.

⁹⁸ *Jones v Dunkel* (1959) 101 CLR 298, 308 and 321.

⁹⁹ *Crossman v Sheahan* [2016] NSWCA 200, [341]-[344].

claim was not raised until a number of years after the events in question, so it is not surprising that the defendants' recollections are vague. It is the contrary that would be surprising, in the absence of detailed contemporaneous notes.

- [267] The conclusion I reach, on the balance of probabilities, is that in making their decision as to the division of the proceeds the defendants had the understanding that LMIM as trustee of the MPF would receive a share of any proceeds from the Gujarat litigation.
- [268] Ultimately, the plaintiff alleges in paragraph 34(g) of the statement of claim that the defendants failed to have proper regard or give adequate consideration to the different interests of the FMIF and the MPF, meaning the different interests of the members of the FMIF as a registered scheme on the one hand and the beneficiaries of the MPF as an investment trust on the other hand, having regard to the matters alleged in subparagraphs 34(aa) to (e) inclusive. In my view, this allegation does not raise any additional point to the separate subject matters of those subparagraphs that are separately considered to the extent necessary above. Nevertheless, I also accept the third and fourth defendants' submission that, in fact, the defendants did consider the different interests of the two funds. Inter alia, the Deed Poll records that PTAL held a first registered mortgage in respect of different indebtedness to that held by LMIM. The Deed Poll also stated that the consent of the MPF was required for the settlement of the Gujarat proceedings and concluded that the "Settlement Proposals are in the best interests of each Relevant Fund's members".
- [269] It is appropriate to return to paragraph 34(d) of the statement of claim where the plaintiff alleges that the defendants failed to consider whether LMIM as trustee of the MPF could be treated as if it was an arm's length litigation funder and whether it was appropriate to divide the settlement proceeds in the ratio of 65:35. The substance of this allegation is that the defendants gave too much weight to the analogy of the amount that might have been payable to a commercial litigation funder of the Gujarat proceedings. Similarly, paragraph 37A(aa)(iii) alleges that the defendants ought not to have concluded that the proceeds split was fair to the FMIF and paragraph 37A(aa)(v) alleges that the defendants ought not to have concluded that the division of the proceeds was not unreasonable.
- [270] The third and fourth defendants submit that the plaintiff does not make an identifiable complaint about the process of reasoning. I do not agree. The plaintiff does allege that the defendants failed to consider whether LMIM as trustee of the MPF could be treated as if it was an arm's length litigation funder.
- [271] The WMS report stated:
- "Based on the background section of our report, we note the following pertinent points:
- The matter became very complicated and the litigation was highly complex and the prospects uncertain. In our opinion, litigation by its nature is difficult to predict with absolute certainty.
 - FMIF was in the position of being unable to provide additional funding, and of being unable to satisfy any adverse costs orders that might have been made against LM.
 - The burden of funding the litigation fell largely on MPF.

The funding in the litigation by FMIF and MPF is summarised at Table 2 above being \$1,638,438 by MPF and \$161,471 by FMIF. As noted above, this does not include the \$1.3M to another party Coalfields, to secure the withdrawal of certain caveats.

In our opinion, based on the information provided and our discussions with Monaghan Lawyers a commercial decision was undertaken by MPF to fund the litigation to attempt to preserve the capital entitlements under the loan documents. In [e]ffect MPF's role was not dissimilar to a litigation funder."

- [272] Although, in my view, the analogy with an arm's length litigation funder was not particularly strong, the clear import of the WMS report was that it was an appropriate comparison and their conclusion was that LMIM's role was not dissimilar. That conclusion constituted independent expert advice and was reasoned. Other analogies might have been considered. For example, creditors who fund a liquidator to bring proceedings to recover the property of the company for the benefit of the unsecured creditors may receive more than a refund of the contributed costs by way of distribution, in contravention of the *pari passu* and priority principles that otherwise apply in a company liquidation.¹⁰⁰
- [273] Looking at the question of the fairness and reasonableness of the proposed division of the settlement proceeds as a matter of first principle, it is apparent that both the WMS report and the Allens advice considered that it was relevant to assess it as if it were an arm's length commercial transaction. In my view, that was the correct approach. The analogy made between LMIM as trustee of the MPF as funder of the Gujarat proceedings for the benefit of, inter alia, PTAL as custodian of the FMIF and Bellpac and a commercial litigation funder was part of that approach. But there were other matters.
- [274] One was that the Gujarat proceedings would not have been carried on by PTAL and the Bellpac receivers and managers appointed by PTAL without the funding provided by LMIM as trustee of the MPF. That funding included that LMIM gave security for costs of the proceeding by PTAL and Bellpac, as well as paying the costs of their own lawyers. Second, the Gujarat proceedings could not be settled on the terms of the proposed Gujarat contract, Deed of Settlement and Release and Deed of Release without LMIM's releases as provided for, in particular, in the Deed of Release. Third, the Gujarat proceedings could not be settled on the terms of the proposed Gujarat contract, Deed of Settlement and Release and Deed of Release without LMIM paying \$1.3 million to Coalfields at or before settlement. Fourth, the defendants had the understanding that LMIM as trustee of the MPF would receive a share of any proceeds from the Gujarat litigation.
- [275] In my view, it was prudent for LMIM to obtain external independent professional accounting advice as to whether and to what extent the proposed division of the settlement proceeds was fair and reasonable in an arm's length dealing. Looked at objectively, to do so followed some of the principles underlying similar models for assessment of a related party transaction¹⁰¹ or the process of obtaining an independent

¹⁰⁰ *Corporations Act 2001 (Cth)*, s 564; *Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd (in liq)* (1995) 18 ACSR 294, 296; *Proficient Building Company Pty Ltd* (2011) 87 ACSR 183, [16].

¹⁰¹ *Corporations Act 2001 (Cth)*, s 210, 219, 220 and 221. ASIC Regulatory Guide 111.

expert's report to assist in making a decision upon voting for or against a scheme of arrangement.¹⁰² Prima facie, generally speaking, it is reasonable for the directors of a corporation to obtain and act on external independent professional accounting and legal advice as to whether a transaction is fair and reasonable to assist in the consideration of whether it is in the best interests of the company and its shareholders and whether the directors duties of care and skill are discharged, although there has been controversy at times in the case law as to the extent to which directors in performing their functions may rely on information provided by delegates or advisors.¹⁰³ Trustees, too, are authorised to do so, generally speaking.¹⁰⁴ Of course, neither directors nor trustees are thereby absolved from the obligation to independently consider and make the relevant decisions in exercising their powers of management or investment, according to any statutory or general law duty of care and diligence to members that applies.

[276] In the case of a company director, and at least the statutory duty of care and diligence imposed under s 180(1) of the CA, s 189 of the CA specifically provides as follows:

“189 Reliance on information or advice provided by others

If:

- (a) a director relies on information, or professional or expert advice, given or prepared by:
 - (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
 - (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence; or
 - (iii) another director or officer in relation to matters within the director's or officer's authority; or
 - (iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and
- (b) the reliance was made:
 - (i) in good faith; and
 - (ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and

¹⁰² *Corporations Act 2001 (Cth)*, s 411(3)(b), *Corporations Regulation*, reg 5.1.01(1)(a)(ii) and Schedule 8, para [8303] and ASIC Regulatory Guide 111

¹⁰³ Compare, for example *AWA Ltd v Daniels trading as Deloitte Haskins & Sells* (1992) 7 ACSR 759, 868 and 1015 and *Daniels v Anderson* (1995) 13 NSWLR 408; 16 ACSR 607, 665. The question is discussed more fully in an article by A Gibbs and J Webster, “*Delegation and reliance by Australian company directors*”, (2015) 33 C&SLJ 297 and in Ford, Austin and Ramsay's *Principles of Corporations Law*, August 2019, [8.340.12]-[8.340.15].

¹⁰⁴ *Trusts Act 1973 (Qld)*, s 54(1); *Commissioner of Taxation v Bargwanna* (2012) 244 CLR 655, 662, [11].

- (c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved."

- [277] Where it applies, s 189 has the effect that the director's reliance on the advice is taken to be reasonable, unless the contrary is proved. None of the parties referred to s 189 or made any submissions as to whether it applies in relation to the duty of care and diligence to members of a director as an officer under s 601FD(1)(b) of the CA. Whether or not s 189 applies, in my view, does not affect the answer to whether the defendants' reliance on the WMS report and the Allens advice was reasonable on the facts of this case. In my view, it was.
- [278] Both WMS and Allens were professional advisers. The defendants believed that their opinions and advices were within their relevant fields of professional competence. The defendants' reliance on those opinions and advices was made in good faith. The defendants made their own assessments of the opinions and advice in varying degrees.
- [279] The sixth defendant instructed WMS with Mr Monaghan. After the second defendant received the WMS report as to the proposed division of the proceeds in the 65:35 ratio, she instructed Mr Monaghan to obtain legal advice as well, which resulted in the Allens advice. She informed the other directors she had done so. When Mr Monaghan obtained and provided the Allens advice to the second defendant, he included a summary of it, saying there was a lot to wade through but the conclusion was that the transaction was ok. The summary was sent on to the fourth defendant and the sixth defendant. The second defendant read the Allens advice. She forwarded it to LMIM's auditor. Neither the auditor nor Mr Monaghan raised any concern as to the sufficiency of the Allens advice or the WMS report. The third defendant did not have any significant role in relation to the Gujarat proceedings. She relied on the directors who did, being the sixth defendant and second defendant. She was aware of WMS' opinion as to the 65:35 ratio and of the summary given by Mr Monaghan of the Allens advice at the meeting on 14 June 2011. She believed the proposed division of the proceeds was in the interests of the members of both the FMIF and the MPF. The fourth defendant relied on his fellow directors and Mr Monaghan. He could not recall whether he read the Allens advice. He knew when he signed the Deed Poll that both the WMS report and the Allens advice had been obtained. He believed WMS and Allens to be well, known, independent and competent firms. His understanding was that their opinions and advices were favourable to the proposed division of the settlement proceeds. The sixth defendant reviewed the WMS report and the Allens advice and concluded that the proposed division of the proceeds was legally acceptable.
- [280] The plaintiff did not identify any case in which parties in a position comparable to the defendants have been held to have breached a relevant duty of care and skill by relying on or in failing to reject independent expert opinion of an accounting nature or by way of legal advice. My own researches have only produced one possible case of that kind but the facts are not usefully comparable.¹⁰⁵

- [281] In my view, the plaintiff failed to establish that the defendants' reliance upon the WMS report amounted to a contravention of the duty of care and diligence to members because that report may have placed too much weight on the analogy of a litigation funder in reaching the opinion that the ratio of 65:35 was appropriate for the division of the settlement proceeds. In relying on that opinion, the defendants were exercising the degree of care and diligence that a reasonable person would exercise if they were in the defendants' positions.
- [282] In reaching that conclusion, I have not found it necessary to consider whether the positions of some of the defendants should be distinguished having regard to their relative functions and involvement in the management of LMIM's operations, either generally, or in relation to the Gujarat proceedings, in particular. The third and fourth defendants made detailed submissions that their individual positions should be assessed having regard to their lesser roles and their reasonable reliance on the sixth defendant, second defendants and Mr Monaghan, but I do not consider it necessary to deal with those submissions further, having regard to the conclusion I have reached as to the defendants positions as directors, in general.

Conclusion

- [283] It follows, in my view, that the plaintiff has not established a contravention of the duty of care and diligence to members by any of the defendants.
- [284] Having regard to my earlier findings as to the operation of the duty to act in the members' best interests and the failure of the plaintiff to prove that any contravention of that duty caused the damage of the loss of all the settlement proceeds not being received by the FMIF, it follows that the plaintiff's claim must be dismissed.
- [285] Because of those conclusions, it has been unnecessary to consider other questions that were disputed between the parties, in particular whether, even if there was some contravention of either the duty to act in the members' best interests or the duty of care and diligence to members, the defendants or some of them should be excused from liability under s 1317S of the CA.
- [286] In the circumstances of this case, it is not appropriate to make further findings on those questions, because the discretionary power to grant relief under s 1317S must be exercised in relation to "a liability to which the person would otherwise be subject". 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. The absence of the relevant factual findings, because I have not found that the defendants or any of them are liable, makes it inappropriate, in my view, to consider the application of s 1317S in a hypothetical way.
- [287] Finally, in these reasons I have not dealt with every point that was advanced in the written submissions of the parties. Those submissions were voluminous. To have dealt with every argument or point would have increased the length of these reasons by many, many pages. Instead, I have focussed on the facts and arguments that are necessary to decide the case, in my view. That does not mean I have not given close attention to the other points that were advanced both in writing and orally.

" SC-2 "

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER:
NUMBER:

14258/19

Appellant: **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**

AND

First Respondent: **PETER CHARLES DRAKE**

AND

Second Respondent: **LISA MAREE DARCY**

AND

Third Respondent: **EGHARD VAN DER HOVEN**

AND

Fourth Respondent: **FRANCENE MAREE MULDER**

AND

Fifth Respondent: **SIMON JEREMY TICKNER**

NOTICE OF APPEAL

To the Respondents

And to the Registrar, Supreme Court of Queensland

TAKE NOTICE that the Appellant appeals to the Court of Appeal against the whole of the order of the Court.

1. THE DETAILS OF THE JUDGMENT APPEALED AGAINST ARE –

Date of Judgment: 22 November 2019

Description of Proceedings: BS 12317/14

Description of parties involved in the proceedings:

LM Investment Management Limited (Receivers & Managers Appointed) (In

NOTICE OF APPEAL
Filed on Behalf of the Appellant
Form 64, Version 4
Uniform Civil Procedure Rules 1999
Rule 747(1)

GADENS LAWYERS
Level 11, 111 Eagle Street
Brisbane Qld 4000
Phone: (07) 3231 1666
Fax: (07) 3229 5850
Ref: SCZ:JSO:201401822

Liquidation) ACN 077 208 461 as Responsible Entity of the LM First Mortgage
Income Fund ARSN 089 343 288 as Plaintiff

AND

Peter Charles Drake as First Defendant

AND

Lisa Maree Darcy as Second Defendant

AND

Eghard van der Hoven as Third Defendant

AND

Francene Maree Mulder as Fourth Defendant

AND

John Francis O'Sullivan as Fifth Defendant

AND

Simon Jeremy Tickner as Sixth Defendant

AND

LM Investment Management Limited (Receivers & Managers Appointed) (In
Liquidation) ACN 077 208 461 as Seventh Defendant

AND

Korda Mentha Pty Ltd ACN 100 169 391 in its capacity as Trustee of the LM Managed
Performance Fund

Name of Primary Court Judge: Justice Jackson

Location of Primary Court: Brisbane

2. GROUNDS -

The Appellant relies on the following grounds of appeal:

Construction of Statutory Provisions

1. The learned primary judge erred in holding that:
 - (a) in s 601FD(1)(c) of the *Corporations Act 2001* (Cth), "the interests of the responsible entity" of a registered management investment scheme do not include the duty (or duties) of the responsible entity as trustee of another trust to the beneficiaries of that trust (Reasons at [87]);

- (b) LMIM's duties as trustee of the MPF, an unregistered management investment scheme, were not "interests of the responsible entity" within the meaning of s 601FD(1)(c) (Reasons at [92]); and
 - (c) for those reasons, the statutory duty in s 601FD(1)(c) imposed on the First, Second, Third, Fourth and Sixth Respondents (**Respondents**) as officers of LMIM as responsible entity for the registered management investment scheme FMIF, that, if there is conflict between the interests of members of a registered scheme and the interests of the responsible entity for that scheme, they "must .. give priority to the members' interests", did not require them to give priority to the interests of the members of the FMIF over the interests of the beneficiaries of the MPF (Reasons at [92]).
2. The learned primary judge erred in holding that the statutory duty imposed on the Respondents as officers of LMIM as the responsible entity for the FMIF in s 601FD(1)(c) of the *Corporations Act* to "act in the best interests of the members":
- (a) does not reflect and give statutory force to the equitable principle or rule that applies when a trustee or fiduciary is placed in a position of conflict between two duties (Reasons at [108]);
 - (b) is constrained by, and must take into account of, the fact that the constitution of the FMIF expressly authorised LMIM (i) to act as the responsible entity of another trust, or fund; (ii) to deal with itself as trustee of another trust; and (iii) to be interested in a contract or transaction with itself as trustee of another trust" (Reasons at [116] and [117]); and
 - (c) does not require an officer of a responsible entity necessarily to prefer the members' interests to the interests of the members of another scheme or the beneficiaries of another trust, where they conflict (Reasons at [111], [126]); and
 - (d) only required the Respondents to act in a manner that was "impartial and fair" as between the conflicting interests of the members of the FMIF and the members of the MPF (Reasons at [122] to [125] and [209]).
3. In the alternative to subparagraph 2(d) above, the learned primary judge erred in failing to determine what the statutory duty imposed on the Respondents as officers of LMIM as the responsible entity for the FMIF in s 601FD(1)(c) of the *Corporations Act* to "act in the best interests of the members" required of the Respondents.

Scheme Property

4. The learned primary judge erred in:
- (a) finding that the Appellant did not contend that the entirety of the \$35.5 million settlement proceeds (**Settlement Proceeds**) from the litigation involving Gujarat NRE Minerals Ltd (**Gujarat litigation**) were "scheme property" of the FMIF before part of those proceeds were received by LMIM as trustee of the MPF (Reasons at [136]) in circumstances where such a contention was expressly made by the Appellants in (i) paragraph 37 of the Statement of Claim; (ii) paragraph 2 and 3 of the document entitled "Findings Sought by the Plaintiff" handed up during oral closing submissions; and (iii) paragraph 119 of the Appellant's written closing submissions;

- (b) failing to find that the entirety of the Settlement Proceeds were “scheme property” of the FMIF before part of those proceeds were received by LMIM as trustee of the MPF (Reasons at [210]).

The Understanding

- 5. The learned primary judge erred in finding that:
 - (a) LMIM as trustee for the MPF did not fund the Gujarat Litigation as second mortgagee (Reasons at [185]);
 - (b) there was an understanding between the Respondents that it was appropriate for the contribution of LMIM as trustee for the MPF to the Gujarat litigation to be recognized by providing LMIM as trustee for the MPF with a share of the proceeds recovered in that litigation (**Understanding**) (Reasons at [256]-[267]),

in that such findings were glaringly improbable, contrary to compelling inferences and/or against the weight of the evidence in that they were:

- (c) contrary to all the contemporaneous documentary evidence;
 - (d) not supported by any contemporaneous documentary evidence (in circumstances where, in the case of any arrangement such as the Understanding, LMIM’s policies and protocols required such an arrangement to be documented and approved by LMIM’s Risk Management Committee or Board of Directors);
 - (e) based solely on evidence of three Respondents whose evidence as to the Understanding was found by the learned primary judge to be “vague” and where the learned primary judge also observed that it was “quite possible that the defendants believed that they had the understanding at the time when they gave evidence but that their beliefs are mistaken and the product of reconstruction” (Reasons at [265]); and
 - (f) illogical in that LMIM as trustee for the MPF was, at the time of the alleged Understanding, in fact indebted to LMIM as responsible entity for the MPF in the amount of \$36 million.
- 6. The learned primary judge erred, in assessing whether the Respondents breached their duties under s 601FD(1)(b) and (c), in failing to consider that, even if there was such an Understanding:
 - (a) the Respondents had admitted on the pleadings, and in their submissions, that the Understanding was not a legally binding agreement or arrangement;
 - (b) there was no understanding as to what the share of the proceeds was;
 - (c) there was no understanding that the share of the proceeds was to be calculated by reference to the returns of a commercial litigation funder.

Breaches

- 7. The learned primary judge erred in failing to find that the Respondents breached their duties under s 601FD(1)(c) by causing LMIM to pay \$15.5 million (**Settlement Payment**) from the Settlement Proceeds.

8. The learned primary judge erred in finding that the Respondents did not breach the duty in s 601FD(1)(b) of the *Corporations Act* (Reasons at [283]), and in particular in finding that:

- (a) the Respondents adequately read and considered the legal advice from Allens to LMIM dated 28 March 2011 (**Allens advice**) (Reasons at [192], [200]-[225]);
- (b) the Respondents were not required to obtain independent advice, separate from the Allens advice (Reasons at [193]);
- (c) the Respondents exercised independent judgment in considering the Allens advice (Reasons at [199]);
- (d) the Respondents were justified in concluding that the Allens advice or the advice from WMS to LMIM dated 7 March 2011 (**WMS report**) justified the payment of part of the Settlement Payment to LMIM as trustee of the MPF (Reasons at [226]-[230]);
- (e) the Respondents had proper regard and gave adequate consideration to the fact that PTAL sold the property to Gujrat as mortgagee exercising power of sale, and that PTAL as first mortgagee for the benefit of the FMIF had priority over LMIM as second mortgagee (Reasons at [231]-[239]);
- (f) the Respondents had proper regard and gave adequate consideration to the different interests of the members of the FMIF as a registered scheme and the beneficiaries of the MPF as an investment trust (Reasons at [268]); and
- (g) the Respondents were justified in concluding, in reliance on the Allens advice and the WMS report, that:
 - (i) the use of the litigation funding analogy in reaching their decision as to the division of the settlement proceeds was appropriate; and
 - (ii) a ratio of 65:35 was appropriate for the division of the settlement proceeds (Reasons at [269]-[281]),

in circumstances where the Respondents knew:

- (h) the litigation was being funded by LMIM as trustee for the MPF as a second mortgagee;
- (i) that there was no Understanding and that the Allens Advice and the WMS Advice was premised on the Understanding being in existence;
- (j) that even if there was an Understanding:
 - (i) it was not a legally binding agreement or arrangement;
 - (ii) it did not extend to what share of the proceeds LMIM as trustee for the MPF was entitled to;
 - (ii) it did not extend to the share of the proceeds LMIM as trustee for the MPF was entitled to being calculated by reference to the returns of a commercial litigation funder; and
- (k) no analogy could be drawn between:

- (i) LMIM as trustee for the MPF, as second mortgagee, advancing funds to LMIM as RE for the FMIF as first mortgagee, to fund litigation in to which LMIM as trustee for the MPF was itself a party and stood to benefit and where there was no agreement as to what return LMIM as trustee for the MPF would receive for advancing funds if the litigation was successful; and
- (ii) a commercial litigation funder agreeing to fund the prosecution of litigation, to which it was not a party, for a commercial return.

Causation and loss

- 9. The learned primary judge erred in:
 - (a) failing to find that, but for the Respondents' breaches of the duties in ss 601FD(1)(b) and (c) of the *Corporations Act*, the Respondents (or a sufficient number of them), or hypothetical directors acting reasonably, would have caused LMIM as trustee of the MPF to enter into the Deed of Release and the Deed of Settlement and Release on the footing that all the Settlement Proceeds would be paid to PTAL as custodian for LMIM as responsible entity of the FMIF (Reasons at [165]-[166]);
 - (b) failing to find that the fact that LMIM as responsible entity of the FMIF did not receive the amount of the Settlement Proceeds that was received by LMIM as trustee of the MPF "resulted from" the respondents' breaches of the duties in ss 601FD(1)(b) and (c) within the meaning of s 1317H of the *Corporations Act*; and
 - (c) failing to find that the Respondents should not be excused from their breaches of ss 601FD(1)(b) and (c) of the *Corporations Act* pursuant to s 1317S of the *Corporations Act* (Reasons at [285] to [286]);
 - (d) failing to order, pursuant to s 1317H, that the Respondents compensate the FMIF in the amount of the Settlement Payment received by LMIM as trustee of the MPF.
- 10. In the alternative, the learned primary judge erred in failing to:
 - (a) find that but for the Respondents' breaches of the duty in s 601FD(1)(b) of the *Corporations Act*, the respondents (or a sufficient number of them), or hypothetical directors acting reasonably, would have caused LMIM as trustee of the MPF to enter into the Deed of Release and the Deed of Settlement and Release on the footing that all the Settlement Proceeds would be paid to PTAL as custodian for LMIM as responsible entity of the FMIF, except for an amount to reimburse LMIM as trustee of the MPF for the contribution it made to funding the Gujarat litigation together with interest (Reasons at [173]-[174]);
 - (b) find that the fact that LMIM as responsible entity of the FMIF did not receive the amount of the Settlement Proceeds that was received by LMIM as trustee of the MPF, less the amount by way of reimbursement referred to in paragraph 10(a) above, "resulted from" the respondents' breaches of the duty in s 601FD(1)(b) within the meaning of s 1317H of the *Corporations Act*;

- (c) find that the Respondents should not be excused from their breaches of ss 601FD(1)(b) and (c) of the *Corporations Act* pursuant to s 1317S of the *Corporations Act* (Reasons at [285] to [286]); and
- (d) order, pursuant to s 1317H, that the Respondents compensate the FMIF in the amount of the Settlement Proceeds that were received by LMIM as trustee of the MPF less the amount by way of reimbursement referred to in paragraph 10(a) above.

3. ORDERS SOUGHT -

The Appellant seeks the following orders:

1. The appeal be allowed.
2. The Orders made on 22 November 2019 and subsequent orders as to costs be set aside.
3. As Against each of the Respondents:
 - (a) an order pursuant to s 1317H of the *Corporations Act* 2001 (Cth) that the Respondents pay to the Appellant compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) interest under s 58 of the *Civil Proceedings Act* 2011 (Qld) on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) the Respondents pay the Appellants' costs of and incidental to the appeal and of the trial.
4. In the alternative:
 - (a) the proceeding be remitted for the determination of the question of whether relief should be granted in favour or one or more of the Respondents pursuant to section 1317S of the *Corporations Act* 2001 and for the making of final orders; and
 - (b) the Respondents pay the costs of the appeal.

4. RECORD PREPARATION

The Appellant undertakes to cause a record to be prepared and lodged, and to include all material required to be included in the record under the rules and practice directions and any order or direction in the proceedings.

PARTICULARS OF THE APPELLANT:

Name: 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

Residential or business address: c/- David Whyte, BDO
Level 10, 12 Creek Street
BRISBANE QLD 4000

Appellant's solicitor's name:
and firm name: Scott Couper, Gadens

Solicitor's business address: Level 11, 111 Eagle Street, BRISBANE QLD 4000
Address for service: Level 11, 111 Eagle Street, BRISBANE QLD 4000
DX(if any):
Telephone: (07) 3231 1666
Fax: (07) 3223 5850
E-mail address (if any): scott.couper@gadens.com

PARTICULARS OF THE FIRST RESPONDENT:

Name: PETER CHARLES DRAKE
Residential or business address: 18 The Esplanade, SURFERS PARADISE QLD
4217

Respondent's solicitor's name:
and firm name: Ben Cohen, Bartley Cohen

Solicitor's business address: Level 22, 123 Eagle Street, BRISBANE QLD 4000
Address for service: Level 22, 123 Eagle Street, BRISBANE QLD 4000
DX (if any):
Telephone: (07) 3831 9400
Fax: (07) 3831 9500
E-mail address (if any):

PARTICULARS OF THE SECOND RESPONDENT:

Name: LISA MAREE DARCY
Residential or business address: Unit 25, 35-43 Dalley Street, QUEENSCLIFF NSW
2096

Respondent's solicitor's name:
and firm name: Gregory Wayne Rodgers, Rodgers Barnes & Green

Solicitor's business address: Level 10, 300 Adelaide Street, BRISBANE QLD
4000
Address for service: Level 10, 300 Adelaide Street, BRISBANE QLD
4000

DX (if any):
Telephone: (07) 3009 9300
Fax: (07) 3009 9399
E-mail address (if any): greg.rodgers@rbglawyers.com.au

PARTICULARS OF THE THIRD RESPONDENT:

Name: EGHARD VAN DER HOVEN
Residential or business address: 10 Rowes Court, SORRENTO QLD 4217
Respondent's solicitor's name: James Conomos/ Wiebke Herrmann, James
Conomos Lawyers
and firm name:
Solicitor's business address: Level 12, 179 Turbot Street, BRISBANE QLD 4001
Address for service: Level 12, 179 Turbot Street, BRISBANE QLD 4001
DX (if any):
Telephone: (07) 3004 8200
Fax: (07) 3221 5005
E-mail address (if any): jim@jcl.com.au/ wiebke@jcl.com.au

PARTICULARS OF THE FOURTH RESPONDENT:

Name: FRANCENE MAREE MULDER
Residential or business address: 109 Strawberry Road, MUDGEERABA QLD 4213
Respondent's solicitor's name: James Conomos/ Wiebke Herrmann, James
Conomos Lawyers
and firm name:
Solicitor's business address: Level 12, 179 Turbot Street, BRISBANE QLD 4001
Address for service: Level 12, 179 Turbot Street, BRISBANE QLD 4001
DX (if any):
Telephone: (07) 3004 8200
Fax: (07) 3221 5005
E-mail address (if any): jim@jcl.com.au/ wiebke@jcl.com.au

PARTICULARS OF THE FIFTH RESPONDENT:

Name: SIMON JEREMY TICKNER
Residential or business address: U1304 Wyndham Apartments, 3108 Surfers Paradise
Blvd, SURFERS PARADISE QLD 4217
Respondent's solicitor's name: Martin Nelson Daniel, HW Litigation Pty Ltd
and firm name:
Solicitor's business address: PO Box 1221, SOUTHPORT QLD 4215
Address for service: HW Litigation Pty Ltd, Suite 30803, Level 8,
Southport Central, 9 Lawson Street, SOUTHPORT
QLD 4215
DX (if any):
Telephone: (07) 5556 7100
Fax: (07) 5556 7111
E-mail address (if any): mdaniel@hwlitigation.com.au

Signed:



Description: Solicitor for the Appellant

Dated: 20 December 2019

This Notice of Appeal is to be served on: Peter Charles Drake, Lisa Maree Darcy, Eghard van der Hoven, Francene Maree Mulder and Simon Jeremy Tickner, the Respondents

"SC-3"

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 12317/14

Plaintiff: **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 Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

Eighth Defendant: **KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

~~FIFTH FOURTH THIRD~~ FURTHER AMENDED STATEMENT OF CLAIM

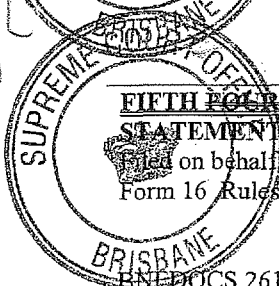
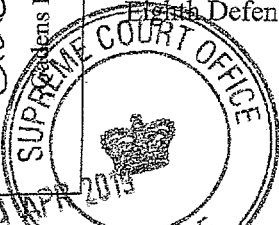
~~FIFTH FOURTH THIRD~~ FURTHER AMENDED STATEMENT OF CLAIM

on behalf of the Plaintiff
Form 16 Rules 22, 146

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No: 07 3231 1666
Fax No: 07 3229 5850

Amended pursuant to the Order of the Honourable Justice Jackson dated 2 April 2019
Signed: *Gadens*
Dated: 2 April 2019

Gadens Lawyers



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

The Parties and roles

1. The seventh defendant, LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 (**LMIM**):
 - (a) is and was at all material times a company duly incorporated and capable of suing in its own name;
 - (b) is and was at all material times the Responsible Entity (**RE**) of the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**);
 - (c) was, until order of this Honourable Court on 12 April 2013 (**LM Order**), trustee of the trust named The LM Managed Performance Fund (**MPF**);
 - (d) was placed into voluntary administration on 19 March 2013 and John Park and Ginette Muller of FTI Consulting were appointed voluntary administrators;
 - (e) had receivers and managers, Joseph Hayes and Anthony Connelly of McGrathNicol, appointed to certain of its property held in its capacity as RE of FMIF on 11 July 2013 by Deutsche Bank AG (**Deutsche**);
 - (f) was placed into liquidation on 1 August 2013 following a resolution of its creditors that it be placed into liquidation and that John Park and Ginette Muller be appointed liquidators (**Liquidators**).

2. ~~At all material times~~ Each of the first to sixth defendants was a director of LMIM between the following dates:
 - (a) the first defendant (Mr Drake) was a director of LMIM between 31 January 1997 and 9 January 2015;
 - (b) the second defendant (Ms Darcy) was a director of LMIM from 12 September 2003 to 21 June 2012;
 - (c) the third defendant (Mr van der Hoven) became a director of LMIM on 22 June 2006 and remains so;
 - (d) the fourth defendant (Ms Mulder) became a director of LMIM on 30 September 2006 and remains so; and
 - (e) the sixth defendant (Mr Tickner) was a director of LMIM from 18 September 2008 to 13 July 2012.

3. By Order of this Honourable Court dated 21 August 2013 (**FMIF Order**), David Whyte (**Receiver**), Partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd:
 - (a) was appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (**Appointment**);
 - (b) was appointed as receiver of the property of the FMIF;
 - (c) has, in relation to the property of FMIF for which he is appointed receiver, the powers set out in s 420 of the *Corporations Act 2001* (Cth) (**Act**); and

- (d) without derogating in any way from the Appointment or the Receiver's powers pursuant to the FMIF Order, was authorised to, inter alia:
- (i) take all steps necessary to ensure the realisation of property of FMIF held by LMIM as RE of the FMIF by exercising any legal right of LMIM as RE of the FMIF in relation to the property including but not limited to:
 - (A) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate or finalise the sale of the property;
 - (B) providing a response as appropriate to matters raised by receivers of property of LMIM as RE of the FMIF to which receivers have been appointed;
 - (C) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of the property;
 - (D) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (E) executing contracts, transfers or releases or any such other documents as are required to carry out any of the above;
 - (ii) 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 its constitution, including the execution of documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions;
- (e) is entitled to bring and does bring these proceedings in the name of LMIM as RE of the FMIF.

4. Further, by the LM Order, LMIM was removed as trustee of the MPF and Korda Mentha Pty Ltd ACN 100 169 391 and Calibre Capital Pty Ltd ABN 66 108 318 985 were appointed joint and several trustees of the MPF.
- 4A. On or about 5 January 2015, Calibre Capital Pty Ltd ABN 66 108 318 985 resigned as trustee of the MPF.

The Bellpac loans

5. On or about 10 March 2003, Permanent Trustee Australia Limited as custodian of LMIM as RE of the FMIF (**PTAL**) entered into a loan agreement with Bellpac (**FMIF Bellpac Loan Agreement**) [MPF.001.004.4454].
6. Pursuant to the FMIF Bellpac Loan Agreement, PTAL agreed to advance and did advance the sum of \$16M to Bellpac (**FMIF Bellpac Loan**).
7. As security for the FMIF Bellpac Loan, Bellpac granted to PTAL:
- (a) a first registered mortgage (**PTAL Mortgage**) over land known as "Balgownie No 1 Colliery Wollongong" in the state of New South Wales (**Property**); and

(b) a registered charge over Bellpac (**PTAL Charge**).

8. Between December 2003 and July 2008, the FMIF Bellpac Loan Agreement was varied.

Particulars

The FMIF Bellpac Loan Agreement was varied by the following instruments:

- (a) Deed of Variation of Loan Agreement and Consent by Guarantor dated 5 December 2003; [FMIF.300.002.1892]
 - (b) Deed of Variation of Loan Agreement and Consent by Guarantor dated 13 February 2004; [FMIF.300.002.1887]
 - (c) Deed of Variation of Loan Agreement and Consent by Guarantor dated 14 May 2004; [FMIF.300.002.1888]
 - (d) Deed of Variation of Loan Agreement and Consent by Guarantor dated 4 October 2004; [FMIF.300.002.1889]
 - (e) Deed of Variation of Loan Agreement and Consent by Guarantor dated 4 October 2004; [FMIF.015.002.0024]
 - (f) Deed of Variation of Loan Agreement and Consent by Guarantor dated 21 January 2005; [FMIF.300.002.1890]
 - (g) Deed of Variation of Loan Agreement and Consent by Guarantor dated 2 May 2005; [FMIF.300.002.1893]
 - (h) Variation Deed dated 23 June 2006; [FMIF.013.001.0091] and
 - (i) Deed of Variation of Loan Agreement and Consent by Guarantor dated 11 July 2008; [FMIF.500.014.9633]
9. On or about 23 June 2006, LMIM as trustee for the MPF entered into a loan agreement with Bellpac (**MPF Bellpac Loan Agreement**) [FMIF.006.001.0031].
10. Pursuant to the MPF Bellpac Loan Agreement, LMIM as trustee for the MPF agreed to advance and did advance the sum of \$6M to Bellpac (**MPF Bellpac Loan**).
11. As security for the MPF Bellpac Loan, Bellpac granted to LMIM as trustee for the MPF:
- (a) a registered mortgage over the Property (which was registered as the third registered mortgage) (**MPF Mortgage**); and
 - (b) a registered charge over Bellpac (**MPF Charge**).
12. On or about 23 June 2006, LMIM as RE of the FMIF, LMIM as trustee for the MPF, GPC No. 11 Pty Ltd, GPC No. 12 Pty Ltd, GPC No. 8 (Bulli) Pty Ltd, Austcorp Project No. 20 Pty Ltd and Bellpac entered into a Deed of Priority (**Deed of Priority**) [FMIF.009.003.0043] pursuant to which:
- (a) by clause 3.1(1), LMIM as RE for the FMIF was granted first priority to the extent of the Principal Amount of \$33.8M plus Interest, Other Moneys and Enforcement Expenses as those terms are defined therein;

- (b) by clause 3.1(2), LMIM as trustee for the MPF was granted second priority to the extent of the Principal Amount of \$11M plus Interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
 - ~~(c) by clause 8, LMIM as trustee for the MPF was required to provide a release of any security held by it where an asset the subject of any security held by PTAL was sold pursuant to a bona fide sale for approximately fair market value;~~
 - (d) by clause 3.2, subject to any prior right in favour of any other person, all money received by, inter alia, Bellpac, LMIM as RE of the FMIF or LMIM as trustee of the MPF, in respect of the Security (as that term is defined therein) must be applied in order of the priority set out in clause 3.1.
13. From in or about March 2006, Bellpac was in default under the FMIF Bellpac loan and PTAL as custodian of LMIM as RE of the FMIF was entitled to exercise rights under the PTAL Mortgage and the PTAL Charge.
 14. On or about 6 May 2009, PTAL appointed receivers and managers to Bellpac.
 15. On or about 30 July 2009, voluntary administrators were appointed to Bellpac.
 16. On or about 3 September 2009, Bellpac was placed into liquidation following a resolution of its creditors.

The Bellpac sale of the Property to Gujarat

17. On or about 22 September 2004, Bellpac and GPC Equipment Pty Ltd (**GPC**) and Gujarat NRE Coking Coal Limited (formerly Gujarat NRE Minerals Limited)(**Gujarat**), Bounty Industries Australia Pty Limited (**Bounty**) and Coalfields (NSW) Pty Limited (**Coalfields**) entered into a Land and Asset Sale Agreement (**LASA**) pursuant to which Bellpac agreed to sell to Gujarat and Coalfields certain assets including, inter alia, the Property.
18. In addition to the LASA, Bellpac and GPC and Gujarat and Coalfields entered into certain other agreements on or about 3 December 2004 which, inter alia, amended the LASA (**2004 Agreements**).

Particulars

The 2004 Agreements comprised of:

- (a) Amendment Deed Bellpac No.1 Colliery dated 3 December 2004; [FMIF.007.001.0309]
- (b) Remediation Licence Deed Bellpac No. 1 Colliery dated 3 December 2004; [FMIF.007.001.0130]
- (c) Royalty Deed Bellpac No. 1 Colliery dated 3 December 2004; [FMIF.005.007.0077]
- (d) Subdivision Deed Bellpac No. 1 Colliery dated 3 December 2004; [FMIF.007.001.0321]
- (e) Access Licence Bellpac No. 1 Colliery dated 3 December 2004; [FMIF.007.001.0106]
- (f) Letter from Bellpac to Bounty and Gujarat dated 3 December 2004. [FMIF.013.004.0039]

19. A dispute arose between Bellpac and Gujarat as to the parties' rights, obligations and liabilities under the LASA and the 2004 Agreements (**Dispute**).
20. In 2007 and 2008, Bellpac and Gujarat executed settlement deeds (**Settlement Deeds**) in order to resolve the Dispute.

Particulars

The Settlement Deeds comprised of:

- (a) Deed of Settlement dated 12 September 2007; [FMIF.007.001.0213]
 - (b) Amendment Deed to Deed of Settlement dated 12 September 2007, dated 23 July 2008; [FMIF.007.001.0232]
 - (c) Restated Settlement Deed (Replacing the Deed of Settlement dated 12 September 2007) dated 23 July 2008. [FMIF.007.001.0274]
21. In 2009, a dispute arose between LMIM, PTAL and Bellpac and Gujarat and Coalfields as to the parties' rights, obligations and liabilities under and as a consequence of the LASA, the 2004 Agreements and the Settlement Deeds (**2009 Dispute**).
 22. Legal proceedings were commenced by:
 - (a) Gujarat against Bellpac in or about May 2009 (**Gujarat proceedings**);
 - (b) LMIM, PTAL and Bellpac against Gujarat, Coalfields, Bounty and GPC in or about November 2009 (**Bellpac proceedings**);
 - (c) by Coalfields against Bellpac and Gujarat by cross-claim in the Gujarat proceedings (**Coalfields cross-claim**),together (the **Proceedings**).

The Funding of the Proceedings

- ~~23. In or about July 2009 the first to sixth defendants formed the view that LMIM as RE of the FMIF was not in a position to fund the Proceedings.~~

Particulars

~~The best particulars that the plaintiff can presently provide are that each of the first to sixth defendants executed the Deed Poll which stated, inter alia, that they had given careful consideration to, inter alia, the circumstances described in the Background to the Deed Poll.~~

24. From in or about July 2009, as registered mortgagee of the Property with second priority under the Deed of Priority, LMIM as trustee of the MPF:
 - (a) funded the Proceedings as second mortgagee in an amount of not more than \$1,380,431.51 approximately \$1,950,421.69, including for legal fees, receivers' remuneration, consultants costs and local government rates payable with respect to the Property; and
 - (b) drew down such funding against the MPF Bellpac Loan.

The Mediation Heads of Agreement

25. In or about November 2010, a non-binding Heads of Agreement recording Agreement in Principle was executed in the course of a mediation between the parties to the Proceedings (**Mediation Heads of Agreement**).
26. Pursuant to the Mediation Heads of Agreement:
- (a) the Property was to be sold to Gujarat or its nominee by either the liquidator of LMIM (with mortgagees' consent) or via a mortgagee sale for an amount up to \$65.5M as follows:
 - (i) \$15.5M to be paid by:
 - (A) an instalment of \$1M within 1 month; and
 - (B) \$14.5M within 6 months;
 - (ii) Vendor finance for \$46-50M (to be updated on amortisation);
 - (b) LMIM was to pay \$1.3M to Coalfields (NSW) Pty Limited ACN 111 369 110 to secure its release of certain caveats over the Property;
 - (c) LMIM was to be granted an option to purchase a half share in the Property for \$15M in certain circumstances.
27. The parties continued to negotiate a settlement of the Proceedings between November 2010 and June 2011.

The Settlement of the LMIM Bellpac proceedings

28. On or about 21 June 2011:
- (a) LMIM in its capacity as RE for FMIF, PTAL, Bellpac, Gujarat and Southbulli Holdings Pty Limited (**Southbulli**) executed a Deed of Release pursuant to which the parties agreed to settle all of their disputes, including the disputes in the Proceedings and to regulate their relationship (**Deed of Release**) [FMIF.003.003.0198];
 - (b) simultaneously with the execution of the Deed of Release, PTAL, LMIM in its capacity as RE for FMIF, Bellpac, Gujarat, Southbulli and Coalfields executed a Deed of Settlement and Release pursuant to which these parties agreed to settle their differences in respect of the Proceedings (**Deed of Settlement and Release**) [FMIF.003.003.0118]; and
 - (c) PTAL, as mortgagee exercising power of sale under the PTAL Mortgage, entered into a contract to sell the Property to Gujarat for a purchase price of \$10M exclusive of GST (**Gujarat Contract**) [FMIF.003.001.0001].
29. By clause 7 of the Deed of Release, Gujarat was obliged to pay to PTAL the settlement sum of \$35.5M exclusive of GST by way of bank cheque simultaneously with the execution and delivery of that deed.
30. By clause 2 of the Deed of Settlement and Release:

- (a) PTAL was to pay to Coalfields the sum of \$1.3M by bank cheque simultaneously with the execution and delivery of that deed;
- (b) the sum of \$1.3M was to be held in trust until completion of the Gujarat Contract; and
- (c) if the Gujarat Contract was terminated the sum of \$1.3M, together with any accretions thereon, was to be refunded in full to PTAL.

The Advice

- 30A. On or about 6 December 2010, LMIM as RE of the FMIF and as trustee of the MPF instructed WMS Chartered Accountants (**WMS**) to provide an opinion about what would be a fair and reasonable split of the likely proceeds from the Proceedings.

Particulars

The instructions were in writing and contained in an email from David Monaghan on behalf of LMIM to Aaron Lavell of WMS (and copied to ~~the second and sixth defendant Ms Darcy and Mr Tickner~~) dated 6 December 2010.

- 30B. On or about 14 March 2011, LMIM as RE of the FMIF and as trustee of the MPF instructed Allens Arthur Robinson (**Allens**) to provide advice as to whether a proposed split of proceeds from the Proceedings of 65% for the FMIF and 35% for the MPF was "legally acceptable" given that LMIM was in a position of conflict being the RE of the FMIF and the trustee of the MPF.

Particulars

The instructions were in writing and contained in emails from David Monaghan on behalf of LMIM to John Beckinsale of Allens dated 14 March 2011 and 17 March 2011.

- 30C. The instructions provided to WMS and Allens pleaded in paragraphs 30A and 30B above:

- (a) did not include copies of the Gujarat Contract, the Deed of Release or the Deed of Release and Settlement;

~~(b) did not otherwise state, as was the fact, that:~~

~~(i) settlement of the Proceedings was to be effected:~~

~~A. in part by a contract in the form of the Gujarat Contract, pursuant to which PTAL as mortgagee exercising power of sale would agree to sell the Property to Gujarat;~~

~~B. in part by a deed in the form of the Deed of Release to which LMIM as trustee of the MPF would not be a party;~~

~~C. in part by a deed in the form of the Deed of Release and Settlement to which LMIM as trustee of the MPF was not a party;~~

~~(ii) as was the fact that, the consent by LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents in subparagraph (i) above settle the Proceedings;~~

- (c) did not include a copy of the Deed of Priority or otherwise state, as was the fact, that the Deed of Priority included the provisions pleaded in paragraph 12 above;
- (d) did not state, as was the fact, that:
 - (i) LMIM as trustee of the MPF had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority; and
 - (ii) LMIM as trustee of the MPF drew down such funding against the MPF Bellpac Loan;
 - (iii) there was no binding express prior arrangement for LMIM as trustee of the MPF to be paid any amount if the amount that LMIM as RE of the FMIF recovered did not cover the whole of the amount owing by Bellpac to it;

Particulars

That there was no such arrangement is apparent from, or to be inferred from:

- (A) the fact that no such arrangement is referred to in the books and records of LMIM until after an email exchange between Mr Fischer, Mr Monaghan, Ms Darcy and Mr Tickner commencing on 17 August 2010 in which Mr Monaghan said, among other things, in response to a suggestion from Mr Fischer that an agreement on litigation funding should be "drawn up for the file":

"Grant and Simon

I am not sure that an agreement is necessary. As I understand it MPF is funding the various proceedings at present because as second mortgagee it has the most interest in achieving a good outcome. I think that is sufficient justification for it to continue to provide funding at this time." ([FMIF.100.004.9878]);

and

"Simon

There is no agreement in place. I do not believe that an agreement is necessary, as it is simply a situation of MPF as the second mortgagee, who has the most to lose, paying legal costs, and in this case council rates. I do not think it requires an agreement. It will be a proper cost for MPF to add to its debt. It will rank behind MIF's debt.

Let me know if you had any particular purpose in mind for an agreement." ([FMIF.100.003.2096])

- (B) the Defences filed on behalf of the first, second, third, fourth and sixth defendants allege an understanding to the effect that MPF's contribution to the funding of the Bellpac Proceedings would be recognised by a share of the proceeds, but do not allege or particularise any express oral or written communications to that effect;
- (C) the email exchange referred to at paragraph (A), which referred to a possible split of the proceeds of settlement of the Proceeding between FMIF and MPF, occurred at approximately the time it was clear that the anticipated settlement proceeds were insufficient to fully discharge both the FMIF Bellpac Loan and the MPF Bellpac Loan; and

(D) any such arrangement, if it was made, would have been unenforceable as a purported agreement between LMIM and itself in two different trustee capacities.

30D. On or about 7 March 2011, WMS provided a report containing the opinion sought and referred to in paragraph 30A above (**WMS Report**) [MPF.001.002.8061].

30E. On or about 28 March 2011, Allens provided ~~the advice sought and~~ in response to the instructions referred to in paragraph 30B above (**Allens Advice**) [FMIF.100.003.7021].

30F. The Allens Advice relevantly provided as follows:

(a) at Recital 9:

“The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE’s directors that it was appropriate for MPF’s contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation”;

(b) at [15]:

“You have asked us whether it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, given that the RE is in a position of conflict (in its capacity as responsible entity for FMIF and in its capacity as trustee for MPF)”;

(c) at [16]:

“We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict, subject to the following matters [being a summary of the various obligations set out subsequently in the advice]”;

(d) at [16](d):

“The directors must be satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm’s length. [...] The directors of the RE must make ‘their own independent assessment’ of the relevant matters, and the advice from WMS Chartered Accountants does not replace ‘careful judgement by the directors’”;

(e) at [16](e):

“The RE should ensure that it complies with any procedures in the FMIF compliance plan (or with any other procedures it has in place) in respect of conflicts of interest [...]”;

(f) at [16](f):

“The directors of the RE must comply with their general law and statutory duties under the *Corporations Act* (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between

FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed)";

(g) at [25]:

"The RE therefore needs to always act in the best interests of members of the FMIF when making any decision regarding the split of the litigation proceeds and the terms of the Gujarat settlement. [...] In addition, we assume that the RE is satisfied that there is a need to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF (because the overall settlement cannot occur without the agreement of the MPF trustee – for example, it needs to release its security and pay Coalfields to withdraw its caveats)."

(h) at [27]:

"We assume that any decision regarding the terms of the Gujarat settlement and the split of the litigation proceeds will be made on the basis of what is in the best interests of FMIF's members, and not for the purpose of benefitting the members of the MPF."

(i) at [35]:

"The RE [LMIM] therefore needs to always act in the best interests of the members of the MPF when making any decision regarding the split of the litigation proceeds and the terms of the Gujarat settlement. [...]"

(j) at [37]:

"We assume that any decision regarding the terms of the Gujarat settlement and the split of the litigation proceeds will be made on the basis of what is in the best interests of MPF's members, and not for the purpose of benefitting members of the FMIF [...]"

(k) at [51] set out section 601FC(1)(c) of the Act and paragraph [53] then provided:

"The RE will therefore need to conclude that the proposed split of the litigation proceeds and the terms of the Gujarat settlement are in the best interests of members of the FMIF."

(l) at [55]:

"The RE will need to be satisfied that the terms of the Gujarat settlement and the proposed split of litigation proceeds does not unfairly put the interests of one client (e.g. FMIF) ahead of the interests of its other client (e.g. MPF) or vice versa."

(m) at [57]:

"The RE will also need to ensure that it follows any procedures or policies it has established in accordance with section 912A(1)(aa) for managing conflicts of interest."

(n) paragraph 62 set out, among other things, the terms of section 601FD(1)(c) of the Act.

(o) at [63]:

“[...] Although this point has not yet been decided by case law, it is possible that section 601FD(2) will mean that directors of a responsible entity will have a fiduciary relationship with members of a registered scheme. This would mean that the directors would owe the scheme members all of the proscriptive fiduciary duties that arise as between the RE itself and the scheme members.”

(p) at [69](c):

“We have not considered whether it is possible at law for a trustee of one trust to contract with itself as trustee of another trust (although we note that would clearly be permissible if a third party is also a party to the contract).”

30G. LMIM’s Conflicts Management Policy relevantly stated at the time of the Allens Advice:

“Importantly, section 601FD(2) states that any duty of an officer under section 601FD(1) overrides any conflicting duty the officer has under Part 2D.1. In some cases, this may dictate a response to a conflict.”

and

“Section 601FC(3) states that any duty of LM under section 601FC(1) and 601FC(2) overrides any conflicting duty an officer or employee has under Part 2D.1 of the Corporations Act 2011. This overriding mechanism may dictate LM’s response to a conflict.”

30H. The Allens Advice:

- (a) recognised, as was the case, that there was a position of conflict of interest and interest, as between LMIM as RE of the FMIF and LMIM as trustee of the MPF;
- (b) set out a number of matters which the directors of LMIM would need to take into account in determining whether to cause part of the Settlement payment to be paid to LMIM as trustee of the MPF;
- (c) at [25] and [27] referred to the need for LMIM as RE of the FMIF to act in the best interests of members of the FMIF, but did not state how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with that obligation;
- (d) at [56], stated that LMIM would need to be satisfied that the terms of the settlement and the proposed split of litigation proceeds did not unfairly put the interests of the FMIF ahead of the MPF, which misconstrued the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act;
- (e) at [56], by the use of the term “vice versa”, stated that LMIM would need to be satisfied that the terms of the settlement and the proposed split of litigation proceeds did not unfairly put the interests of the MPF ahead of the FMIF, but did not state how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with that obligation;

- (f) was premised on an assumption (appearing at Recital 9) that there was an existing agreement between LMIM as RE of the FMIF and LMIM as trustee of the MPF, which the second to sixth defendants knew was not the case;
- (g) set out inconsistent conclusions but did not state how those inconsistencies were to be reconciled;

Particulars

- (i) [25] of the Allens Advice is irreconcilable with [35] thereof.
- (ii) [27] of the Allens Advice is irreconcilable with [37] thereof.
- (h) referred at [16](e) to LMIM's Compliance Plan, which contained the terms pleaded at paragraph 30G above, but did not state how the obligations imposed by sections 601FC(1) and 601FD(1) could be reconciled with the statement at [35] of the Allens Advice that LMIM must act in the best interests of the members of the MPF when making any decision regarding the split of the Settlement proceeds;
- (i) stated at [57] that LMIM would need to ensure that it followed any procedures or policies it has established in accordance with section 912A(1)(aa) of the Act for managing conflicts of interest, but did not state how the proposed proceeds split could be reconciled with the matters pleaded at paragraph 30G above;
- (j) stated at [63] that the effect of section 601FD(2) of the Act may have been to impose fiduciary duties on LMIM to act in the best interests of members of the FMIF, but did not identify what those duties would be or that such duties would include a duty of undivided loyalty;
- (k) did not, when properly construed, reach an opinion that the proposed transaction was "legally acceptable".

Deed Poll

- 31. ~~On or By~~ By about 21 June 2011, ~~a Deed Poll was executed by the first to sixth defendants had each executed counterparts of the Deed Poll~~ as directors of LMIM as RE of the FMIF and as trustee of the MPF.
- 31A. Prior to execution of the Deed Poll and prior to the payment pleaded in paragraph 35 below, each of the first to sixth defendants knew, or ought to have known the facts pleaded in paragraphs 5-22, 24-30 and 30A-30E and 30H above.

Particulars

The best particulars of knowledge and the facts from which knowledge can be inferred that the plaintiff can presently provide are as follows:

- (a) each of the first to sixth defendants as directors of LMIM had access to the books and records of that company which included:
 - (i) the FMIF Bellpac Loan Agreement and Deeds of Variation;
 - (ii) the MPF Bellpac Agreement;
 - (iii) the FMIF Charge, the PTAL Mortgage and the Deed of Priority;

- (iv) the MPF Charge, the MPF Mortgage and the Deed of Priority;
 - (v) loan statements showing the balance, from time to time, outstanding with respect to the FMIF Bellpac Loan;
 - (vi) loan statements showing the balance, from time to time, outstanding with respect to the MPF Bellpac Loan;
 - (vii) the existence of default under the FMIF Bellpac Loan;
 - (viii) statements showing the drawdown of costs including costs related to the funding of the Proceedings against the MPF Bellpac Loans;
 - (ix) in relation to the Proceedings, court documents, the Mediation Heads of Agreement, the Deed of Release, the Deed of Settlement and Release, the Gujurat Contract;
 - (x) conflict records dated 1 June 2010 and October 2010;
 - (xi) the Conflicts Management Policy dated July 2005 updated as at September 2009;
 - (xii) the Deed of Release;
 - (xiii) the Deed of Settlement and Release;
 - (xiv) the Gujurat Contract;
 - (xv) the WMS Report (which included the instructions provided by LMIM);
 - (xvi) the Allens Advice (which included the instructions provided by LMIM);
- (b) each of the first to sixth defendants:
- (i) executed the Deed Poll which stated, inter alia, that they had given careful consideration to, inter alia, the circumstances described in the Background to the Deed Poll;
 - (ii) were informed of the proposed terms of settlement of the Proceedings on or about 10 and 24 November 2010;
 - (iii) took part in directors' discussions about the terms of settlement of the Proceedings in or about March 2011;
 - (iv) were informed of the existence of the WMS Report;
 - (v) discussed with David Monaghan a draft of the WMS Report in December 2010;
 - (vi) were informed of the existence of legal advice about the proposed split of the proceeds of settlement of the Proceedings;
- (c) at material times until in or about June 2012, ~~the first, second, third, fourth and sixth defendants~~ Mr Drake, Ms Darcy, Mr van der Hoven, Ms Mulder and Mr Tickner were part of the LM Credit Committee and/or the LM Arrears Committee with access to the financial records of the FMIF and/or the MPF;

- (d) additionally, in the case of ~~the first defendant~~ Mr Drake, he:
- (i) executed the Deed of Priority;
 - (ii) executed the FMIF Bellpac Loan Agreement and the MPF Bellpac Loan Agreement;
 - (iii) was aware that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings such as rates from in or about August 2010;
 - (iv) was informed by ~~the second defendant~~ Ms Darcy in March 2011 that the ~~second defendant~~ Ms Darcy had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (iva) had available a copy of, and read, the Allens Advice prior to signing the Deed Poll (in respect of which the Plaintiff relies upon paragraphs 31A(b) and 34(i)(i) of the Amended Defence of the First Defendant filed on 23 March 2018);
 - (iv) executed the Deed of Settlement and Release;
- (e) additionally, in the case of ~~the second defendant~~ Ms Darcy, she:
- (i) executed the Deed of Priority;
 - (ii) was informed by David Monaghan in August 2010 that LMIM as trustee for the MPF was funding the proceedings as second mortgagee;
 - (iii) knew that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings and approved payments such as rates in or about August 2010;
 - (iv) was copied in on the email of 6 December 2010 providing instructions to WMS;
 - (v) was provided with a draft of the WMS Report on 21 December 2010;
 - (vi) instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (vii) was provided with a copy of the Allens Advice on 29 March 2011 by the email [FMIF.100.003.7017];
 - (viii) read the Allens Advice prior to signing the Deed Poll (in respect of which the plaintiff relies upon paragraph 35(g)(i) of the Amended Defence of the Second Defendant filed on 24 April 2018);
 - (viii) executed the Deed of Release;

- (f) additionally, in the case of ~~the third defendant~~ Mr van der Hoven, he:
- (i) knew that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings and approved payments such as rates in or about August 2010;
 - (ii) was informed by ~~the second defendant~~ Ms Darcy on 14 March 2011 that ~~the second defendant~~ Ms Darcy had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (iii) was provided with a copy of the Allens Advice on 7 April 2011 by the email [FMIF.200.011.5748];
 - (iv) read, the Allens Advice prior to signing the Deed Poll (in respect of which the plaintiff relies upon paragraphs 38(i) and (k) of the Further Amended Defence of the Third Defendant filed on 12 March 2018);
- (g) additionally, in the case of ~~the fourth defendant~~ Ms Mulder, she:
- (i) was informed by ~~the second defendant~~ Ms Darcy on 14 March 2011 that ~~the second defendant~~ Ms Darcy had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (ii) had available a copy of, and read, the Allens Advice prior to signing the Deed Poll (in respect of which the plaintiff relies upon paragraphs 38(b)(ii)(B), (i) and (k) of the Further Amended Defence of the Fourth Defendant filed on 12 March 2018);
- (h) Additionally, in the case of ~~the sixth defendant~~ Mr Tickner, he:
- (i) was informed by David Monaghan in August 2010 that there was no funding agreement in place regarding LMIM funding the Proceedings and that one was not necessary because it was simply a situation of LMIM as trustee of the MPF as second mortgagee funding the proceedings;
 - (ii) was copied in on the email of 6 December 2010 providing instructions to WMS;
 - (iii) was provided with a draft version of the WMS report on 15 December 2010;
 - (iv) was provided with a copy of the Allens Advice on 7 April 2011 by the email [FMIF.200.011.5748];
 - (iva) read the Allens Advice prior to signing the Deed Poll (in respect of which the plaintiff relies upon paragraph 34(h)(iv) of the Amended Defence of the Sixth Defendant filed on 27 April 2018);
 - (v) knew that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings in or about August 2010;

- (vi) was informed by ~~the second defendant~~ Ms Darcy on 14 March 2011 that ~~the second defendant~~ Ms Darcy had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (vii) executed the Deed of Settlement and Release and the Deed of Release; and
 - (i) each of the first to sixth defendants ought to have known those facts because a reasonable person in the position of the first to sixth defendants would have identified those facts upon raising or making enquiry and upon considering the books and records available to them as set out in paragraph (a) of these particulars and the information set out in sub-paragraphs (b), (c), (d), (e), (f), (g) and (h) of these particulars.
32. The Deed Poll provided, inter alia, that:
- (a) **“Settlement Proposals** means the Bellpac Settlement and the Proceeds Split”;
 - (b) **“Proceeds Split** means the proposal between FMIF and MPF under which it is proposed to split the proceeds that it has recovered from the litigation in the ratio of 65% of the proceeds to the FMIF and 35% of the proceeds to MPF”;
 - (c) **“Bellpac Settlement** means the principal agreement that has been reached between LM and Gujarat pursuant to which LM will inter alia sell the Bellpac Land to Gujarat and settle the litigation with Gujarat for a total consideration of \$45.5 Million and the RE will pay \$1.3m to Coalfields to secure the withdrawal of certain caveats”;
 - (d) “after giving full and comprehensive consideration to all of the relevant issues, the directors have concluded ...”, inter alia:
 - (i) “there is a need for the FMIF RE to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF trustee”;
 - (ii) “LM as trustee of MPF will comply with its general law fiduciary duties as a trustee if it agrees to the Settlement Proposals pursuant to which MPF will be obliged to release its security over the Bellpac Land”.

32A. The Deed Poll did not refer to:

- (a) the Allens Advice;
 - (b) the Conflicts Management Policy pleaded at paragraph 30G above;
 - (c) sections 601FC or 601FD of the Act.
33. At the time LMIM as trustee of the MPF agreed to fund the Proceedings as registered mortgagee of the Property with second priority under the Deed of Priority in or about July 2009, the first to sixth defendants:
- (a) had not considered that MPF’s contribution to the funding of the Proceedings was to be recognised by providing MPF with a share of any proceeds recovered by the litigation as a litigation funder;

Particulars

The plaintiff relies on the particulars provided at subparagraph 30C(d)(iii) above.

- (b) had an expectation that if LMIM and PTAL were successful in the Proceedings and the Property was developed by LMIM as RE for the FMIF then:
 - (i) the amount owed under the FMIF Bellpac loan would be repaid in full; and
 - (ii) the amount owed under the MPF Bellpac loan would be repaid in part and possibly in full.
34. In reaching the conclusions and decision stated in the Deed Poll referred to in paragraph 32 above the first to sixth defendants:
- (aa) failed to adequately read or consider the content of the Allens Advice;

Particulars

Such a failure to adequately read or consider the contents of the Allens Advice may be inferred from:

- (i) the second to sixth defendants' failures to identify the matters pleaded at paragraph 30H above;
 - (ii) the absence of reference in the Deed Poll to the matters referred to at paragraph 32A above;
 - (iii) the fact that a draft of the Deed Poll was circulated by Mr Monaghan and Ms Kingston to the second to sixth defendants on or about Friday, 10 June 2011 and each of the second to sixth defendants had signed the Deed Poll by Tuesday, 14 June 2011.
- (a) failed to have proper regard or give adequate consideration to the fact that, in circumstances where, as they knew or ought to have known:
 - (i) pursuant to the Gujarat Contract, PTAL sold the Property to Gujarat as mortgagee exercising power of sale; and
 - (ii) pursuant to clause 3.1 of the Deed of Priority, the FMIF Bellpac Loan had priority over the MPF Bellpac Loan;
 - (ii) ~~in any event the Deed of Priority contains the terms pleaded in paragraph 12 above;~~
 - (iii) LMIM as trustee of the MPF could not have prevented the sale of the Property to Gujarat under the Gujarat Contract by refusing to provide a release of the MPF Mortgage over the Property;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(a)(v), 31A(a)(vi), 31A(a)(vii), 31A(a)(ix), 31A(a)(xiv), 31A(b)(i), 31A(d)(i), 31A(d)(ii), 31A(e)(i) and 31A(i).

- (b) failed to have proper regard or give adequate consideration to the fact that there was no necessity for LMIM as RE of FMIF to reach agreement with LMIM as trustee of the MPF about sharing the amounts payable to PTAL under the Deed of Release or the Gujarat Contract because, as they knew or ought to have known:

~~(i) LMIM as trustee of the MPF was not a party to the Deed of Release nor the Gujarat Contract;~~

~~(ia) the matters pleaded at subparagraph 30C(d)(iii) above;~~

~~(ii) the agreement of LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract;~~

Particulars

~~The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(a)(v), 31A(a)(vi), 31A(a)(vii), 31A(a)(viii), 31A(a)(ix), 31A(a)(xii), 31A(a)(xiii), 31A(a)(xiv), 31A(b)(i), 31A(b)(ii), 31A(b)(iii), 31A(d)(i), 31A(d)(ii), 31A(d)(iv), 31A(e)(i), 31A(e)(viii), 31A(h)(vii) and 31A(i).~~

- (c) failed to have proper regard or give adequate consideration to the fact that, as they knew or ought to have known:

(i) LMIM as trustee of the MPF was a subsequent mortgagee of the Property and a subsequent charge holder over the assets of Bellpac;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(b)(i), 31A(d)(i), 31A(e)(i) and 31A(i).

~~(ii) the terms of the Deed of Priority included those pleaded in paragraph 12 above;~~

Particulars

~~The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(iv), 31A(b)(i), 31A(d)(i), 31A(e)(i) and 31A(i).~~

(iii) LMIM as trustee of the MPF:

(A) had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority;

(B) was drawing down such funding against the MPF Bellpac loan;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(a)(vi), 31A(a)(viii), 31A(a)(x), 31A(a)(xi), 31A(d)(iii), 31A(e)(ii), 31A(e)(iii), 31A(f)(i), 31A(h)(i), 31A(h)(v) and 31A(i).

- (iv) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i) 31A(a)(iii), 31A(a)(v), 31A(a)(vii), 31A(a)(ix), 31A(a)(xii), 31A(a)(xiii), 31A(a)(xiv) and 31A(i).

- (v) PTAL was, as at 22 June 2011, owed the sum of \$52,480,469.12 by Bellpac comprising the Principal Amount, Interest, Other Moneys and Enforcement Expenses (as those terms are defined in the Deed of Priority); and

Particulars

The plaintiff relies upon the particulars set out above in paragraph 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(v), 31A(a)(vii) and 31A(i).

- (vi) ~~LMIM as trustee for the MPF was not entitled to any amount beyond that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;~~

Particulars

~~The plaintiff relies upon the particulars set out above in paragraph 31A above.~~

- (d) failed to consider whether the LMIM as trustee for the MPF could be treated as if it was an arms-length litigation funder when it was a registered mortgagee with second priority and whether it was appropriate to split the Bellpac Settlement proceeds in accordance with the Proceeds Split;
- (e) failed to obtain independent legal advice or other independent advice as to whether, in the circumstances outlined in subparagraphs (a)(i), ~~and (ii) and (iii)~~, b(i), (ia) and (ii) and ~~c(i), (ii) and (iii)~~, (iv) and (v) above:
 - (i) LMIM as trustee of the MPF could be treated as if it was an arms-length litigation funder;
 - (ii) it was reasonable for LMIM as trustee of the MPF to be paid in accordance with the Proceeds Split an amount over and above the amount it had paid to LMIM in respect of the funding of the Proceedings or any amount at all; and
 - (iii) it was in the interests of the FMIF for LMIM as RE of the FMIF to agree to LMIM as trustee of the MPF to be paid in accordance with the Proceeds Split an amount over and above the amount it had paid in respect of the funding of the Proceedings or any amount at all;
- (f) took into consideration the Allens Advice and the WMS Report which, as they ought to have known, did not constitute the advice identified in subparagraph (e) above;
- (g) in the premises pleaded in subparagraphs ~~(aa)~~, (a), (b), (c), (d), (e) and (f) above, failed to have proper regard or give adequate consideration to the different interests of the FMIF and the MPF.

The Payment to MPF of monies payable to FMIF by Gujarat under Gujarat Contract and Deed of Release

35. LMIM as trustee of the MPF received the sum of \$15,546,147.85 (Settlement payment) from the proceeds payable to PTAL as custodian of LMIM as RE of the FMIF pursuant to the terms of the:

- (a) Gujarat Contract; and
- (b) Deed of Release.

Particulars

- (a) on or about 21 June 2011, LMIM as trustee for the MPF received:
 - (i) the sum of \$12,747,810.53; and
 - (ii) separately, the sum of \$858,282.79;
 - (b) on or about 29 June 2011, an amount of \$4,545.94 was refunded by LMIM as trustee for the MPF to Gujarat for an overpayment made on settlement such that the total amount received by LMIM as trustee for the MPF in June 2011 was \$13,601,547.38;
 - (c) on or about 8 September 2011, LMIM as trustee for the MPF received the sum of \$1,944,600.47.
36. ~~On the basis of the conclusions and the decision recorded in the Deed Poll,~~ LMIM as RE of the FMIF agreed to make and further caused, permitted or directed the Settlement payment to be made to LMIM as trustee of the MPF from the amounts payable to LMIM as RE of the FMIF and PTAL pursuant to the terms of the:
- (a) Gujarat Contract; and
 - (b) Deed of Release.
37. The Settlement payment was scheme property which ought to have been held by LMIM as RE of the FMIF for the benefit of the members of the FMIF.
- 37A. Had the first to sixth defendants had proper regard and given adequate consideration to the facts and matters pleaded in paragraph 34 above, and acted with the degree of reasonable care and diligence that a reasonable person would have exercised if they were a director or officer of a corporation in LMIM's circumstances, and occupied the office held by, and had the same responsibilities within LMIM as the first, second, third, fourth, fifth and sixth defendants respectively:
- (aa) they would not have concluded that:
 - (i) ~~the overall settlement in accordance with the terms of the Gujarat Contract and the Deed of Release could not occur without the agreement of the MPF trustee;~~
 - (ii) they needed to reach an agreement with LMIM as RE of the MPF about the sharing of proceeds for the settlement to occur;
 - (iii) the Proceeds Split was fair to the FMIF;

- (iv) the Proceeds Split was in the best interests of the FMIF's members;
 - (v) the Proceeds Split was not unreasonable;
 - (v) the MPF was in an analogous position to a litigation funder and the Settlement Proposals would not be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length;
 - (vi) the WMS Report or the Allens advice justified the payment of any part of the Settlement payment to LMIM as trustee of the MPF; and
- (a) they would not have agreed to make, cause, permit or direct the Settlement payment to LMIM as trustee of the MPF and would have determined that:
- (i) LMIM as trustee of the MPF had no entitlement to be paid the Settlement payment or in the alternative, had no entitlement to receive any payment beyond that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (ii) it was not in the interests of the members of the FMIF to do so; and
 - (iii) it would cause detriment, in the form of depletion of its assets, to LMIM as RE of the FMIF if the Settlement payment was made or in the alternative, if an amount beyond that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount was paid to LMIM as trustee of the MPF;
- (b) further, and in the alternative, they would not have split the proceeds at all and would have applied all proceeds of the settlement against the amount owed to LMIM as RE of the FMIF by Bellpac.

37B. LMIM as trustee of the MPF accepted and retained the Settlement payment.

~~Contraventions of s 180 and 182 of the Corporations Act~~

~~38. At all material times in their capacity as directors of LMIM, the first to sixth defendants owed duties to LMIM as RE of the FMIF under:~~

~~(a) section 180(1) of the Act and at general law to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in LMIM's circumstances, and occupied the office held by, and had the same responsibilities within LMIM as the first, second, third, fourth, fifth and sixth defendants respectively;~~

~~(b) section 182(1) of the Act and at general law not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to LMIM.~~

~~39. By causing LMIM as RE of the FMIF to agree to make and to cause, permit or direct the Settlement payment to be made to LMIM as trustee of the MPF the first to sixth defendants:~~

~~(a) failed to exercise their powers and discharge their duties with a reasonable degree of care and diligence in breach of the duty pleaded in paragraph 38(a) above in the~~

premises pleaded in paragraph 37A above which, as was reasonably foreseeable, caused harm to the interests of LMIM as RE of the FMIF;

(b) — improperly used their position as directors of LMIM to gain an advantage for the MPF in breach of the duty pleaded in paragraph 38(b) above in the premises pleaded in paragraph 37A above.

39A. — As a result of the breaches of duty pleaded in paragraph 39 above, and in the premises pleaded in paragraph 37A above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, by the amount paid to it in excess of that which was necessary to reimburse the LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

39B. — LMIM as RE of the FMIF has suffered damage being the amount of the Settlement payment or, in the alternative, the amount paid to it in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

40. — In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment or, in the alternative, the amount paid to it in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

LMIM's involvement in contraventions by directors

41. — LMIM as trustee of the MPF knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

42. — By reason of the matters pleaded in paragraph 39(b) and 41 above LMIM as trustee of the MPF was involved in the contravention of the duty pleaded in paragraph 39(b) above and was itself in contravention of section 182(2) of the Act.

42A. — As a result of the breach of duty pleaded in paragraph 42 above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, by the amount paid to it in excess of that which was necessary to reimburse the LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

42B. — As a result of the matters pleaded in paragraph 42A above and the contravention pleaded in paragraph 42 above, the LMIM as RE of the FMIF has suffered damage in the amount of the Settlement payment or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

43. — In the premises LMIM as trustee of the MPF is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment or, in the alternative, the amount paid to it in excess of that which was necessary to reimburse it for the contribution

it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

The contravention of s 601FD of the Corporations Act

44. At all material times in their capacity as officers of LMIM as RE of the FMIF, the first to sixth defendants owed duties under:

- (a) section 601FD(1)(b) of the Act to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively;
- (b) section 601FD(1)(c) of the Act to act in the best interests of members of the FMIF and, if there is a conflict between the members' interests and the interests of the RE, give priority to the members' interests.
- (c) ~~section 601FD(1)(e) not to make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the FMIF.~~

45. By causing LMIM as RE of the FMIF to agree to make and to cause, permit or direct the Settlement payment to be made to LMIM as trustee of the MPF, the first to sixth defendants:

- (a) failed to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively in breach of the duty pleaded in paragraph 44(a) above in the premises pleaded in paragraph 37A above;
- (b) did not act in the best interests of the members of the FMIF and give priority to the interests of the members of the FMIF in breach of the duty pleaded in paragraph 44(b) above in the premises pleaded in paragraph 37A above;
- (c) ~~improperly used their position as officers of the RE of FMIF to gain an advantage for the MPF in breach of the duty pleaded in paragraph 44(c) above in the premises pleaded in paragraphs 34A, 34B and 37A above.~~

45AA. Had the first to sixth defendants complied with their duties pleaded at subparagraphs 44(a) and (b) above:

- (a) LMIM as RE of the FMIF would have entered into the Deed of Release, the Deed of Release and Settlement and the Gujarat Contract on the terms provided therein;
- (b) LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the terms provided therein;
- (c) the Deed Poll would not have been entered into;
- (d) the first to sixth defendants would not have split the proceeds of settlement of the Proceedings;
- (e) the Settlement payment would not have been made to LMIM as trustee of the MPF;
- (f) all proceeds of the settlement of the Proceedings would have been paid to LMIM as RE of the FMIF.

Particulars

That LMIM and its directors would have taken those steps is apparent from, or to be inferred from, the following:

- (i) the matters pleaded in paragraph 12 to 16, 24 and 28 to 30 and 37A above and the terms of the Deed of Release, Deed of Settlement and Release and the Gujarat Contract;
- (ii) the statutory obligations imposed by section 601FC(1)(b) and (c) and section 601FD(1)(b) and (c);
- (iii) that PTAL as custodian for the FMIF was first registered mortgagee with a secured debt that exceeded the amounts to be paid to PTAL under the Deed of Release and the Gujarat Contract;
- (iv) that the directors had formed the view that settlement obtained under the Deed of Release, the Deed of Settlement and Release and the Gujarat Contract was the best settlement that could be achieved in relation to the Proceedings; and
- (v) in light of that, expending further costs on litigating the Proceedings was of no commercial value;
- (vi) the terms of clause 3 of the Deed of Priority.

45AB. In the alternative to paragraph 45AA above, in respect of the breach of subsection 601FD(1)(b), had the first to sixth defendants complied with their duty pleaded at paragraph 44(a) above:

- (a) LMIM as RE of the FMIF would have entered into the Deed of Release, the Deed of Release and Settlement and the Gujarat Contract on the terms provided therein;
- (b) LMIM as trustee of the MPF would have entered into the Deed of Release and the Deed of Settlement and Release on the terms provided therein;
- (c) the Deed Poll would not have been entered into;
- (d) the first to sixth defendants would have caused LMIM as trustee of the MPF to be reimbursed for the contribution it made it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
- (e) otherwise, the proceeds of the settlement of the Proceedings would have been paid to LMIM as RE of the FMIF.

Particulars

The plaintiff repeats and relies upon the particulars of paragraph 45AA above.

45A. As a result of the breaches of duty pleaded in paragraph 45 above,

- (a) the first to sixth defendants caused the Settlement payment to be made to LMIM as trustee of the MPF;
- (b) the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, in respect of the breach of subsection 601FD(1)(b), by the amount paid to LMIM as trustee of the MPF in excess of that

which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

- 45B. As a result of the matters pleaded in paragraphs 45AA, 45AB and 45A above and the contraventions pleaded in paragraph 45 above, the LMIM as RE of the FMIF has suffered damage in the amount of the Settlement payment or, in the alternative, in respect of the breach of subsection 601FD(1)(b), in the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
46. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment or, in the alternative, in respect of the breach of subsection 601FD(1)(b), in the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

~~LMIM's involvement in contraventions by officers~~

- ~~47. LMIM as trustee of the MPF knew of the matters pleaded in paragraphs 1(b), 1(e), 2, 5-13 and 17-31 and 32-37, 37A and 37B above.~~

~~Particulars~~

~~LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.~~

- ~~47A. LMIM as trustee of the MPF entered into the Deed Poll and received the Settlement payment acting for the benefit of the MPF.~~

- ~~47B. LMIM entered into the Deed Poll and received the Settlement payment acting as responsible entity for the FMIF and as trustee for the MPF.~~

- ~~48. By reason of the matters pleaded in paragraphs 45, and 47, 47A and 47B above, LMIM as trustee of the MPF was involved in the contraventions of the duties pleaded in paragraph 45 above and was itself in contravention of sections 601FD(1)(b), and 601FD(1)(c) and 601FD(1)(e) of the Act.~~

- ~~48A. As a result of the breaches of duty pleaded in paragraph 48 above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, in respect of the breach of subsection 601FD(1)(b), by the amount paid to it in excess of that which was necessary to reimburse the LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount and the assets of LMIM as trustee for the MPF were increased by a corresponding amount.~~

- ~~48B. As a result of the matters pleaded in paragraph 48A above and the contraventions pleaded in paragraph 48 above, the LMIM as RE of the FMIF has suffered damage in the amount of the Settlement payment or, in the alternative, in respect of the breach of subsection 601FD(1)(b), in the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.~~

~~49. In the premises:~~

- ~~(a) LMIM as trustee of the MPF is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment or, in the alternative, in respect of the breaches of subsection 601FD(1)(b), the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;~~
- ~~(b) that liability was incurred in circumstances where LMIM was acting as RE for the FMIF and as trustee for the MPF.~~

~~**Rights of LMIM as former trustee of the MPF and the Plaintiff's right of subrogation**~~

- ~~50. As former trustee of the MPF, in the premises pleaded at paragraphs 47 to 49 above, LMIM has a right of indemnity out of the assets of the MPF with respect to any liability of LMIM in these proceedings.~~
- ~~51. Any right of indemnity of LMIM as former trustee of the MPF operates as an equitable lien over the assets of the MPF.~~
- ~~52. The eighth defendant holds the assets of the MPF subject to any right of indemnity and lien of LMIM over those assets.~~
- ~~53. LMIM is insolvent.~~
- ~~54. By reason of the matters pleaded in paragraphs 50 to 53 above, the plaintiff is entitled to be subrogated to LMIM's right of indemnity and lien to the extent of LMIM's liability in these proceedings.~~

The Plaintiff claims the following relief:

1. As against the first defendant:
 - (a) an order under s 1317H of the *Corporations Act 2001* (Cth) that the first defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) costs.
2. As against the second defendant:
 - (a) an order under s 1317H of the *Corporations Act 2001* (Cth) that the second defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount ;

- (b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) costs.
- 3. As against the third defendant:
 - (a) an order under s 1317H of the *Corporations Act 2001 (Cth)* that the third defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) costs.
- 4. As against the fourth defendant:
 - (a) an order under s 1317H of the *Corporations Act 2001 (Cth)* that the fourth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) costs.
- 5. As against the fifth defendant:
 - (a) an order under s 1317H of the *Corporations Act 2001 (Cth)* that the fifth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) costs.
- 6. As against the sixth defendant:
 - (a) an order under s 1317H of the *Corporations Act 2001 (Cth)* that the sixth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;

- (b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
- (c) costs.

~~7. As against the seventh defendant:~~

- ~~(a) an order under s 1317H of the *Corporations Act 2001 (Cth)* that the seventh defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;~~
- ~~(b) interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and~~
- ~~(c) costs.~~

~~8. As against the seventh and eighth defendant a declaration that:~~

- ~~(a) the seventh defendant is entitled to be indemnified out of the assets of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;~~
- ~~(b) the seventh defendant has a lien or charge over the assets and undertakings of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;~~
- ~~(c) the plaintiff is entitled to be subrogated to the rights of the seventh defendant in respect of the assets of the MPF.~~

~~This pleading was settled by Ms MJ Luchich of Counsel and Ms Susan Brown of Queens Counsel.~~

~~The amendments to this pleading were settled by Mr Damien O'Brien QC and Mr Matthew Jones of counsel.~~

Signed:

Coaders

Description: Solicitors for the Plaintiff

Dated: 7 November 2016 ~~1 February 2019~~ 2 April 2019

NOTICE AS TO DEFENCE

Your Defence must be attached to your Notice of Intention to Defend.

"SC-4"

Cor: Jackson J
Leave to file and read together with exhibits (if any) hereto
3/14/19 Assoc NT

SUPREME COURT OF QUEENSLAND
3 APR 2019

Amended 3 April 2019 pursuant to the direction of Jackson J dated 2 April 2019
Bartley Cohen

SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: 12317 of 2014

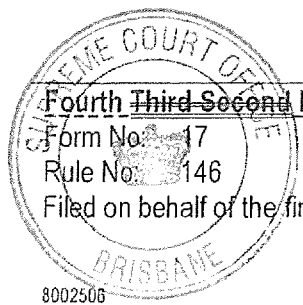
- Plaintiff LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
- First Defendant PETER CHARLES DRAKE
- Second Defendant LISA MAREE DARCY
- Third Defendant EGHARD VAN DER HOVEN
- Fourth Defendant FRANCENE MAREE MULDER
- Fifth Defendant JOHN FRANCIS O'SULLIVAN
- Sixth Defendant SIMON JEREMY TICKNER
- Seventh Defendant LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461
- Eighth Defendants KORDA MENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES OF THE LM MANAGED PERFORMANCE FUND

Filed in the Brisbane registry on 2019 ~~2018~~

FOURTH~~THIRD SECOND~~ FURTHER AMENDED DEFENCE OF THE FIRST DEFENDANT

In this defence the first defendant adopts the definitions used in the ~~second~~ third ~~fifth~~ further amended statement of claim filed 2 April 2019 ~~1 February 2019~~ ~~17 June 2015~~ (the statement of claim), unless a contrary intention is expressed.

- 1 The first defendant admits the facts alleged in paragraph 1 of the statement of claim.
- 2 As to The first defendant admits the facts alleged in paragraph 2 of the statement of claim, and says that: ~~the first defendant:~~



~~Fourth Third Second~~ Further Amended Defence
Form No. 17
Rule No. 146
Filed on behalf of the first defendant

Bartley Cohen
Level 22
123 Eagle Street
Brisbane Qld 4000
Tel: 3831 9400
Fax: 3831 9500

- (a) ~~He was principally responsible for the strategic vision, direction and structured growth of the seventh defendant. Admits he (Drake) became a director of LMIM on 31 January 1997 and remained so until 9 January 2015;~~
- (b) ~~As a consequence of his role referred to in subparagraph (a) above, he spent a significant amount of time travelling. Admits the second defendant (Darcy) was a director of LMIM from 12 September 2003 to 21 June 2012;~~
- (c) ~~He was not the holder of a law degree or other similar tertiary qualification. Admits the third defendant (van der Hoven) became a director of LMIM on 22 June 2006 and remains so;~~
- (d) ~~Admits the fourth defendant (Mulder) became a director of LMIM on 30 September 2006 and remains so;~~
- (e) ~~Admits the fifth defendant was a director of LMIM from 27 November 2007 to 30 September 2012;~~
- (f) ~~Admits the sixth defendant (Tickner) was a director of LMIM from 18 September 2008 to 13 July 2012; and~~
- (g) ~~Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.~~

2A The first defendant says that David Monaghan (**Monaghan**):

- (a) Was admitted as a solicitor in 1990;
- (b) Was an employee of LMIM (through LMIM's service company LM Administration Pty Ltd) from in or around early 2004 to in or around February 2010, during which time he initially held the position of risk manager and, subsequently, the position of commercial lending manager;
- (c) Prior to being employed by LMIM, was an employed solicitor at Hickey Lawyers;
- (d) In his role as commercial lending manager, managed the commercial lending department in LMIM, which had the responsibility for a portfolio of loans, including from in or about 2006 the FMIF Bellpac Loan and MPF Bellpac Loan;
- (e) Subsequently to being employed by LMIM, was the principal of a law firm called Monaghan Lawyers (**Monaghan Lawyers**) for the period 1 March 2010 to 24 October 2012;
- (f) During the period that Monaghan Lawyers operated, acted as solicitor to LMIM in respect of the Proceedings (as that term is defined in paragraph 22 below), and the matters associated with it, including the settlement of the Proceedings and the matters which are the subject of this proceeding.

2B The first defendant says that Grant Fischer (**Fischer**) was:

- (a) The Chief Financial Officer of LMIM from in or around 2008 onwards to around February 2013;
- (b) An executive director of LMIM from in or around March 2012 to August 2012.

3 The first defendant admits the facts alleged in paragraph 3 of the statement of claim.

4 The first defendant admits the facts alleged in paragraph 4 of the statement of claim.

4A The first defendant admits the facts alleged in paragraph 4A of the statement of claim.

5 As to paragraph 5 of the statement of claim, the first defendant:

- (a) Admits that the plaintiff has produced to him a copy of a document entitled "Loan Agreement" which appears to have been executed on 10 March 2003 on behalf of GPC Bellambi Pty Ltd ACN 101 713 017, PTAL and LMIM as RE (**FMIF Bellpac Loan Agreement**);
- (b) Says that the FMIF Bellpac Loan Agreement was executed by him on behalf of LMIM in its capacity as responsible entity (**RE**) of the FMIF;
- (c) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

6 The first defendant admits the facts alleged in paragraph 6 of the statement of claim.

7 As to paragraph 7 of the statement of claim, the first defendant:

- (a) Admits the facts alleged in subparagraph (a) and says further that the land that comprised the Property (as defined in paragraph 7(a) of the statement of claim) was identified in full in the schedule to the FMIF Bellpac Loan Agreement and in annexure A to the PTAL Mortgage;
- (b) Admits the facts alleged in subparagraph (b);
- (c) Says further that by deed of mortgage dated 21 March 2003 granted by Bellpac in favour of PTAL and registered in book 4382 number 489, Bellpac also granted to PTAL a registered mortgage over real property identified as:
 - (i) Lot 66 in DP 751301; and
 - (ii) Lot 67 in DP 751301;
- (d) Says that the land which was ultimately the subject of the Gujarat Contract included the property referred to in subparagraph (a) as well as the property referred to in subparagraph (c) above;
- (e) Says that subsequent references in this defence to the Property are as referred to in subparagraph (d) above.

8 As to paragraph 8 of the statement of claim, the first defendant:

- (a) Admits that between December 2003 and July 2008, the FMIF Bellpac Loan Agreement was varied and says further that it was varied pursuant to the following instruments: Says that the plaintiff has produced to him copies of the following documents:
 - (i) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 5 December 2003, and purporting to have

been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;

- (ii) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 13 February 2004 ~~5 December 2003~~, and purporting to have been executed on behalf of Bellpac, GPC No. 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
 - (iii) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 14 May 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
 - (iv) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 4 October 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, ~~Balgow Pty Limited~~, LMIM, and PTAL;
 - (v) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 4 October 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
 - (vi) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 21 January 2005, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
 - (vii) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 2 May 2005, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM and PTAL;
 - (viii) a document entitled "Variation Deed", bearing the date 23 June 2006, and purporting to have been executed on behalf of Bellpac, PTAL, Richard Investment (Australia) Pty Ltd, Balgow Pty Ltd, Great Pacific Capital Limited and GPC No 8 (Bulli) Pty Ltd and LMIM; and
 - (ix) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 11 July 2008, and purported to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, Anpor Holdings Pty Ltd, Richland Investments (Australia) Pty Ltd, Alfred Chi Wai Wong, LMIM, and PTAL;
- (b) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

9 The first defendant admits the facts alleged in paragraph 9 of the statement of claim and says further that the MPF Bellpac Loan Agreement was executed by him on behalf of LMIM in its capacity as trustee of the MPF.

10 The first defendant admits the facts alleged in paragraph 10 of the statement of claim.

11 As to paragraph 11 of the statement of claim, the first defendant:

- (a) Says that the plaintiff has produced to him copies of documents:
 - (i) purporting to be a mortgage granted by Bellpac on 17 December 2004 to LMIM in respect of various properties bearing dealing no. AB211547W; and
 - (ii) purporting to be a certificate of entry of a charge on the property of Bellpac, together with terms of a fixed and floating charge, bearing the date 9 October 2006 and in favour of LMIM as trustee for the MPF;
- (b) Denies that the MPF Mortgage was over the same land that comprised the Property (as that term is defined in paragraph 7(a) of the statement of claim) because:
 - (i) the MPF Mortgage was also over the land identified in subparagraph 7(c) above;
 - (ii) the MPF Mortgage did not encumber:
 - (A) Lot 130 in DP751301; or
 - (B) Auto Consol 8643-188;
- (c) Says that the MPF Mortgage was dated 17 December 2004 and predated the MPF Bellpac Loan Agreement;
- (d) Says that the MPF Charge was dated 23 June 2006 and that the Certificate of Entry of Charge lodged with ASIC was dated 9 October 2006 but recorded a lodgement date of 18 July 2006;
- (e) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

12 As to paragraph 12 of the statement of claim, the first defendant:

- (a) Says that the plaintiff has produced to him a copy of a document entitled "Priority Deed of Priority" which appears to have been entered into between PTAL, LMIM as RE for the FMIF, LMIM as trustee for the MPF, GPC No. 11 Pty Ltd, GPC No. 12 Pty Ltd, GPC No. 8 (Bulli) Pty Ltd, Austcorp Project No. 20 Pty Ltd and Bellpac on or about 23 June 2006 ("Deed of Priority");
- (b) ~~Denies the facts alleged in subparagraph (a) because clause 8 in fact provides:~~

"Release of Securities

~~*"If an asset which is subject to a Security is sold pursuant to a bona fide sale for approximately fair market value and the full proceeds of sale are distributed in accordance with this Deed, each Mortgagee must provide a release of their respective Securities to the extent that they relate to the sold assets."*~~
- (c) Says that the Deed of Priority was executed by him and by Darcy on behalf of LMIM in its capacity as RE of the FMIF and on behalf of LMIM in its capacity as trustee of the MPF;

- (d) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 13 The first defendant does not admit the facts alleged in paragraph 13 of the statement of claim because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 14 The first defendant admits the facts alleged in paragraph 14 of the statement of claim.
- 15 The first defendant admits the facts alleged in paragraph 15 of the statement of claim.
- 16 The first defendant admits the facts alleged in paragraph 16 of the statement of claim.
- 17 As to paragraph 17 of the statement of claim, the first defendant:
- (a) Says that the plaintiff has produced to him a copy of a document entitled "Land and Asset Sale Agreement Bellpac No. 1 Colliery" dated 21 October ~~2004~~ 2014 and which appears to have been entered into between Bellpac, GPC, Gujarat NRE Australia Pty Ltd (subsequently known as Gujarat NRE Minerals Limited and Gujarat NRE Coking Coal Limited ("**Gujarat**"), Bounty and Coalfields;
- (b) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 18 As to paragraph 18 of the statement of claim, the first defendant:
- (a) Admits that in addition to the LASA, Bellpac and GPC and Gujarat and Coalfields entered into other agreements on or about 3 December 2004, which amended the LASA and says that those other agreements comprised of: ~~Says that the plaintiff has produced to him copies of:~~
- (i) a document entitled "Amendment Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, to be entered by Bellpac, GPC, Gujarat, Bounty and Coalfields, but as disclosed comprising only the first 12 pages of such document and not bearing signatures for or on behalf of any person or entity;
- (ii) a document entitled "Remediation Licence Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, Gujarat, Bounty and Coalfields;
- (iii) a document entitled "Royalty Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, Gujarat, Bounty and Coalfields;
- (iv) a document entitled "Subdivision Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, GPC, Gujarat Ltd, Bounty and Coalfields;
- (v) a document entitled "Access Licence Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, Gujarat, and Bounty ~~and Coalfields~~; and

- (vi) a document dated 3 December 2004 purporting to be a letter from Bellpac to Bounty and Gujarat;
 - (b) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 19 As to paragraph 19 of the statement of claim, the first defendant:
- (a) Admits that a dispute arose between Bellpac and Gujarat subsequent to the LASA and 2004 Agreements being entered into;
 - (b) Says that aspects of the dispute included those recorded in the summons filed by Gujarat in the Supreme Court of New South Wales on 13 May 2009;
 - (c) Otherwise does not admit the facts there alleged because despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 20 As to paragraph 20 of the statement of claim, the first defendant:
- (a) Admits that in 2007 and 2008, Bellpac and Gujarat executed settlement deeds and says that those settlement deeds comprised of: ~~Says that the plaintiff has produced to him copies of:~~
 - (i) a document entitled "Deed of Settlement" bearing the date 12 September 2007 and purporting to have been executed on behalf of India NRE Minerals Ltd, Southbulli Holdings Pty Ltd (Southbulli) and Bellpac;
 - (ii) a document entitled "Amendment Deed to Deed of Settlement dated 12 September 2007" bearing the date 23 July 2008 and purporting to have been executed on behalf of Gujarat, Southbulli and Bellpac; and
 - (iii) a document entitled "Restated Settlement Deed (Replacing the Deed of Settlement dated 12 September 2007)" bearing the date 23 July 2008 and purporting to have been executed on behalf of Gujarat, Southbulli and Bellpac Pty Ltd;
 - (b) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 21 As to paragraph 21 of the statement of claim, the first defendant:
- (a) Says that in or around 2009, a dispute arose between, at least, Gujarat, Bellpac, and Coalfields and that LMIM as trustee for the MPF and PTAL had an interest in how the dispute was resolved;
 - (b) Admits that rights, obligations and liabilities of Gujarat, Bellpac and Coalfields, under and as a consequence of the LASA, the 2004 Agreements and the Settlement Deeds, were matters that were relevant to the 2009 Dispute;
 - (c) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- 22 As to paragraph 22 of the statement of claim, the first defendant:

- (a) Admits the facts alleged in subparagraph (a) and says further that the Gujarat proceedings were commenced by summons filed in the Supreme Court of New South Wales on or around 13 May 2009;
- (b) As to subparagraph (b), says that:
 - (i) the Bellpac proceeding was originally commenced by LMIM (in its capacity as trustee for the MPF) and Bellpac against Gujarat by summons filed in the Supreme Court of New South Wales on or around 7 July 2009;
 - (ii) pursuant to a list summons filed in the Supreme Court of New South Wales on 30 November 2009, the Bellpac proceeding was:
 - (A) expanded to include PTAL as a plaintiff, and Coalfields, Bounty and GPC as defendants;
 - (B) placed on the commercial list;
 - (iii) an amended list summons was filed by the plaintiffs to the Bellpac Proceeding on 8 February 2010;
 - (iv) otherwise admits the facts there alleged;
- (c) Denies the facts alleged in subparagraph (c) because the Coalfields cross-claim was commenced in the Bellpac proceedings on or around 16 March 2010 and pursuant to leave granted by Hammerschlag J on 12 March 2010;
- (d) Says further that, on 25 June 2010, Gujarat filed a second cross-claim and commercial list cross-claim statement in the Bellpac proceeding which named the plaintiffs in the Bellpac proceeding as cross-defendants and Gujarat and Southbulli as cross-claimants (the **Gujarat cross-claim**);
- (e) Says that the subsequent references in this defence to the Gujarat proceedings, the Bellpac proceedings, the Coalfields cross-claim and the Gujarat cross-claim are to those proceedings and those cross-claims as referred to above (together the **Proceedings**) and in paragraph 22A below.

22A In relation to the Proceedings, the first defendant says further that;

- (a) The claims being pursued by LMIM as trustee for the MPF and PTAL in the Bellpac proceedings were not claims for the recovery of a security property but were instead complex claims against third parties for a range of relief including for:
 - (i) a declaration that the Amendment Deed and Restated Settlement Deed were unenforceable, void or voidable;
 - (ii) a declaration that the parties by their conduct mutually rescinded and terminated or abandoned the Amendment Deed and Restated Settlement Deed;
 - (iii) damages pursuant to section 82 of the *Trade Practices Act 1974* (Cth);
 - (iv) damages for tortious interference;

- (b) Darcy, Tickner and Monaghan (initially in his capacity as Commercial Lending Manager and subsequently in his capacity as the principal of Monaghan Lawyers) were (and the first defendant was not himself) managing, and directly involved in, the conduct of the Proceedings, including the settlement negotiations, on behalf of LMIM in its capacity as trustee of the MPF and in its capacity as RE of the FMIF;
- (c) Allens Arthur Robinson, a major Australian firm (**Allens**) was retained by LMIM to act to protect its various interests in the Proceedings from in or around January 2007 ~~mid-2009~~ until in or around December 2009;
- (d) Verekers Lawyers, a Sydney litigation firm (**Verekers**) was retained by LMIM to act to protect its various interests in the Proceedings from in or around late November 2009 until the Proceedings were concluded;
- (e) Monaghan Lawyers was retained by LMIM to act to protect its various interests in the Proceedings, in conjunction with Verekers and Allens, from on or around 1 March 2010, when Monaghan Lawyers was established;
- (f) Allens was subsequently retained by LMIM to act to protect its various interests in the settlement of the Proceedings from in or around early December 2010;
- (fa) Monaghan (initially in his capacity as Commercial Lending Manager and subsequently in his capacity as the principal of Monaghan Lawyers) sought and obtained a number of advices from Allens in relation to matters concerning the Dispute and the Proceedings;

Particulars

- (i) email from Monaghan to Alf Pappalardo of Allens (**Pappalardo**) dated 17 March 2008 and sent at 11.24am;
- (ii) email from Pappalardo to Monaghan dated 17 March 2008 and sent at 4.25pm;
- (iii) email from Brett Cook of Allens (**Cook**) to Monaghan dated 21 April 2008 and sent at 9.39am;
- (iv) letter from Allens to Monaghan dated 30 April 2008;
- (v) letter from Allens to Monaghan dated 27 June 2008;
- (vi) email from Monaghan to Cook dated 3 June 2008 and sent at 2.35pm;
- (vii) email from Cook to Monaghan dated 3 June 2008 and sent at 4:07pm;
- (viii) letter from Allens to Monaghan dated 21 November 2008;
- (ix) email from Monaghan to Bruce Wacker of Allens (**Wacker**) dated 11 May 2008 and sent at 8.57am;
- (x) letter from Allens to Monaghan dated 12 May 2009; [FMIF.050.002.0280]
- (xi) email from Monaghan to Pappalardo and Wacker dated 28 May 2009 and sent at 2.00pm;

- (xii) email from Wacker to Monaghan dated 10 June 2009 and sent at 5.07pm, attaching strategy paper;
 - (xiii) email from Pappalardo to Monaghan dated 13 August 2009 and sent at 2.22pm;
 - (xiv) email from Andrew Stumer of Allens [Stumer] to Monaghan dated 27 August 2009 and sent at 8.43am, attaching draft instructions to counsel;
 - (xv) letter from Allens to Monaghan dated 17 November 2009;
- (fb) The advice provided by Allens to Monaghan included advice to the following effect:
- (i) the relief sought by the plaintiffs in the Bellpac proceeding was unlikely to operate to invalidate the consolidated coal lease granted by the NSW Government in favour of Gujarat;
 - (ii) even if the plaintiffs were successful in the Bellpac proceeding the Court was unlikely to require Gujarat to perform the Remediation Licence Deed, meaning that Gujarat's occupation of the mining land and mining operations would continue.
- (fc) In the premises of the matters pleaded in subparagraph (fb) above, traditional claims for the recovery of a security property were not available to LMIM;
- (g) He was informed about the nature and the progress of the Proceedings by Monaghan and others, including by the following email communications:
- (i) email from Monaghan to Drake and Tickner dated 18 May 2009 and sent at ~~10.12~~ 9.10am;
 - (ii) ~~email from Monaghan to Drake and Tickner dated 18 May 2009 and sent at 10.12am;~~
 - (iii) email from Monaghan to Drake, Darcy, van der Hoven, Mulder, and Tickner dated 6 July 2009 and sent at 9.53am, including its attachment;
 - (iv) emails from Monaghan to Drake, Darcy, van der Hoven, Mulder, and Tickner dated 6 July 2009 and sent at 12.11pm and 4.21pm;
 - (v) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 16 July 2009 and sent at 4.53pm;
 - (vi) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 23 July 2009 and sent at 1.56pm, including its attachment;
 - (vii) email from Monaghan to Drake, Darcy, van der Hoven, Fran Gordon and Tickner dated 29 July 2009 and sent at 11.26am;
 - (viii) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 7 September 2009 and sent at 9.54am, including its attachments;
 - (ix) email from Monaghan to Drake, Darcy, van der Hoven, Mulder, and Tickner dated 27 November 2009 and sent at 11.36am, including its attachment;

- (x) email from Monaghan to Drake dated 7 July 2010 and sent at 3.59pm;
 - (xi) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 23 July 2010 and sent at 11.04am;
 - (xii) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 4 August 2010 and sent at 9.48am;
 - (xiii) email from Monaghan to Drake dated 17 August 2010 and sent at 1.32pm;
 - (xiv) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 22 October 2009 and sent at 5.25pm;
 - (xv) email from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner and Fischer dated 10 November 2010 and sent at 6.58pm;
 - (xvi) the email communications referred to in subparagraphs (h) and 27(b)(ii) below;
- (h) He was aware that LMIM as trustee for the MPF had provided an undertaking as to damages in the Bellpac proceedings, on its own behalf and on the behalf of the other plaintiffs;

Particulars

Email from Monaghan to Drake dated 23 August 2010 and his reply dated 24 August 2010;

- (i) In the premises of the matters pleaded in subparagraphs (a) to (h) above, he believed that:
- (i) Darcy, Tickner and Monaghan would give and gave proper regard and consideration to all of the relevant facts and circumstances when managing and conducting the Proceedings and the settlement negotiations on behalf of LMIM in its various capacities;
 - (ii) Allens and Verekers would give and gave proper regard and consideration to all of the relevant facts and circumstances when acting on behalf of LMIM in its various interests in the Proceedings and in the settlement of the Proceedings;
 - (iii) if there were any facts, matters or circumstances which he should consider or have regard to in relation to the Proceedings or the settlement thereof or a matter the subject of the Proceedings, they would be brought to his attention as such by Darcy, Tickner, Monaghan, Allens and/or Verekers.
- 23 ~~The first defendant admit the facts alleged in paragraph 23 of the statement of claim.~~
- 24 As to paragraph 24 of the statement of claim, the first defendant:
- (a) Says that from in or around July 2009, LMIM as trustee for the MPF funded the Gujarat proceedings and the Bellpac proceedings;
 - (b) Says that LMIM as trustee for the MPF funded the Coalfields cross-claim from in or around March 2010;

- (c) Says that LMIM as trustee for the MPF funded the Gujarat cross-claim from in or around June 2010;
- (d) Says that in relation to claims brought by or on behalf of FMIF in the Bellpac proceedings:
 - (i) as pleaded in subparagraph 22(b) above, PTAL did not become a party to the Bellpac proceedings until 30 November 2009;
 - (ii) ~~in the premises,~~ PTAL as custodian for the FMIF, or alternatively LMIM as RE of the FMIF, could not have commenced or maintained proceedings against Gujarat unless LMIM as trustee for the MPF had agreed to fund such proceeding and further relies upon paragraph 22(f) of the defence of the second defendant to the third further amended statement of claim;
- (e) Says that in addition to funding the Proceedings, LMIM as trustee for the MPF also funded other costs associated with the Proceedings, the costs of additional proceedings or anticipated proceedings associated with the FMIF Bellpac Loan and the MPF Bellpac Loan (including proceedings against the guarantors under the loans), and the costs of the Bellpac receivership;
- (f) Says that he was aware of the matters pleaded in subparagraphs (e) above

Particulars

- (i) email from Monaghan to Drake, Darcy, van der Hoven, Fran Gordon (by error) and Tickner dated 29 July 2009 and sent at 11.26am;
- (ii) email from Tickner to van der Hoven, Drake and Darcy dated 25 August 2010 and sent at 12.16pm;
- (iii) emails from Andrew Petrik of LMIM to Tickner, Darcy, van der Hoven, Monaghan and Drake dated 2 December 2010 and sent at 3.32 and 4.56pm respectively;
- (g) Denies that the funding was provided by LMIM as trustee for the MPF as registered mortgagee of the Property with second priority under the Deed of Priority, because the funding was not provided pursuant to the Deed of Priority;
- (h) Denies that the funding was provided expressly as second mortgagee because the funding was provided:
 - (i) to enable LMIM to continue to prosecute and defend (respectively) the Proceedings on behalf of and for the benefit of the FMIF and the MPF;
 - (ii) on the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions but rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
- (i) Denies that the amount of the funding provided by the MPF was an amount of not more than ~~\$1,380,431.54~~ \$1,950,421.69 because: ~~and in the premises of the~~

~~matters pleaded in subparagraph (e) above, the amount of the funding provided by the MPF was in excess of that figure;~~

- (i) in the premises of the matters pleaded in subparagraph (e) above, the amount of the funding provided by the MPF was in excess of that figure;
- (ii) LMIM as trustee for the MPF continued to contribute amounts in respect of the Proceedings after the date of completion;

Particulars

- (A) Allens Invoice no. 90732196, dated 4 July 2011, and in the amount of \$34,841.04;
- (B) Woodbury Bell Valuers invoice no. V3110750PW, dated 11 August 2011, and in the amount of \$1,375.00;
- (C) On-going liquidators costs, paid on 7 September 2011, and in the amount of \$50,000.00;
- (D) Allens invoice no. 90733747, dated 27 July 2011, and in the amount of \$1,063.15;
- (E) Allens invoice no. 90738726, dated 29 August 2011, and in the amount of \$2,527.62;
- (F) Monaghan Lawyers invoice no. 530, dated 18 July 2011, and in the amount of \$39,797.88;
- (G) Verekers invoice no. 11367, dated 11 July 2011 and in the amount of 10,432.09;
- (H) Stamp Duty in the amount of \$9,040.00 paid on 20 September 2011;
- (I) Allens invoice no. 90743074, dated 28 September 2011, and in the amount of \$12,883.40;
- (J) Monaghan invoice no. 578, dated 1 September 2011 in the amount of \$11,771.77.;
- (K) Monaghan invoice no. 644, dated 4 October 2011, and in the amount of \$9,915.71;
- (L) Verekers invoice no's. 100128 and 11518, dated 13 September 2011, and in the amount of \$9,223.46;
- (M) Verekers invoice no. 11592, dated 18 October 2011, and in the amount of \$8,966.56;
- (N) Verekers invoice no. 11623, dated 11 November 2011, in the amount of \$5,384.83.

(iii) LMIM as trustee for the MPF agreed to fund, and did in fact fund, further recovery efforts including in respect of guarantees provided pursuant to the FMIF Bellpac Loan Agreement and MPF Bellpac Loan Agreement.

(j) Says that in addition to providing funding and in the premises of the matters pleaded in subparagraphs 22A(h) above and 27(viii) below, LMIM as trustee for the MPF also agreed to provide an undertaking as to damages on behalf of the plaintiffs in the Bellpac proceedings and to fund the \$1.3M payment to Coalfields on settlement;

(k) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

25 As to paragraph 25 of the statement of claim, the first defendant:

(a) Says that the plaintiff has produced to him a copy of a handwritten document entitled "Heads of Agreement Recording Agreement in Principle" dated 9 November 2010;

(b) Says that the plaintiff has produced to him a copy of a typed document with some handwriting that is entitled, "Heads of Agreement Recording Agreement in Principle";

(c) Says that on behalf of LMIM's various interests, the mediation was attended by Monaghan, Darcy, Tickner, Rob Tassell of Verekers Lawyers, David Sulan of counsel and Martin Einfeld QC;

(d) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

26 As to paragraph 26 of the statement of claim, the first defendant:

(a) Admits that the documents referred to in subparagraphs 25(a) and 25(b) provide, inter alia, as alleged;

(b) Says that the terms on which the Proceedings were ultimately settled were not those referred to in the Mediations Heads of Agreement as pleaded further below;

(c) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

27 As to paragraph 27 of the statement of claim, the first defendant:

(a) Admits that the parties continued to negotiate a settlement of the Proceedings between November 2010 and June 2011;

(b) Says further that:

(i) the settlement which was ultimately reached and documented in the Deed of Release, the Deed of Settlement and Release and the Gujarat Contract, was substantially different to the settlement proposal set out in the documents referred to in subparagraphs 25(a) and 25(b) above;

- (ii) during the period referred to in subparagraph (a) above, he was informed as to the progress of settlement negotiations, including in relation to complications associated with settlement negotiations;

Particulars

- (A) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 24 November 2010 and sent at 12.19pm;
- (B) email from Darcy to Monaghan, Tickner, van der Hoven, Drake and Andrew Petrik of LMIM dated 25 November 2010 and sent at 4.27pm;
- (C) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 22 December 2010 and sent at 8.29am;
- (D) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 17 December 2010 and sent at 10.42am;
- (E) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 13 January 2011 and sent at 9.40am;
- (F) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 14 January 2011 and sent at 2.23pm;
- (G) ~~email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 14 January 2011 and sent at 3.43pm;~~
- (H) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 21 January 2011 and sent at 12.54pm;
- (I) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 27 January 2011 and sent at 2.19pm;
- (Ia) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 2 February 2011 and sent at 10.32am;
- (J) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 4 February 2011 and sent at 10.34am;
- (K) Email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 7 February 2011 and sent at 1.10pm;
- (L) email from Darcy to Monaghan, Drake, Tickner and van der Hoven dated 8 February 2011 and sent at 1.20pm;
- (M) email from Monaghan to Drake, Darcy and Tickner dated 28 February 2011 and sent at 2.44pm;
- (N) email from Darcy to Monaghan, Drake, Tickner and van der Hoven dated 1 March 2011 and sent at 7.26pm;
- (Na) email from Darcy to Drake, Tickner, van der Hove, Fischer and Mulder dated 14 March 2011 and sent at 4.35pm;

- (O) email from Monaghan to Darcy, van der Hoven, Tickner, Drake and Fischer dated 18 March 2011 and sent at 3.58pm;
- (P) email from Darcy to Drake, Tickner, van der Hoven, Monaghan, Fischer and Mulder dated 25 March 2011 and sent at 2.25pm;
- (Q) email from Darcy to Monaghan, Fischer, Tickner, Drake and van der Hoven dated 31 March 2011 and sent at 11.56am;
- (Qa) email from Darcy to Drake, Fenwick, Tickner and van der Hoven dated 5 April 2011 and sent at 10.09am;
- (R) email from Darcy to Drake, van der Hoven, Tickner and Fischer dated 12 April 2011 and sent at 4.49pm;
- (Ra) email from Darcy to Drake, van der Hoven and Tickner, dated 28 April 2011 and sent at 2.38pm;
- (S) email from Darcy to Drake dated 6 May 2011 and sent at 3.02am;
- (T) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner, including its attachments, dated 31 May 2011 and sent at 7.22am;
- (U) email from Monaghan to Drake and Darcy dated 31 May 2011 and sent at 8.40am;
- (V) email from Arun Kumar Jagatramka (director of Gujarat) (Arun) to Drake dated 31 May 2011 and sent at 4.49pm;
- (W) email from Monaghan to Drake, Darcy and Tickner dated 1 June 2011 and sent at 4.33pm;
- (X) email from Monaghan to Drake dated 2 June 2011 and sent at 4.21pm;
- (Y) email from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner and Fischer dated 3 June 2011 and sent at 12.04pm;
- (Z) email from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner and Fischer dated 3 June 2011 and sent at 2.27pm;
- (AA) email from Monaghan to Drake, Darcy, van der Hoven, Mulder and Tickner dated 7 June 2011 and sent at 10.45am;
- (BB) email from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner and Fischer dated 8 June 2011 and sent at 10.49am;
- (CC) email from Monaghan to van der Hoven, Drake, Darcy, Mulder, Tickner and Fischer dated 10 June 2011 and sent at 10.03am;
- (DD) email from Arun to Brian Gillard (solicitor for Gujarat) (Gillard), Darcy, Drake and Monaghan dated 9 June 2011 and sent at 8.16am;

- (EE) email from ~~Darcy~~ to Monaghan to Darcy, Drake, van der Hoven, Mulder, Tickner and Fischer dated 9 June 2011 and sent at 9.16am;
 - (FF) email from Darcy to Monaghan, Drake, van der Hoven, Mulder, Tickner and Fischer dated 9 June 2011 and sent at 9.39am;
 - (GG) Emails from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner and copied to Fischer dated 9 June 2011 and sent at 12.09pm, 12.18pm and 3.59pm;
 - (HH) Emails from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner, Fischer and Chalmers, dated 15 June 2011 and sent at 4.01pm.
- (iii) in or around late May 2011, he spoke with Monaghan and during which conversation, Monaghan said words to the effect that:
 - (A) he was very pessimistic about the settlement negotiations;
 - (B) he thought they were being led along by 'Arun' (being a reference to Gujarat's director);
 - (iv) following the conversation with Monaghan referred to in subparagraph (iii) above, he engaged in some direct negotiations with Arun;

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- (A) emails exchanged between Drake and Arun on 31 May 2011;
 - (B) emails exchanged between Drake and Arun on 4 June 2011;
- (v) in relation to Coalfields, it was always an aspect of the contemplated settlement that there would be an obligation on LMIM as RE of the FMIF, or alternatively PTAL as custodian of the FMIF, to pay Coalfields \$1.3M in exchange for the release of caveats over some of the land that comprised the Property without which settlement of the Proceedings could not occur;
 - (vi) during the period referred to in subparagraph (a) above, LMIM as RE of the FMIF or alternatively PTAL as custodian of the FMIF, (as a bare custodian), did not have the capacity to fund a payment to Coalfields in that amount or in any like amount;
 - (vii) during the period referred to in subparagraph (a) above, he was advised by Monaghan Lawyers of (at least) the following matters regarding the settlement with Coalfields:
 - (A) on 10 November 2010, he was advised by email from Monaghan that "Bellpac" had settled subject to board and any other required approvals on both sides on broad terms which included, inter alia, that LMIM was to pay Coalfields \$1.3M and that the payment was necessary to make all of the land available for sale to Gujarat;
 - (B) on 24 November 2010, he was advised by email from Monaghan that:

- (1) there was an obligation upon LMIM to pay \$1.3M to Coalfields on settlement;
- (2) LMIM would need to have a plan to have that amount available if a payment from Gujarat could not be coordinated to occur on settlement;

(viii) in the premises of the matters pleaded in subparagraphs (v) to (vii) above, he knew that LMIM as trustee of the MPF, was, was likely to be, or may be required to make the \$1.3M payment to Coalfields in order to achieve a settlement of the Proceedings.

28 As to paragraph 28 of the statement of claim, the first defendant:

- (a) Says that the plaintiff has produced to him copies of documents which appear to be those pleaded in subparagraphs 28(a), (b) and (c) of the statement of claim;
- (b) Denies that the Deed of Release was executed by LMIM in its capacity as RE for the FMIF, because:
 - (i) the execution page of the Deed of Release provides that it was executed by LMIM;
 - (ii) the recitals to the Deed of Release refer to the fact that:
 - (A) LM (a reference to LMIM) and PTAL (as those terms are defined in the Deed of Release):
 - (1) have loaned substantial amounts to Bellpac;
 - (2) both hold registered mortgages over the Bellpac Land (or most of it);
 - (3) both hold registered fixed and floating charges over all of the assets of Bellpac;
 - (B) Bellpac is in default of its obligations to LM and PTAL and that PTAL proposes to sell the land as mortgagee in possession;
 - (iii) in the premises of subparagraph (ii) above, and on the proper construction of the Deed of Release, references to LM in the Deed of Release could only have been references to LMIM as trustee for the MPF;
 - (iv) in order for LMIM to perform its obligations under the Deed of Release, it was required to take steps which would impact on the rights and obligations of the MPF including by:
 - (A) pursuant to clause 4.1, filing the LM Orders (as that term is defined in the Deed of Release) pursuant to which claims by LMIM as trustee for the MPF (and the other plaintiffs' claims in the Bellpac proceedings) would be dismissed with an order that each party to the proceeding pay their own costs;

- (B) pursuant to clause 5.1, releasing Gujarat and Southbulli from all claims arising out of or in any way related to:
 - (1) the Bellpac proceedings;
 - (2) the subject matter of the Bellpac proceedings;
 - (3) the Gujarat proceedings;
 - (4) the subject matter of the Gujarat proceedings;
 - (5) the events and documents referred to in the recitals to the Deed of Release;
- (v) the Deed of Release was executed by PTAL, which was sufficient to bind LMIM as RE of the FMIF, and it was unnecessary for LMIM to also execute the Deed of Release in its capacity as RE for the FMIF;
- (vi) in the premises of subparagraphs (i) to (v) above, the Deed of Release was executed by LMIM in its capacity as trustee for the MPF which was a party thereto;
- (c) In the alternative to subparagraph (b) above, if the Deed of Release was executed by LMIM only in its capacity as RE for the FMIF (which is denied), the parties to the Deed of Release and the lawyers engaged by LMIM (being Allens and Monaghan Lawyers) conducted themselves on the basis that the Deed of Release would be binding on both LMIM as trustee for the MPF and LMIM as RE for the FMIF;
- (d) Denies that the Deed of Settlement and Release was executed by LMIM in its capacity as RE for the FMIF, because:
 - (i) the execution page of the Deed of Settlement and Release provides that it was executed by LMIM;
 - (ii) the recitals to the Deed of Release refer to:
 - (A) the Bellpac proceedings;
 - (B) the mediation;
 - (C) the agreement of the parties to the Proceedings to settle their differences on the terms set out in the Deed of Settlement and Release;
 - (iii) in the premises of subparagraph (ii) above, and on the proper construction of the Deed of Settlement and Release, references to LM in the Deed of Settlement and Release could only have been references to LMIM as trustee for the MPF;
 - (iv) in order for LMIM to perform its obligations under the Deed of Settlement and Release, it was required to take steps which would impact on the rights and obligations of the MPF, including by:
 - (A) pursuant to clause 4.1, releasing Coalfields from all claims arising in any way directly or indirectly from, inter alia, any of the following:

- (1) the Proceedings;
- (2) the conduct of the Proceedings;
- (3) the circumstances or allegations giving rise to or referred to in the Proceedings;
- (4) entitlement to costs:
 - (a) under the Court rules, consequent on the dismissal of the Proceedings or otherwise; or
 - (b) under any unsatisfied orders for costs made in the Proceedings;
- (B) pursuant to clause 6.1, requiring LMIM to deliver the signed consent orders pursuant to which the Proceedings would be dismissed;
- (v) the Deed of Settlement and Release was executed by PTAL, which was sufficient to bind LMIM as RE for the FMIF, and it was unnecessary for LMIM to also execute the Deed of Settlement and Release in its capacity as RE for the FMIF;
- (vi) in the premises of subparagraphs (i) to (v) above, the Deed of Settlement and Release was executed by LMIM in its capacity as trustee for the MPF, which was a party thereto;
- (e) In the alternative to subparagraph (d) above, if the Deed of Settlement and Release was executed by LMIM only in its capacity as RE for the FMIF (which is denied), the parties to the Deed of Settlement and Release and the lawyers engaged by LMIM (being Allens and Monaghan Lawyers) conducted themselves on the basis that the Deed of Settlement and Release would be binding on both LMIM as trustee for the MPF and LMIM as RE for the FMIF;
- (f) As to subparagraph (c):
 - (i) says that the Gujarat Contract was executed by PTAL in its capacity as mortgagee exercising power of sale, including under the PTAL mortgage;
 - (ii) says that the power of sale was also exercised under mortgage book 4382 number 489;
 - (iii) otherwise admits the allegations;
- (g) Says further that:
 - (i) the Deed of Settlement and Release was executed by him and by Tickner on behalf of LMIM;
 - (ii) at the time the Deed of Release, the Deed of Settlement and Release and the Gujarat Contract were executed, the Deed Poll referred to in paragraph 31 below had already been executed by the directors of LMIM;
- (h) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

29 As to paragraph 29 of the statement of claim, the first defendant:

- (a) Admits that clause 7 of the document referred to in subparagraph 28(a) of the statement of claim is to the effect alleged;
- (b) Says that pursuant to clause 54 of the Gujarat Contract, provision was made for an extended completion date in respect of three lots defined as "Lots 6, 34 & 130", the sale of which was unable to be completed on the Completion Date (**the extended completion arrangement**);
- (c) Says that pursuant to clause 54.1(c) of the Gujarat Contract, PTAL was deemed to have issued a direction to Gujarat for the payment of \$5.5M to be held on trust by Gillard Consulting Lawyers until the extended completion date, such funds to be payable from the sum payable to PTAL pursuant to clause 7 of the Deed of Release;
- (d) Says that pursuant to clause ~~61~~ 64 of the Gujarat Contract, LMIM as RE for the FMIF was authorised to act for PTAL under the Gujarat Contract;
- (e) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

30 As to paragraph 30 of the statement of claim, the first defendant:

- (a) Admits that clause 2 of the document referred to in subparagraph 28(b) of the statement of claim is to the effect alleged;
- (b) Repeats and relies on the matters pleaded in subparagraphs 27(b)(v) to 27(b)(viii) above;
- (c) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

30A *The first defendant denies paragraph 30A of the statement of claim, because:*

- (a) By an email dated 6 December 2010, Monaghan, as principal of Monaghan Lawyers, on behalf of LMIM, communicated with WMS;
- (b) That email was not a request to provide an opinion about what would be a fair and reasonable split of the likely proceeds from the Proceedings but rather it was a request to:
 - (i) advise what further information WMS required in addition to the information contained in the email, to provide an advice; and
 - (ii) provide Monaghan with an estimate of WMS's fees to provide the requested advice as a necessary step before WMS were formally engaged to provide advice;
- (c) Monaghan provided additional information and/or instructions on at least the following occasions:
 - (i) by telephone on 3 December 2010;
 - (ii) in person on 7 December 2010;

- (iii) by email on 9 December 2010;
 - (iv) by telephone on 14 December 2010;
 - (v) by email on 21 December 2010;
 - (vi) in person and by email on 4 March 2011;
- (d) The terms of the engagement of WMS were contained in a letter of engagement dated 6 December 2010 (**WMS terms of engagement**), which:
- (i) was addressed to Monaghan of Monaghan Lawyers;
 - (ii) referred to discussion and correspondence in relation to the proposed engagement of WMS to provide an opinion as to the reasonable split of litigation proceeds to the FMIF and MPF;
 - (iii) in relation to the scope of work to be performed, provided that WMS would prepare an advice in accordance with Chapter 2E of the Corporations Act and AASB 124 Related Party Disclosures;
 - (iv) nominated Tickner as a director and authorised representative of LMIM to accept the terms contained in the letter;
- (e) On 9 December 2010, Tickner provided instructions to Monaghan via email to accept the WMS terms of engagement.
- 30B The first defendant admits the allegations in paragraph 30B of the statement of claim and says further that:
- (a) The request for advice by LMIM was conveyed to Allens by Monaghan, in email correspondence from Monaghan to John Beckinsale of Allens (**Beckinsale**) dated 14 March 2011;
 - (b) The request for advice to Allens from Monaghan attached various documents;
 - (c) The request for advice was part of the ongoing solicitor and client relationship between LMIM and Allens in relation to matters concerned with and incidental to the Proceedings and the settlement thereof.
- 30C As to paragraph 30C of the statement of claim, the first defendant:
- (a) Admits that what the plaintiff refers to as 'the instructions', namely an email from Monaghan to Aaron Lavell dated 6 December 2010, and two emails from Monaghan to Beckinsale dated 14 and 17 March 2011, did not include copies of the Gujarat Contract, the Deed of Release or the Deed of Settlement and Release and says further that these documents were not in existence as at the date of those emails;
 - (b) ~~Admits that the emails referred to in the preceding subparagraph did not state the matters set out in subparagraph 30C(b)(i) of the statement of claim but denies~~ says that the matters there set out were "facts" because as at the dates of those emails, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised, as it was the subject

of continuing discussions and negotiations between the parties to the Proceedings which would not be concluded until in or about mid-June 2011 (as is alleged in paragraph 27 of the statement of claim);

- (c) ~~Denies the allegations in subparagraph (b)(ii) because says further that:~~
- (i) as at the dates of those emails, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised, as it was the subject of continuing discussions and negotiations between the parties to the Proceedings which would not be concluded until in or about mid-June 2011 (as is alleged in paragraph 27 of the statement of claim);
 - (ii) the settlement of the Proceedings did not involve the sale of security pursuant to a bona fide stand-alone sale; for approximately fair market value with the full proceeds of sale being distributed in accordance with the Deed of Priority;
 - ~~(A) the fair market value of the Property was not approximately the sale price for the Property under the Gujarat Contract;~~
- Particulars**
- ~~(1) The 2007 settlement deed provided (in clause 4.2) that Bellpac then had a valuation of the Property at \$42M to \$52M and (by clause 4.3) Gujarat's nominee, SBH, agreed to pay \$56M for the Property;~~
 - ~~(2) The 2008 settlement deed provided (in clause 2.3(b)) that the Property would be sold to SBH for \$35M;~~
 - ~~(3) In the proceedings, the plaintiffs alleged that Bellpac had acquired the Property and associated rights in 2003 for \$21M;~~
 - ~~(4) Under the Mediation Heads of Agreement, Gujarat or its nominee was to buy the Property for \$65.5M;~~
- ~~(B) the sale of the Property was not a bona fide sale of the Property, within the meaning of or for the purposes of the Deed of Priority, but was part of the overall proposed settlement of the Proceedings pursuant to which the bulk of the proceeds were not to be for, or referable to, the sale of the Property;~~
 - (lia) the sale was part of the overall proposed settlement of the Proceedings pursuant to which the bulk of the proceeds were not to be for, or referable to, the sale of the Property.
 - (iii) for the reasons pleaded in subparagraph 22(b) above LMIM as trustee for the MPF was a party to the Bellpac proceedings;
 - (iv) for the reasons pleaded in paragraph 28 above, LMIM as trustee for the MPF was a party to the Deed of Release and the Deed of Settlement and Release;

- (v) the original certificates of title for the Property, which were required for any sale of the Property, were held by Allens on account of their unpaid fees in the amount of \$25,000.00 and could not be released until those fees were paid in circumstances where only the MPF had capacity to do so (and did do so);
- (vi) therefore (or in any event), LMIM as trustee of the MPF was entitled:
 - (A) to refuse to settle and discontinue the Bellpac proceedings and the claims made against Gujarat in that proceeding which, in the circumstances pleaded in subparagraph (c)(ii)(B) above, would have had the result that the settlement would not have proceeded, including in relation to the sale of the land;
 - (B) to refuse to pay Allens' outstanding invoice as pleaded in subparagraph (c)(v) above and thereby prevent the release of the certificates of title required for the sale of the Property;
 - (C) to withdraw its agreement to pay the \$1.3M payment to Coalfields and thereby prevent the settlement proceeding;
 - (D) to seek an injunction or other relief to prevent the sale of the Property or to sue the RE of the FMIF for damages or other relief, including:
 - (1) for payment of the Agreed Contribution (as that term is subsequently defined in subparagraph 35(e) below) or some other amount reflecting an appropriate share of the proceeds of the settlement of the Proceedings;
 - (2) for an order that it pay the Agreed Contribution or some other amount reflecting an appropriate share of the proceeds of the settlement of the Proceedings in exchange for the agreement to the proposed settlement by LMIM as trustee of the MPF, on the basis that LMIM as RE of the FMIF was estopped from denying that there was an arrangement to that effect between LMIM in its respective capacities;
- (vii) in the circumstances:
 - (A) the Proceedings could not and would not have settled on the proposed terms or at all without the consent and cooperation of LMIM as trustee of the MPF;
 - (B) unless LMIM as trustee of the MPF remained prepared to fund the ongoing costs of the Proceedings and the other costs associated with the Proceedings, including the settlement thereof, and the costs of the Bellpac receivership (including the payment of the Bellpac rates);
 - (1) LMIM as RE of the FMIF would have been at risk of being unable to prosecute and defend the proceedings further and of being liable to judgments against it in default of

- taking steps, and consequently pay the other parties' costs thereof and suffer the relief claimed by Coalfields in the Coalfields cross-claim and Gujarat and Southbulli in the Gujarat cross-claim;
- (2) Bellpac would have been at risk of being unable to prosecute and defend the Gujarat proceedings further and of being liable to judgments against it in default of taking steps, and consequently be required to pay Gujarat's costs thereof and suffer the relief claimed by Gujarat in the Gujarat proceedings;
- (3) the Proceedings would not have settled on the terms upon which they ultimately settled as pleaded in this defence or at all;
- (C) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF and PTAL to perform their obligations under the documents referred to in subparagraph 30C(b)(i) of the statement of claim and in order for the settlement to proceed at all;
- (d) Admits that the emails referred to in subparagraph (a) above did not include or attach a copy of the Deed of Priority but says that:
- (i) on 9 December 2010, WMS was provided with access to a secured LMIM website which contained copies of the securities documents for the FMIF Bellpac Loan and MPF Bellpac Loan, including the Deed of Priority;
- (ii) in relation to Allens:
- (A) Allens had been provided with a copy of the Deed of Priority on previous occasions and otherwise had copies of, or alternatively access to, all transactional and security documents (which included the Deed of Priority) as a consequence of its solicitor client relationship with LMIM;
- (B) Allens issued an invoice in December 2010 which included charges for reviewing the securities documents and advising generally about settlement;
- (C) in the premises, as at March 2011, there was no necessity, nor apparent reason to specifically instruct Allens as to the terms of the Deed of Priority;
- (iii) in the premises pleaded in paragraph 22A it was reasonable to assume that Allens and WMS would have been briefed with all of the relevant material or alternatively that Allens and WMS would have requested any further relevant material that they might have required;
- (e) Says further that the emails and attachments to those emails to WMS and to Allens set out that the loan by LMIM as RE of the FMIF was secured by a registered first mortgage and that as at 28 November 2010 approximately \$49M was outstanding in respect of FMIF's loan, and that the loans by LMIM as trustee of the MPF were

secured by a second registered mortgage and as at 28 November 2011 approximately \$24M was outstanding in respect of those loans;

- (f) Denies that the matters in subparagraph (d)(i) were "facts" as alleged because:
- (i) LMIM as trustee of the MPF was not expressly funding the Proceedings as mortgagee because it was providing funding to LMIM as RE of the FMIF to allow it to progress and defend (respectively) the Proceedings and for the costs of the Bellpac receivership; and
 - (ii) it was the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
- (g) Otherwise does not admit the facts alleged in subparagraph (d)(ii) were "facts" because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.
- (h) Denies the allegation in subparagraph (d)(iii) and believes it to be untrue because:
- (i) as the outcome of the Proceedings was uncertain, no formal agreement was entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF;
 - (ii) the first defendant understood that if the Proceedings did not result in full recovery of the FMIF Bellpac Loan and the MPF Bellpac Loan, then the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
 - (iii) that understanding was:
 - (A) reached prior to the settlement, and the request for advice from WMS and Allens;
 - (B) binding, or arguably binding, in that it could have been enforced in contract, or as an assignment in equity, or by way of estoppel or constructive trust;
 - (iv) in the premises of the matters pleaded in the preceding sub-paragraphs, the matters alleged in subparagraph (d)(iii) were not "facts".

30D As to paragraph 30D of the statement of claim, the first defendant:

- (a) Admits that on or about 7 March 2011, WMS provided a report bearing that date (**WMS Report**) and says further:
- (i) that the WMS Report was addressed to Monaghan Lawyers;
 - (ii) that WMS opined that a fair and reasonable split of the likely proceeds from the Proceedings would be 30% to 40% to the MPF and the balance to the FMIF;

- (iii) that, as pleaded in paragraph 30A above, the WMS Report was based on multiple sources of information, including the matters set out in the Monaghan email dated 6 December 2010 and attachments to that email;
- (b) Says that he was provided with a copy of the WMS Report by Darcy on 14 March 2011.

30E As to paragraph 30E of the statement of claim, the first defendant:

- (a) Repeats paragraph 30B above and otherwise admits the allegations in paragraph 30E of the statement of claim;
- (b) Says further that, in the Allens Advice (which was addressed to Monaghan of Monaghan Lawyers and was provided to LMIM by Monaghan Lawyers), Allens:
 - (i) opined that it was legally acceptable for LMIM to split the proceeds of the settlement on the basis of the opinion in the WMS Report;
 - (ii) did not advise that Allens should be provided with particular relevant documents, or any other documents concerning the respective rights and obligations of LMIM as RE of the FMIF and as trustee of the MPF respectively, as lenders to Bellpac and as between themselves;
 - (iii) stated that Allens were not aware of any reason why agreeing to split the litigation proceeds between the FMIF and the MPF on the basis of the opinion in the WMS Report would raise any issues concerning the general law and statutory duties of the directors of LMIM;
 - (iv) addressed the advice to Monaghan of Monaghan Lawyers and it was subsequently provided to LMIM by Monaghan Lawyers.

30F As to paragraph 30F of the statement of claim, the first defendant:

- (a) As to subparagraph (a):
 - (i) denies that the Allens Advice contains a Recital 9 because it does not;
 - (ii) admits that paragraph [9] of the Allens advice contains the words alleged in subparagraph (a);
- (b) Admits the allegation in subparagraph (b);
- (c) As to subparagraph (c):
 - (i) says that paragraph [16] was stated to be a "Summary of advice";
 - (ii) denies that that paragraph [16] of the Allens Advice was described as a "summary of the various obligations set out subsequently in the advice" because it was not described in those terms;
 - (iii) otherwise admits that paragraph [16] of the Allens Advice contains the words alleged in subparagraph (c);
- (d) Admits the allegation in subparagraph (d);

- (e) Admits the allegation in subparagraph (e);
 - (f) Denies the allegation that paragraph [16(f)] of the Allens Advice contained the words alleged because it did not and says that those words are contained in paragraph [16(g)] of the Allens Advice;
 - (g) As to subparagraph (g):
 - (i) says that paragraph [15] of the Allens Advice further states "We assume that the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the result of the litigation with Gujarat, being the terms of the proposed settlement, are in the best interests of the FMIF members";
 - (ii) otherwise admits the allegation;
 - (h) Admits the allegation in subparagraph (h);
 - (i) Admits the allegation in subparagraph (i);
 - (j) As to subparagraph (j):
 - (i) says that paragraph [37] of the Allens Advice further states "If the proposed dealings are considered by the RE to be on arm's length terms for the purposes of Chapter 2E/Part 5C.7 then this will presumably be an important factor used by the RE in reaching this conclusion";
 - (ii) otherwise admits the allegation;
 - (k) Admits the allegation in subparagraph (k);
 - (l) Denies the allegation in subparagraph (l) and believes it to be untrue because paragraph [55] of the Allens Advice did not contain the words alleged and says that those words are contained in paragraph [56] of the Allens Advice;
 - (m) Admits the allegation in subparagraph (m);
 - (n) As to subparagraph (n), says that paragraph 62(a) of the Allens Advice contains a summary of the effect of section 601(1)(c) but denies that it set out the precise terms of that section because it did not;
 - (o) Admits the allegation in subparagraph (o);
 - (p) Admits the allegation in subparagraph (p).
- 30G The first defendant admits the facts alleged in paragraph 30G of the statement of claim, and says further that:
- (a) The extracts pleaded specifically refer to conflicts of duty between an officer's duties under ss601FD and 601FC, and conflicting duties under Part 2D.1 of the Act.
 - (b) There was and is no such conflict alleged to have occurred.
- 30H As to paragraph 30H of the statement of claim, the first defendant:

- (a) As to subparagraph (a) says that paragraph [15] of the Allens Advice stated that "the RE is in a position of conflict (in its capacity as responsible entity for FMIF and in its capacity as trustee for MPF":
- (b) Admits the allegation in subparagraph (b):
- (c) As to subparagraph (c):
- (i) admits that paragraphs [25] of the Allens Advice referred to the need for LMIM as RE of the FMIF to act in the best interests of members of the FMIF:
 - (ii) says further that paragraph [25] of the Allens Advice correctly identified that the RE would need to be satisfied that there is a need to reach an agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF (because the overall settlement cannot occur without the agreement of the MPF Trustee) which was in fact the case for the reasons pleaded in subparagraph 30C(c)(vii) above:
 - (iii) denies that paragraph [27] of the Allens Advice referred to a need to act in the best interests of members of the FMIF because it did not and says that paragraph [27] stated, in part "We assume that any decision regarding the terms of the Gujarat settlement and the split of the litigation proceeds will be made on the basis of what is in the best interests of FMIF's members..."
 - (iv) admits that paragraphs [25] and [27] of the Allens Advice did not specifically state how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with the obligation pleaded in subparagraph 30H(c)(i) above;
 - (v) says that paragraph [16] of the Allens Advice concluded that it was legally acceptable for the RE to split the litigation proceeds between FMIF and MPF.
- (d) As to subparagraph (d):
- (i) admits that paragraph [56] of the Allens Advice stated that the RE would need to be satisfied that the terms of the Gujarat settlement and proposed split of the litigation proceeds did not unfairly put the interests of the FMIF ahead of the MPF (e.g. MPF) or vice versa;
 - (ii) says that the paragraph fell under the heading "Issues for the RE as an AFS Licensee" and specifically related to LMIM's responsibilities as an Australian Financial Services Licensee under section 912A of the Act;
 - (iii) the Allens advice addressed the effect of sections 601FC(1)(c) and 601FD(10)(c) elsewhere in the act;
 - (iv) otherwise does not admit the allegation because it is inadequately particularised and, despite request from the first defendant, the plaintiff has failed to plead or particularise how the Allens Advice misconstrued 601FC(1)(c) and 601FD(1)(c) of the Act or what it relies upon as being the proper construction of those sections;
- (e) As to subparagraph (e):

- (i) repeats and relies on the matters pleaded in subparagraph (d)(i) above;
 - (ii) admits that paragraph [56] of the Allens Advice did not specifically state how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with the obligation pleaded in subparagraph 30H(c)(i) above;
 - (iii) says that paragraph [16] of the Allens Advice concluded that it was legally acceptable for the RE to split the litigation proceeds between FMIF and MPF;
- (f) As to subparagraph (f):
- (i) repeats and relies on the matters pleaded in paragraph 30F(a) above;
 - (ii) says that paragraph [9] of the Allens Advice stated "the FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation";
 - (iii) it was in fact the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
 - (iv) does not admit the allegation insofar as it is alleged against the second to sixth defendants because they are matters within the knowledge of the second to sixth defendants and, further, because no particulars of the alleged knowledge have been provided;
 - (v) otherwise denies the allegations by reason of the matters set out above;
- (g) Denies the allegation in subparagraph (g) and believes it to be untrue because the Allens Advice did not set out inconsistent conclusions and, as such, did not need to reconcile any inconsistencies;
- (h) As to subparagraph (h):
- (i) admits that the Allens Advice referred at paragraph [16(e)] to LMIM's Compliance plan and repeats and relies on the matters pleaded in paragraph 30(f)(e) above;
 - (ii) admits that the Allens Advice did not expressly state how state how the obligations imposed by sections 601FC(1) and 601FD(1) could be reconciled with paragraph [35] of that advice;
 - (iii) relies on the Allens Advice for its full terms, meaning and effect;
 - (iv) says that paragraph [16] of the Allens Advice concluded that it was legally acceptable for the RE to split the litigation proceeds between FMIF and MPF;

- (i) As to subparagraph (l):
 - (i) repeats and relies on the matters pleaded in paragraph 30F(m) above;
 - (ii) admits that the Allens Advice did not expressly state how the proposed proceeds split could be reconciled with the matters pleaded at paragraph 30G of the statement of claim;
 - (iii) relies on the Allens Advice for its full terms, meaning and effect;
 - (iv) says that paragraph [16] of the Allens Advice concluded that it was legally acceptable for the RE to split the litigation proceeds between FMIF and MPF;
- (j) As to subparagraph (i):
 - (i) repeats and relies on the matters pleaded in paragraph 30F(o) above;
 - (ii) admits that the Allens Advice did not expressly state that fiduciary duties would include a duty of undivided loyalty;
 - (iii) relies on the Allens Advice for its full terms, meaning and effect;
 - (iv) says that paragraph [16] of the Allens Advice concluded that it was legally acceptable for the RE to split the litigation proceeds between FMIF and MPF.
- (k) Does not admit the allegation in subparagraph (k) because:
 - (i) despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof;
 - (ii) despite request by the first defendant, the plaintiff has failed to plead or particularise what it relies upon as being the proper construction of the Allens Advice;
- (l) says that a reasonable person in the position of Drake would have formed a view that the Allens Advice reached an opinion that the proposed transaction was legally acceptable;

Particulars

- (i) such fact to be inferred from:
 - (A) the contents of the Allens advice;
 - (B) the email from Monaghan to Darcy, copied to Fischer and Bruce MacKenzie, dated 29 March 2011 and sent at 3.41pm
- (m) says further that the Allens Advice was not obviously wrong or unsatisfactory;

Particulars

- (i) such fact to be inferred from:

- (A) the contents of the Allens advice;
- (B) the absence of any communication between any of the first to sixth defendants and/or Monaghan which identified a short coming in, or was in any way critical of, the Allens Advice.

31 As to paragraph 31 of the statement of claim, the first defendant:

- (a) Says that the plaintiff has produced to him a copy of an undated document entitled "Deed Poll";
- (b) Admits that he executed that document as a director of LMIM;
- (c) Denies that the Deed Poll was executed on or about 21 June 2011 because it was executed by all of the directors of LMIM on a date between 10 June 2011 and 14 June 2011;
- (d) Says that the Deed Poll was drafted by Monaghan Lawyers, who:
 - (i) commenced drafting the Deed Poll on or around 11 April 2011;
 - (ii) had finalised drafting the Deed Poll by 10 June 2011;
- (e) Says that, and in the premises pleaded in subparagraph 27(b)(ii) above, at the time the Deed Poll was executed he was aware that:
 - (i) the total agreed consideration to be paid by Gujarat at settlement was \$45.5M, comprised of:
 - (A) \$10M for the sale of the Property;
 - (B) \$35.5M for the settlement of the Proceedings;
 - (ii) the necessary settlement documents had not yet been finalised and exchanged;
- (f) Otherwise does not admit the facts there alleged because, despite having made reasonable inquiries, he remains uncertain as to the truth or otherwise thereof.

31A As to paragraph 31A of the statement of claim, the first defendant:

- (aa) Repeats and relies on the matters pleaded in paragraph 30H above;
- (ab) Says that 30(H)(f) alleges that the second to sixth defendants had knowledge of the matters pleaded therein and it is not relevantly alleged that the first defendant had knowledge of those matters;
- (a) Admits that, prior to executing the Deed Poll, he knew the facts alleged in the paragraphs referred to which he has admitted above;
- (b) Says further that, in the premises of the matters pleaded in subparagraphs 22A(g) to 22A(i), 24(f), 24(h), and 27(b) above, he knew of the matters recorded in the background of the Deed Poll, and that, as recorded in clause 2.1(a) of the Deed Poll, he, considered those matters at the time of executing the Deed Poll;

- (c) Does not admit whether the second to sixth defendants had such knowledge, as those are matters solely within the knowledge of those defendants;
- (d) Is not required to, and does not plead to, the particulars;
- (e) Otherwise respectively denies or does not admit that he knew or ought to have known the facts alleged because of the matters pleaded above in response to the allegations in the paragraphs referred to, upon which he relies.

32 The first defendant admits the facts alleged in paragraph 32 of the statement of claim and says further that the Deed Poll also provided:

- (aa) "2.1(a) The Directors gave careful consideration to the circumstances that are described in the Background to this Deed";
- (ab) "2.1(d) The Directors gave careful consideration to general law and statutory duties that relate to directors under the Corporations Act 2001";
- (a) "1. The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation.";
- (b) "3.1(b) There is a need for the FMIF RE to reach an agreement with the MPF Trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF Trustee";
- (c) 3.1(g) Apart from the Settlement Proposals there is currently no other reasonable alternative open to either of the Relevant Funds in achieving a reasonable outcome for each of the relevant Funds;
- (d) "3.1(h) the Settlement Proposals are in the best interest of each Relevant Fund's members."

32A As to paragraph 32A of the statement of claim, the first defendant:

- (a) Denies the allegation in subparagraph (b) because the Deed Poll in fact stated that, "The Directors gave careful consideration to procedures in the Constitution, the Trust Deed and the Compliance Plans (and any other procedures that are in place) in respect of conflicts of interest", which included the Conflicts Management Policy pleaded in paragraph 30G of the statement of claim;
- (b) Otherwise admits the allegations.

33 As to paragraph 33 of the statement of claim, the first defendant:

- (a) Denies that the funding was provided by LMIM as trustee for the MPF as registered mortgagee of the Property with second priority under the Deed of Priority for the reasons pleaded in paragraph 24 above;
- (b) Says that at the time that LMIM as trustee for the MPF agreed to fund the Proceedings, in or around July 2009:

- (i) he understood that there was a possibility that the MPF Bellpac Loan would be repaid in full or in part as a result of the Proceedings and LMIM as RE of the FMIF developing the Property; however because the outcome of the Proceedings was uncertain, it was not his expectation that this would occur;
- (ii) as the outcome of the Proceedings was uncertain, no formal agreement was entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF; however he understood that if the Proceedings did not result in full recovery of the FMIF Bellpac Loan and the MPF Bellpac Loan, then the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
- (c) Otherwise denies the allegations because the true position is pleaded in subparagraphs (a) and (b) above.

34 As to paragraph 34 of the statement of claim, the first defendant:

(aa) As to subparagraph (aa), the first defendant:

- (i) repeats and relies on the matters pleaded in paragraph 30H above;
- (ii) otherwise denies the allegation in subparagraph (aa) and believes it to be untrue because the first defendant did read and consider the contents of the Allens Advice in a reasonable way.
- (a) Repeats subparagraph 28(f) above and otherwise admits that, pursuant to the Gujarat Contract, PTAL sold the Property to Gujarat as mortgagee exercising power of sale;
- (b) Says that the Gujarat Contract provided that the sale price was \$10M;
- (c) Otherwise denies the allegations in subparagraph (a):
 - (i) for the reasons pleaded in subparagraphs (a), (b) and 30C(c) above;
 - (ii) because the allegations proceed on the incorrect premise that the Property sold pursuant to the Gujarat Contract was sold pursuant to a bona fide stand-alone sale rather than being a sale that was part of the overall proposed settlement of the Proceedings pursuant to which the bulk of the proceeds were not to be for, or referable to, the sale of the Property for approximately fair market value in accordance with the Deed of Priority;
 - (iii) because if the Property which was the subject of the Gujarat Contract was sold pursuant to a bona fide sale to which the Priority Deed applied (which is denied) then for approximately fair market value (which is denied) and as a consequence sold pursuant to clause 12 of the Deed of Priority (which is also denied) then:
 - (A) PTAL as custodian of the FMIF would have been only entitled to the consideration under the Gujarat Contract being \$10M;

(B) instead, LMIM as RE of the FMIF received upon and after Completion:

- (1) in June 2011 an amount \$29,315,779.22 (after adjustments); and
- (2) on the extended completion date, a bank cheque dated 8 September 2011 in the sum of \$3,611,405.51;

amounting to a total sum of \$32,927,184.73 (the **FMIF Settlement Payment**);

(iv) because in the premises, the FMIF Settlement Payment substantially exceeded the total sale price for the Property pursuant to the Gujarat Contract;

(d) As to the allegations in subparagraph (b):

(i) ~~admits that LMIM as trustee of the MPF was not a party to the Gujarat Contract;~~

(ii) ~~denies the allegation~~ says that LMIM as trustee of the MPF was ~~not~~ a party to the Deed of Release for the reasons pleaded in subparagraph 28(b) above;

(ia) repeats and relies on the matters pleaded in paragraph 30C(g) above;

(iii) ~~denies the allegations in subparagraph (ii) for the reasons~~ repeats the matters pleaded in subparagraph 30C(c) above;

(e) As to the allegations in subparagraph (c), insofar as they are alleged against him:

(i) the first defendant did have proper regard and gave adequate consideration to (and admits he knew) the matters alleged in subparagraphs (i), ~~(ii)~~, (iv) and (v), such knowledge arising from the matters pleaded in subparagraphs 5(b), 9, 12(c), 31A(a) and 31A(b);

(ii) the first defendant did have proper regard and gave adequate consideration to the matters alleged in subparagraph (iii) (to the extent that he has admitted those allegations above), but says that he also had regard to the fact that it was the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;

(iii) otherwise denies the allegation insofar as, and on the basis that, he denies the truth of the matters set out in subparagraph (c). ~~denies the facts alleged in subparagraph (vi) because in all of the circumstances known to him as pleaded in this defence, it was appropriate to conclude that LMIM as trustee for the MPF was entitled to an amount which exceeded that which was simply necessary to reimburse it for the contribution it had made to funding the Proceedings together with interest at a commercial rate upon that amount;~~

- (f) Denies the allegations in subparagraph (d), insofar as they are alleged against him, because:
- (i) as a director of LMIM in its capacity as RE of the FMIF and in its capacity as trustee of the MPF, he was not required to consider whether the MPF could be treated as if it was an arm's-length litigation funder but was instead required to consider, in circumstances where the MPF and FMIF were related parties in a position of conflict, LMIM's obligations:
 - (A) under chapter 2E of the Corporations Act 2001 (Cth) (the **Act**), subject to the modifications prescribed by section 601LA of the Act (the **Chapter 2E considerations**);
 - (B) under the accounting standard AASB 124 (the **Accounting considerations**);
 - (ii) in all of the circumstances known to him as pleaded in this defence, it was appropriate for him to consider whether the proposed financial benefit to be paid to LMIM as trustee for the MPF would be reasonable in the circumstances if LMIM as RE of the FMIF and LMIM as trustee for the MPF were dealing at arm's length and as such fell within the 'arm's length terms' exception under section 210 of the Act;
 - (iii) in circumstances where LMIM as trustee for the MPF's role was not dissimilar to a litigation funder, it was appropriate to consider analogous litigation funder scenarios to determine whether the proposed proceeds split fell within the ambit of the arm's length terms exception pleaded in subparagraph (ii) above;
 - (iv) LMIM sought and obtained independent accounting advice and independent legal advice in relation to the Chapter 2E considerations and the Accounting considerations, being the WMS Report and the Allens Advice;
 - (v) the matters addressed by the WMS Report and the Allens Advice were the appropriate matters for a director in his circumstances to have sought advice in relation to and considered;
 - (vi) in considering the matters contained in the WMS Report, the Allens Advice and the matters listed under the heading 'Director's Considerations' in the Deed Poll, the first defendant did consider whether:
 - (A) the proposed split would be reasonable in the circumstances if the FMIF and the MPF were dealing at arm's length;
 - (B) it was appropriate to split the Bellpac settlement proceeds in accordance with the conclusion expressed in the WMS Report and Allens Advice;
 - (vii) in the premises of the matters pleaded in subparagraph 22A(i) above, he reasonably believed that Darcy, Tickner and Monaghan Lawyers, who were managing and directly involved in the Proceedings, including in relation to the settlement thereof and the preparation of the Deed Poll, would have:

- (A) given proper regard to and considered all relevant facts and circumstances;
- (B) brought any relevant matters to his attention prior to the Deed Poll being executed;
- (viii) the fact that LMIM as trustee of the MPF was a registered mortgagee with second priority did not impair its ability to act separately as analogous to a litigation funder in any event;
- (g) Denies the allegations in subparagraph (e), insofar as they are alleged against him, because:
 - (i) LMIM did obtain independent legal advice in the form of the Allens Advice;
 - (ii) LMIM did obtain other independent advice in the form of the WMS Report;
 - (iii) to the extent that it was necessary and subject to the matters pleaded in subparagraph (f) above, the Allens Advice and the WMS Report did substantially address the matters in subparagraphs (i), (ii) and (iii), in the circumstances alleged (to the extent that those allegations are admitted);
 - (iv) the matters that were appropriate and necessary for the first defendant (and the other directors) to consider in the circumstances, were those matters which were considered by the WMS Report and Allens Advice and reflected in the Deed Poll;
- (h) Further or alternatively to subparagraph (g) above, it was not necessary to:
 - (i) obtain the advice alleged in subparagraph (e)(i) for the reasons pleaded in subparagraph (f) above;
 - (ii) obtain the advice alleged in subparagraph (e)(ii) in circumstances where it was the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
 - (iii) obtain the advice alleged in subparagraph (e)(iii) in circumstances where it was clearly in the interests of the FMIF to agree to the Proceeds Split for the reasons pleaded in subparagraphs (f) and 30C(c) above;
- (i) As to the allegations in subparagraph (f), insofar as they are alleged against him:
 - (i) admits that he took into consideration the Allens Advice and the WMS Report;
 - (ii) otherwise denies the allegations for the reasons pleaded in subparagraph (g), or alternatively subparagraph (h), above;
- (j) Denies the allegations in subparagraph (g), insofar as they are alleged against him, for the reasons pleaded in subparagraphs (a) to (i) above;

- (k) Otherwise does not admit the allegations insofar as they are alleged against the second to sixth defendants because he is not certain what each of them did and did not take into consideration, other than as stated by them in the Deed Poll and pleaded by them in this proceeding, and despite having made reasonable inquiries, he remains uncertain as to the truth or falsity of the allegations.

35 As to paragraph 35 of the statement of claim, the first defendant denies the allegations because:

- (a) The Gujarat Contract, the Deed of Release and the Deed of Settlement and Release were all executed on or about 21 June 2011 with simultaneous effect and, subject to the extended completion arrangement, with immediate completion on that date (**Completion**);
- (b) Prior to the documents referred to in subparagraph (a) being executed, the directors had executed the Deed Poll as pleaded in paragraph 31 above;
- (c) At Completion, and subject to the extended completion arrangement, PTAL as custodian of the FMIF was entitled to receive:
- (i) \$35.5M pursuant to cl.7 of the Deed of Release; and
- (ii) \$10M pursuant to cl.16.7 of the Gujarat Contract
- (together, the **Gujarat Settlement Payment**);
- (d) Of the Gujarat Settlement Payment, LMIM as RE for FMIF, by its lawyers Allens in their letter dated 21 June 2011 to Gujarat, directed Gujarat to pay the Gujarat Settlement Payment to seven different payees, by drawing nine separate bank cheques, totalling \$50,111,300.88;
- (e) LMIM as trustee of the MPF received upon and after Completion:
- (i) in June 2011 an amount (after adjustments) of \$13,601,547.38; and
- (ii) on the extended completion date, a bank cheque dated 8 September 2011 in the sum of \$1,944,600.47;
- amounting to a total sum of \$15,546,147.85 (the **Agreed Contribution**);
- (f) Prior to providing the directions referred to in subparagraph (d) above, LMIM as RE of the FMIF sought and obtained the approval of FMIF's financier, Deutsche Bank AG, for the Agreed Contribution to be paid directly to LMIM as trustee for the MPF, without passing through the FMIF account;
- (g) In the premises of the matters pleaded in subparagraphs (a) to (f) above, the Agreed Contribution:
- (i) was paid to LMIM as trustee for the MPF out of the Gujarat Settlement Payment, being the total consideration payable to PTAL as custodian of the FMIF, pursuant to the Deed of Release and the Gujarat Contract;
- (ii) reflected, and was consistent with, the conclusions which had been reached by the directors in the Deed Poll;

- (iii) represented a reasonable allocation of the proceeds of the settlement of the Proceedings in the circumstances pleaded in paragraphs 22, 22A, 24, 27, 28, 30C, 33, 34, 35, 37 and 37A of this defence.

36 As to paragraph 36 of the statement of claim, the first defendant:

- (a) Admits the allegations insofar as they are consistent with the matters pleaded in paragraph 35 above;
- (b) Otherwise denies the allegations for the reasons pleaded in paragraph 35 above.

37 As to paragraph 37 of the statement of claim, the first defendant:

- (a) Says that, as recorded in the Deed Poll, it was the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
- (b) Says that the Gujarat Contract, the Deed of Release and the Deed of Settlement and Release were executed only after the matters in the Deed Poll had been formally recorded and the agreement of the directors in relation to how the proceeds would be split had been finalised;
- (c) Says that given the matters pleaded in paragraph 28 and subparagraph 30C(c) above, LMIM as trustee for the MPF would not have agreed to the settlement in circumstances where it did not receive more than a mere reimbursement of, and interest on, its contributions but rather, a share of the proceeds resulting from the Proceedings;
- (d) Says that LMIM as RE for the FMIF directed, as it was entitled to do, part of the Gujarat Settlement Payment to LMIM as trustee for the MPF, as it similarly directed other parts of the Gujarat Settlement Payment to another six parties;
- (da) Says that, pursuant to clause 13 and 29 of the Constitution of the FMIF, the plaintiff was empowered to decide to make the Settlement payment to the seventh defendant;
- (e) Otherwise denies the allegations for the reasons in subparagraphs (a) to (d) and 30C(c) and paragraph 35 above.

37A As to paragraph 37A of the statement of claim, the first defendant:

- (a) Says that for the reasons pleaded in paragraph 34 above:
- (i) he did have proper regard and gave adequate consideration to those matters which were true and relevant;
- (ii) he did act with the necessary degree of reasonable care and diligence;
- (b) Says it was reasonable for him, in all of the circumstances known to him as pleaded in this defence, to conclude that it was appropriate for LMIM as RE of the FMIF and as trustee of the MPF to agree on and fix the Agreed Contribution after the outcome of the Proceedings was known because:

- (i) of the advice received in the WMS Report and in the Allens Advice (which he considered);
 - (ii) agreement on the rate or amount of the appropriate share of the proceeds of the settlement of the Proceedings to be paid to the MPF in light of that outcome was appropriate in order to properly protect the interest of both the FMIF and the MPF, particularly having regard to the following facts:
 - (A) LMIM as RE of the FMIF and LMIM as trustee of the MPF were related parties;
 - (B) the MPF's consent was required to settle the Bellpac proceedings;
 - (C) the nature and extent of the litigation risks that had been taken on by LMIM as trustee for the MPF in funding the Proceedings (including the other costs associated with the Proceedings, the costs of additional proceedings or anticipated proceedings associated with the FMIF Bellpac Loan and the MPF Bellpac Loan, and the costs of the Bellpac receivership);
 - (D) the risk and potential quantum of adverse costs orders that might have been made against Bellpac, LMIM as RE of the FMIF and as the trustee of the MPF respectively in the event that LMIM had not succeeded in the Proceedings (subject to the terms of the undertaking as to damages that LMIM as trustee for the MPF had provided in the Bellpac proceeding);
 - (E) the legal costs in fact expended by LMIM as trustee of the MPF;
 - (F) the amount and structure of the proposed settlement;
 - (G) that without MPF's funding, agreement to provide an undertaking as to damages and agreement to pay \$1.3M to Coalfields the Proceedings would not have been settled, or alternatively, would not have been settled on terms as favourable as the settlement that in fact occurred;
- (c) Says that having proper regard and adequate consideration to those matters it was reasonable for him to conclude that:
- (i) the overall settlement could not occur without the agreement of LMIM as trustee for the MPF, for the reasons pleaded in subparagraph 30C(c) above;
 - (ii) LMIM as RE of the FMIF needed to reach an agreement with LMIM as trustee of the MPF about sharing of the settlement proceeds, as it was the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings and by reason of the facts pleaded in subparagraph 30C(c) above;

- (iii) the Agreed Contribution was fair to the FMIF, as without the funding from the MPF, PTAL on behalf and as custodian of the FMIF would have been unable to pursue and defend the Proceedings, and by reason of the facts pleaded in this paragraph and subparagraph 30C(c) above;
 - (iv) the Agreed Contribution was in the best interests of the FMIF's members, as LMIM as trustee of the MPF would have been entitled to sue LMIM as RE of the FMIF if the former did not receive an appropriate split of the Proceeds and by reason of the facts pleaded in subparagraph 30C(c) above;
 - (v) the Agreed Contribution was not unreasonable, as it fairly recognised the contribution made by the MPF to the Proceedings, and the recovery of settlement proceeds of the Proceedings, which would not have been recovered without it and because of the facts pleaded in this paragraph, subparagraph 30C(c) and paragraph 34 above;
 - (vi) LMIM as trustee of the MPF was in an analogous position to a litigation funder, as it had agreed to fund the Proceedings on the understanding that its contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions but rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
- (d) says further that:
- (i) on the proper construction of clause 29 of the Constitution of the FMIF, LMIM as RE of the FMIF was entitled to:
 - (A) act as an RE for another trust, or managed investment scheme;
 - (B) deal with itself as an RE for another trust, or managed investment scheme;
 - (C) be interested in a contract or transaction with itself as an RE for another trust, or managed investment scheme;
 - (ii) in the circumstances of a contract, transaction or dealing described in paragraphs (i)(B) or (C) above, s. 601FD(1)(b) and 601FD(1)(c) oblige a director to act impartially between the interests of the FMIF and the other trust or managed investment fund for which it is the trustee or RE, in relation to the contract, transaction or dealing;
 - (iii) in the present case, the first defendant complied with this obligation by reason of the matters set out in paragraph 34 and subparagraphs 37A(a)-(c) above.

37B The first defendant admits paragraph 37B of the statement of claim to the extent of the payment of the Agreed Contribution pleaded in paragraph 35 above.

38 ~~As to paragraph 38 of the statement of claim, the first defendant:~~

- ~~(a) Admits that, in his capacity as a director of LMIM, he owed the duties alleged to LMIM;~~

- ~~(b) — Denies that those duties were owed to LMIM as RE of the FMIF because:~~
- ~~(i) — the duties were owed solely to LMIM without regard to its role as RE of the FMIF; and~~
 - ~~(ii) — the statutory duties of officers of a responsible entity of a registered scheme are those prescribed in s.601FD of the Act.~~

~~39 The first defendant denies the allegations in paragraph 30 of the statement of claim because~~

- ~~(a) — For the reasons pleaded in paragraph 38 above, he did not owe the duties alleged to LMIM as RE of the FMIF;~~
- ~~(b) — If there was a duty (which is denied), for the reasons pleaded in paragraph 37A above, he did exercise his powers and discharge his duties with the relevant degree of care and diligence;~~
- ~~(c) — LMIM suffered no harm as a result of the decision to pay the Agreed Contribution to LMIM as trustee for the MPF;~~
- ~~(d) — It was not possible for the MPF to gain an advantage as the MPF is not a separate legal entity.~~

~~39A The first defendant denies the allegations in paragraph 39A of the statement of claim because:~~

- ~~(a) — For the reasons pleaded in paragraph 38 above, there was no duty as alleged;~~
- ~~(b) — For the reasons pleaded in paragraph 39 above, or alternatively for the reasons pleaded in paragraph 37A above, there was no breach of duty;~~
- ~~(c) — The assets of LMIM were not depleted by the amount of the Settlement Payment or the Agreed Contribution;~~
- ~~(d) — It is incorrect to allege that the assets of LMIM as RE of the FMIF were depleted, as LMIM received all of the proceeds from the settlement of the Proceedings;~~
- ~~(e) — Any allocation of the proceeds from the settlement of the Proceedings between the two funds did not cause any loss to be suffered by LMIM.~~

~~39B The first defendant denies the allegations in paragraph 39B of the statement of claim because:~~

- ~~(a) — For the reasons pleaded in paragraphs 37A, 38 and 39 above, there was no breach of duty;~~
- ~~(b) — It was not possible for LMIM as RE of the FMIF to suffer damage in the circumstances alleged, because:~~
 - ~~(i) — The assets of LMIM were not depleted by the amount of the Settlement Payment or the Agreed Contribution;~~
 - ~~(ii) — LMIM received all of the proceeds from the settlement of the Proceedings;~~

~~(iii) any allocation of the proceeds from the settlement of the Proceedings between the two funds did not cause any loss to be suffered by LMIM.~~

40 ~~The first defendant denies the allegations in paragraph 40 of the statement of claim because:~~

~~(a) For the reasons pleaded in paragraph 38 above there were no duties owed as alleged;~~

~~(b) If there were duties owed as alleged, for the reasons pleaded in paragraphs 37A, 38 and 39 above, there was no breach of those duties;~~

~~(c) For the reasons pleaded in paragraphs 39, 39A and 39B above, there was no loss suffered by LMIM.~~

41 ~~The first defendant does not admit the allegations in paragraph 41 of the statement of claim, because the allegations do not relate to him.~~

42 ~~The first defendant does not admit the allegations in paragraph 42 of the statement of claim, because the allegations do not relate to him.~~

~~42A The first defendant does not admit the allegations in paragraph 42A of the statement of claim, because the allegations do not relate to him.~~

~~42B The first defendant does not admit the allegations in paragraph 42B of the statement of claim, because the allegations do not relate to him.~~

43 ~~The first defendant does not admit the allegations in paragraph 43 of the statement of claim, because the allegations do not relate to him.~~

44 The first defendant admits the facts alleged in paragraph 44 of the statement of claim, and, as to sub-paragraph (b), says that the best interests of the members of the FMIF are determined by reference, among other things, to the purpose and terms of the Constitution of the scheme, in particular clause 29 thereof, which relevantly provides that

(a) nothing in the Constitution restricts the RE or its associates from:

(i) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);

(ii) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity); or

(iii) acting in the same or similar capacity in relation to any other trust or managed investment scheme;

(b) all obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.

40. As to paragraph 45 of the statement of claim, the first defendant:

(a) Denies the allegation in subparagraph (a) because, for the reasons pleaded in paragraphs 37A and 44 above, he did not fail to exercise the degree of care and diligence that a reasonable director in his position would have exercised;

- (b) Denies the allegation in subparagraph (b) because:
- (i) for the reasons pleaded in paragraphs 37A and 44, above, he did act in the best interests of the members of the FMIF;
 - (ii) there was no conflict between the members' interests and the interests of LMIM as RE of the FMIF;
- ~~(c) Denies the allegations in subparagraph (c) because, for the reasons pleaded in paragraphs 37A above, there was no breach of duty.~~

45AA As to paragraph 45AA of the statement of claim the first defendant:

- (a) Repeats and relies upon the facts set out in paragraphs 30C(c), 34 and 37A above;
- (b) Says that:
 - (i) the settlement obtained under the Deed of Release, Deed of Settlement and Release and Gujarat Contract (the **Settlement**) was the compromise of a long running dispute;

Particulars

The dispute:

- (A) concerned transactions referred to in paragraphs 17 to 20 of the statement of claim, which were entered into between 2004 and 2008;
- (B) was the subject of litigation commenced in 2009, namely the Proceedings referred to in paragraphs 21, 22 and 22A above.
- (ii) LMIM and its legal advisors considered that LMIM as trustee for the MPF and PTAL had uncertain prospects of success in the Proceedings;

Particulars

- (A) email from Monaghan to Drake, Darcy van der Hoven, Mulder and Tickner dated 6 July 2009 and sent at 12.11PM referred to in subparagraph 22A(g)(iv) above;
- (B) email from Monaghan to Drake, Darcy van der Hoven, Fran Gordon and Tickner dated 29 July 2009 and sent at 11.26am referred to in subparagraph 22A(g)(vii) above;
- (C) advice from Verekers Lawyers to LMIM and PTAL dated 29 March 2010;
- (D) email from Monaghan to Drake, Darcy van der Hoven, Mulder and Tickner dated 4 August 2010 and sent at 9.48am, referred to in subparagraph 22A(g)(xii) above.

- (iii) Gujarat was considered by LMIM and its legal advisors to be a difficult litigant and negotiator;

Particulars

- (A) email from Monaghan to Drake, Darcy van der Hoven, Mulder and Tickner dated 6 July 2009 and sent at 12.11PM referred to in subparagraph 22A(g)(iv) above;
- (B) email from Monaghan to Drake, Darcy van der Hoven, Mulder and Tickner dated 7 September 2009 and sent at 9.54am referred to in subparagraph 22A(g)(viii) above;
- (C) paragraph 17 of the amended commercial list statement filed on behalf of LMIM as trustee for the MPF, Bellpac and PTAL in the Bellpac Proceeding on 8 February 2010;
- (D) email from Monaghan to Drake, Darcy van der Hoven, Mulder and Tickner dated 7 June 2011 and sent at 10.45am referred to in subparagraph 27(b)(ii)(AA) above;
- (iv) the directors formed the view that the Settlement was the best settlement that could be achieved in relation to the Proceedings;
- (v) by reason of what is set out in the preceding paragraph, expending further costs on litigating the Proceedings was of no commercial value to LMIM as RE for the FMIF nor MPF nor PTAL;
- (vi) as such, it is to be inferred that LMIM would not have taken any steps that created any risk that the Settlement would not proceed;
- (vii) Gujarat:
- (A) entered into the Settlement, inter alia, because it resolved all outstanding disputes;

Particulars

- (1) Email from Arun to Gillard, Darcy, Drake and Monaghan dated 9 June 2011 and sent at 8.16am.
- (B) therefore, it is to be inferred, would not have settled on terms which left claims made on behalf of LMIM as trustee for the MPF unresolved.
- (viii) further, or alternatively, to the paragraph (vii)(B) above, by reason of the matters set out in (i) to (vii) above, LMIM would not have proposed or attempted to negotiate with Gujarat a settlement agreement which left claims of LMIM as trustee for the MPF unresolved;
- (ix) it was not possible to completely discontinue the Bellpac Proceedings without the consent or cooperation of LMIM as trustee for the MPF;

Particulars

- (A) there were claims made in the Bellpac Proceedings on behalf of LMIM as trustee for the MPF as set out in subparagraph 22A(a) above;
- (B) matters referred to in subparagraph 28(b)(iv) and 28(d)(iv) above;
- (x) it was not possible to completely perform the obligations of LMIM under the Deed of Release and the Deed of Settlement and Release without the consent or cooperation of MPF;

Particulars

- (A) matters referred to in subparagraph 28(b)(iv) and 28(d)(iv) above;
- (xi) to take the steps alleged in paragraphs 45AA(b) to (f) of the statement of claim would be in breach of LMIM's duties as trustee of the MPF;
- (xii) LMIM as RE of the FMIF nor PTAL did not have any right to insist that LMIM as trustee for the MPF breached its duties in that capacity and in that manner;
- (xiii) in the circumstances set out in subparagraphs (i) to (xii) above, it is to be inferred that:
 - (A) had LMIM refused to make a payment to LMIM as trustee for the MPF, the Settlement would not have occurred;
 - (B) had LMIM refused to make a payment to LMIM as trustee for the MPF, greater than the amount of the funding that MPF had provided, the Settlement would not have occurred;
- (c) further, or in the alternative, causation and loss should not be assessed on the basis that the interests of the MPF are ignored;

Particulars

- (iii) on the proper construction of s1317H of the Corporations Act;
- (iv) by reason of the matters in (a) and (b) above;
- (d) by reason on the matters referred to in subparagraphs (a) to (c) above, each of the allegations in 45AA(a) to 45AA(f) are denied.

45AB The first defendant denies each of the allegations in paragraph 45AB(a) to 45AB(e) of the statement of claim for the reasons pleaded in paragraph 45AA above.

45A The first defendant denies the facts alleged in paragraph 45A of the statement of claim for the reasons pleaded in paragraphs 37A, 44, ~~and~~ 45, 45AA and 45AB above.

45B The first defendant denies the facts alleged in paragraph 45B of the statement of claim because:

- (a) Of the reasons pleaded in paragraphs 37A, ~~44~~, 45, ~~and 45A, 45AA and 45AB~~ above, and because there was no breach of duty or contravention of the Act;
 - (b) It is incorrect to allege that the assets of LMIM as RE of the FMIF were depleted, as LMIM received all of the proceeds from the settlement of the Proceedings;
 - (c) Any allocation of the proceeds from the settlement of the Proceedings between the two funds did not cause any loss to be suffered by LMIM;
 - (d) LMIM suffered no harm as a result of the decision to pay the Agreed Contribution to LMIM as trustee for the MPF.
- 46 The first defendant denies the facts alleged in paragraph 46 of the statement of claim because of the reasons pleaded in paragraph 45B above.
- 46A In the alternative to the matters pleaded in paragraphs 40 and 46 above, if the first defendant is liable to pay the plaintiff compensation under s1317H of the Act (which is denied), then the amount of the compensation should be limited to:
- (a) The amount of the Agreed Contribution less an amount reflecting an appropriate share of the proceeds of the settlement of the Proceedings, which reflects the matters pleaded in paragraphs 22, 22A, 24, 27, 28, 30C, 33, 34, 35, 37 and 37A of this defence, such an amount being more than a mere reimbursement of, and interest on, its contributions to funding the Proceedings, including its contribution to funding the other costs associated with the Proceedings (as pleaded in subparagraph 24(d) above);
 - (b) In the further alternative, the amount of the Agreed Contribution less an amount which represents its contribution to funding the Proceedings, including its contribution to funding the costs associated with the Proceedings (as pleaded in subparagraph 24(d) above) with interest at commercial rates.
- ~~47 The first defendant does not admit the allegations in paragraph 47 of the statement of claim, because the allegations do not relate to him.~~
- ~~47A The first defendant does not admit the allegations in paragraph 47A of the statement of claim, because the allegations do not relate to him.~~
- ~~47B The first defendant does not admit the allegations in paragraph 47B of the statement of claim, because the allegations do not relate to him.~~
- ~~48 The first defendant does not admit the allegations in paragraph 48 of the statement of claim, because the allegations do not relate to him.~~
- ~~48A The first defendant does not admit the allegations in paragraph 48A of the statement of claim, because the allegations do not relate to him.~~
- ~~48B The first defendant does not admit the allegations in paragraph 48B of the statement of claim, because the allegations do not relate to him.~~
- ~~49 The first defendant does not admit the allegations in paragraph 49 of the statement of claim, because the allegations do not relate to him.~~

- 50 ~~The first defendant does not admit the facts alleged in paragraph 50 of the statement of claim because they do not relate to him.~~
- 51 ~~The first defendant does not admit the facts alleged in paragraph 51 of the statement of claim because they do not relate to him.~~
- 52 ~~The first defendant does not admit the facts alleged in paragraph 52 of the statement of claim because they do not relate to him.~~
- 53 ~~The first defendant does not admit the facts alleged in paragraph 53 of the statement of claim because they do not relate to him.~~
- 54 ~~The first defendant does not admit the facts alleged in paragraph 54 of the statement of claim because they do not relate to him.~~

~~Defences under Parts 5.2C, 9.4B and 9.5 of the Act~~

- 55 Further, ~~as to the allegation that the first defendant contravened section 180(1) of the Act (which is denied),~~ the first defendant says that he did not breach his duties under ss 601FD(1)(b) and 601FD(1)(c) because:
- (a) In executing the Deed Poll and thereby making, permitting or directing the Agreed Contribution to be paid to LMIM as trustee for the MPF, he made a ~~business~~ judgment;
 - (b) The ~~business~~ judgment was made in good faith and for a proper purpose, in that:
 - (i) the Agreed Contribution was intended to appropriately compensate LMIM as trustee of the MPF for the risks it had assumed in funding the litigation (including the additional matters pleaded in subparagraph 24(d) above), providing an undertaking as to damages on behalf of the plaintiffs in the Bellpac proceeding and agreeing to fund the \$1.3M payment to Coalfields on settlement, in circumstances where the FMIF was unable to do so;
 - (ii) it was the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere reimbursement of, and interest on, its contributions and rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;
 - (iii) the first defendant relies on the matters pleaded in paragraphs 22, 22A, 24, 27, 28, 30C, 33, 34, 35, 37 and 37A above;
 - (c) He did not have a material personal interest in making, permitting or directing the litigation funding fee to be paid to LMIM as trustee for the MPF;
 - (d) He informed himself about the Agreed Contribution to be paid to LMIM as trustee for the MPF, and in particular he:
 - (i) considered and relied on the WMS report and Allens Advice prior to executing the Deed Poll;
 - (ii) considered and relied on advice and information provided to him by Monaghan, Darcy and Tickner in relation to:

- (A) the progress of the Proceedings, including in relation to risks and prospects;
- (B) the settlement negotiations of the Proceedings;

(e) In light of the information received and considered by the first defendant, he rationally believed that the judgment he made was in the best interests of LMIM, including in its capacities as RE of the FMIF and trustee of the MPF;

~~(f) In the premises pleaded in subparagraphs (a) to (e) above, pursuant to section 180(2) of the Act the first defendant's belief that the judgment was in the best interests of LMIM is taken to be rational unless the belief is one that no reasonable person in his position would hold (which it is not);~~

~~(g) In the premises pleaded in subparagraph (a) to (f) above, pursuant to section 180(2) of the Act the first defendant met, or is taken to have met, the requirements of section 180(1) of the Act.~~

56 ~~Further or alternatively, should the Court find, contrary to the matters pleaded above, that the first defendant contravened any of sections 180(1), 182(1) or 601FD(1) of the Act as alleged in the statement of claim, then:~~

~~(a) The first defendant acted honestly in making, permitting or directing the Agreed Contribution to be paid to LMIM as trustee for the MPF;~~

~~(b) Having regard to all of the circumstances pleaded in this defence, the first defendant ought fairly to be excused for any contravention;~~

~~(c) In the premises pleaded in subparagraphs (a) and (b) above, the first defendant seeks an order pursuant to section 1317S(2) of the Act, or section 1318(1) of the Act, or both, relieving him wholly or partly from any liability to which he would otherwise be subject.~~

57 ~~In the premises pleaded in subparagraphs 31A, 34 and paragraph 37A above, pursuant to section 189 of the Act the first defendant's reliance on the information and advice referred to in subparagraphs 22A(i), 30C(d)(iii) and 34(f)(vii) is taken to be reasonable unless the contrary is proved.~~

Signed.....

Solicitor

This amended pleading was settled by G Beacham QC and A Nicholas of Counsel

NOTICE AS TO REPLY

You have fourteen days within which to file and serve a reply to this defence. If you do not do so, you may be prevented from adducing evidence in relation to allegations of fact made in this defence.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS 12317 of 2014

"SC-5"

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**

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

**AMENDED DEFENCE TO THE SECOND
~~THIRD~~ FIFTH FURTHER AMENDED
STATEMENT OF CLAIM**

Filed on behalf of the Second Defendant
Form 17 R 146

RBG LAWYERS
Level 10
300 Adelaide Street
BRISBANE QLD 4000
Tel: (07) 3009 9300
Fax: (07) 3009 9399
Ref: SGM:MBR:150071

Amended pursuant to order of Jackson J made on 3 April 2019

By [Signature], RBG Lawyers, Dated 3 April 2019

Eighth Defendant: **KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

**AMENDED DEFENCE OF THE SECOND DEFENDANT TO THE SECOND ~~THIRD~~
FIFTH FURTHER AMENDED STATEMENT OF CLAIM**

In this amended defence, the Second Defendant adopts the definitions used in the ~~Third~~ Second Fifth Further Amended Statement of Claim (**Statement of Claim**) unless a contrary intention is expressed.

The Second Defendant relies on the following facts in defence of the claim:

Parties and roles

1. As to paragraph 1 of the Statement of Claim, the Second Defendant:
 - (a) admits that LMIM is a company duly incorporated capable of suing in its own name and says further that its date of registration was 31 January 1997;
 - (b) admits that LMIM is the RE of the FMIF and says further that LMIM has been the RE of the FMIF since on or about 28 September 1999;
 - (c) admits paragraphs 1(c), 1(d), 1(e) and 1(f);
 - (d) otherwise is unable to plead to the allegations in paragraph 1 of the Statement of Claim on the basis that the Plaintiff has failed to particularise the meaning of the phrase 'at all material times'.
 - (e) Says further that Permanent Trustees Australia Limited (ACN 008 412 913):
 - (i) is duly incorporated;
 - (ii) was appointed as the custodian of FMIF pursuant to a custody agreement between it and LMIM dated 4 February 1999; and
 - (iii) changed its name to The Trust Company (PTAL) Limited on 21 June 2010;
 - (f) says:
 - (i) that the Constitution of the FMIF scheme [FMIF.100.005.7639] provided in part as follows:

"13. NATURE OF RE POWERS

13.1 The RE has all the powers:

- (a) of a natural person to invest and borrow on security of the Scheme Property;

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

29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE

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

(a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);

...

(c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

(ii) Says further on the proper construction of clause 29 of FMIF, LMIM as RE of FMIF was entitled to:

(A) Act as an RE or trustee of another trust or managed investment scheme;

(B) Deal with itself as an RE or trustee of another trust or managed investment scheme;

(C) Be interested in a contract or transaction with itself as an RE or trustee of another trust or managed investment scheme;

2. As to paragraph 2 of the Statement of Claim, the Second Defendant:

(a) admits that:

- (i) the First Defendant was a director of LMIM from 31 January 1997 to the date of his bankruptcy on 9 January 2015;
- (ii) she was a director of LMIM from 12 September 2003 to 21 June 2012;
- (iii) the Third Defendant became a director of LMIM on 22 June 2006 and remains a director;
- (iv) the Fourth Defendant became a director of LMIM on 30 September 2006 and remains a director;
- (v) the Fifth Defendant was a director of LMIM from 27 November 2007 to 30 September 2012;
- (vi) the Sixth Defendant was a director of LMIM from 18 September 2008 to 13 July 2012;

- (b) otherwise is unable to plead to the allegations in paragraph 2 of the Statement of Claim on the basis that the Plaintiff has failed to particularise the meaning of the phrase 'at all material times'.
- (c) says further that David Monaghan (Monaghan):
- (i) was from about 1990 a solicitor admitted in the State of Queensland;
 - (ii) was between 2004 to 2010 the risk manager for LMIM;
 - (iii) was between 2004 to about February 2010 an in house legal advisor to LMIM;
 - (iv) from about 2005 to about February 2010 was the Commercial Lending Manager for LMIM;
 - (v) as Commercial Lending Manager:
 - (A) managed the commercial lending department of LMIM;
 - (B) did from in or about 2006 manage the:
 - (I) FMIF Bellpac Loan (as defined in paragraph 6 of the Statement of Claim); and
 - (II) MPF Bellpac Loan (as defined in paragraph 10 of the Statement of Claim);
 - (III) loan by LMIM as trustee of MPF to Great Pacific Capital Ltd;
 - (C) managed the Proceedings (as defined in paragraph 22 of the Statement of Claim as traversed in paragraph 22 below, and in that context is hereinafter referred to as the "Proceedings");
 - (vi) during the period 1 March 2010 to 24 October 2012:
 - (A) was the principal of the legal practice, styled "Monaghan Lawyers";
 - (B) acted as the lawyer for LMIM;
 - (C) acted for LMIM in respect of the Proceedings; and
 - (I) in settlement of the Proceedings;
 - (II) in instructing WMS and obtaining the WMS Report (as referred to in paragraph 30D of the of the Statement of Claim);

- (III) in retaining and instructing Allens, and obtaining the Allens Advice (as referred to in paragraph 30E of the Statement of Claim);
 - (IV) in drawing the Deed Poll (as referred to in paragraph 31 of the Statement of Claim);
 - (V) as to matters associated with the Proceedings and the matters the subject of these Proceedings;
- (d) says further to the knowledge of the Second Defendant, Monaghan was:
- (i) a person of good repute and competence;
 - (ii) more knowledgeable, skilled and experienced, than the Second Defendant, with respect to the matters referred to in subparagraphs (c)(ii), (c)(v)(B) & (C) and (vi)(B) and (C) above (Monaghan Services);
- (e) during the period from about 2007 to October 2011, Allens Arthur Robinson (as the firm was then known) (Allens):
- (i) were solicitors retained by LMIM and PTAL to provide legal services to LMIM and PTAL;
 - (ii) acted for LMIM and PTAL in respect to the FMIF Bellpac Loan;
 - (iii) acted for:
 - (A) LMIM and Bellpac in the Proceedings from about July 2009 to about January 2010; and
 - (B) PTAL in the Proceedings from about November 2009 to January 2010;
 - (iv) was in about December 2010 retained by LMIM to advise in relation to the settlement of the Proceedings;

Particulars

The retainer was in writing and bearing a date of 1 December 2010.

- (v) were as of March 2011 to 21 June 2011, on behalf of LMIM, drafting and negotiating each of the documents which became the Gujarat Contract, the Deed of Release and Deed of Settlement and Release;

- (vi) provided the Allens Advice (as referred to in paragraph 30E of the Statement of Claim) (collectively referred to as the “Allens Legal Services”);
- (f) says further that to the knowledge of the Second Defendant:
- (i) Allens was a firm, and Mr Beckinsale of that firm was a person, of good repute and competence in the provision of legal services;
- (ii) Allens, and Mr Beckinsale, were more knowledgeable, skilled and experienced, than the Second Defendant or the other directors of LMIM, to the knowledge of the Second Defendant, with respect to the provision of the Allens Legal Services.
- (g) says further that the Second Defendant and LMIM, to the knowledge of the Second Defendant, relied upon the specialised skill, expertise and experience of:
- (i) Monaghan;
- (ii) Monaghan Lawyers; and
- (iii) Allens;
- with respect to the provision of the Monaghan Services and the Allens Legal Services respectively, and it was reasonable to do so;
- (h) the Second Defendant in relying upon Allens did so in the belief:
- (i) that Allens would give and gave proper regard to all relevant facts and circumstances when acting on behalf of LMIM, including in providing the Allens Advice as to the proposed split of settlement proposed as between the FMIF and MPF; and
- (ii) that if there were any facts or circumstances or risks which should be considered or had regard to in relation to the Proceedings or settlement thereof, including the proposed split of settlement proceeds as between the FMIF and MPF, those facts or circumstances would be brought to the attention of LMIM prior to 21 June 2011;
- (i) the Second Defendant in relying upon Monaghan and Monaghan Lawyers did so in the belief:
- (i) that Monaghan and Monaghan Lawyers would give and gave proper regard to all relevant facts and circumstances, including:

(A) as to the proposed split of settlement proposed as between the FMIF and MPF; and

(B) settlement of the Proceedings;

(ii) that if there were any facts or circumstances or risks which should be considered or had regard to in relation to the Proceedings or settlement thereof, including the proposed split of settlement proceeds as between the FMIF and MPF, those facts or circumstances would be brought to the attention of LMIM prior to 21 June 2011.

3. As to paragraph 3 of the Statement of Claim, the Second Defendant:

(a) admits that David Whyte was appointed, by an order of this Court dated 21 August 2013, to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution but denies that the Court order describes David Whyte as a partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd. The explanation for this denial is that the order described David Whyte as a partner of 'BDO Australia Limited';

(b) admits that David Whyte was appointed receiver of the property of FMIF and that he, in relation to that appointment, was invested with the powers set out in paragraph 3(c) and (d);

(c) says further in relation to the allegations in subparagraphs (d)(ii) and (e) that the Plaintiff's standing to bring proceedings is limited to proceedings brought under Part 9.4B for alleged breaches of duties under Part 5C.2 of the *Corporations Act* 2001 (**the Act**) and the Plaintiff has no standing to bring a proceeding for alleged breaches of duties under Part 2D.1 of the Act.

4. The Second Defendant admits the allegations in paragraphs 4 and 4A of the Statement of Claim.

Bellpac Loans

5. The Second Defendant admits the allegations in paragraph 5 of the Statement of Claim, but says further:

(a) Bellpac Pty Ltd ACN 101 713 017 (**Bellpac**) was then known as GPC Bellambi Pty Ltd; and

(b) the Plaintiff was also a party to the FMIF Bellpac Loan Agreement.

6. The Second Defendant admits the allegations in paragraph 6 of the Statement of Claim.

7. The Second Defendant admits the allegations in paragraph 7 of the Statement of Claim.
8. As to paragraph 8 of the Statement of Claim the Second Defendant admits that the Bellpac Loan Agreement was varied and says further that those variations were by deeds dated 5 December 2003, 13 February 2004, 14 May 2004, 4 October 2004 (2 deeds of variation), 21 January 2005, 2 May 2005, 23 June 2006 and 11 July 2008.
9. The Second Defendant admits the allegations in paragraph 9 of the Statement of Claim.
10. The Second Defendant admits the allegation in paragraph 10 of the Statement of Claim.
11. As to the allegations in paragraph 11 of the Statement of Claim, the Second Defendant:
 - (a) admits that Bellpac and LMIM as Trustee for the MPF entered into a fixed and floating charge with an execution date of 23 June 2006 which provided that it was to secure a loan agreement intended to be executed and dated on the same date between Bellpac and LMIM as Trustees for the MPF;
 - (b) says further that the MPF Mortgage was dated 17 December 2004 and this predates the MPF Bellpac Loan Agreement.
12. As to paragraph 12 of the Statement of Claim, the Second Defendant:
 - (a) admits that the parties named entered into a Deed of Priority dated 23 June 2006 and says further that PTAL was also a party to that deed;
 - (b) ~~denies the allegations in subparagraph (c) because says that:~~
 - (i) ~~cl.8 of the Deed of Priority provides as follows:~~

"Release of Securities
If an asset which is subject to a Security is sold pursuant to a bona fide sale for approximately fair market value and the full proceeds of sale are distributed in accordance with the Deed, each Mortgagee must provide a release of their respective Securities to the extent that they relate to the sold assets."
 - (ii) PTAL is not specifically mentioned in cl.8;
 - (c) Relies on the full terms of the Deed of Priority.
13. As to paragraph 13 of the Statement of Claim, the Second Defendant:
 - (a) Admits that in or about March 2006 Bellpac defaulted under the FMIF Bellpac Loan.
 - (b) Denies that PTAL as custodian of LMIM as RE of the FMIF had, from in or about March 2006, a continuing entitlement to exercise rights under the PTAL

Mortgage and the PTAL Charge in relation to the default referred to in (a) above. The basis for this denial is that from in or about July 2006 to in or about January 2008, regular interest payments were being made in respect of the FMIF Bellpac Loan and these interest payments were accepted by PTAL in satisfaction of Bellpac's obligations under the FMIF Bellpac Loan. In the premise, there was not a continuing default from March 2006 so as to entitle PTAL as custodian to exercise rights under the PTAL Mortgage and the PTAL Charge.

14. The Second Defendant admits the allegations contained in paragraphs 14, 15 and 16 of the Statement of Claim.

Bellpac Sale of the Property to Gujarat

15. As to paragraph 17 of the Statement of Claim, the Second Defendant:
- (a) Denies that the LASA was entered into on 22 September 2004 because it was entered into on 21 October 2004;
 - (b) Otherwise admits the allegations.
16. The Second Defendant admits the allegations in paragraph 18 of the Statement of Claim.
17. As to paragraph 19 of the Statement of Claim, the Second Defendant admits:
- (a) That a dispute arose between Bellpac and Gujarat subsequent to December 2004;
 - (b) The Second Defendant does not admit that this dispute between Bellpac and Gujarat was limited to the parties' rights, obligations and liabilities under the LASA and the 2004 Agreements. The direct explanation for this non-admission is that the Second Defendant does not have knowledge of the complete scope of this dispute and is therefore unaware of whether the dispute was limited to those parties' rights, obligations, and liabilities under the LASA and the 2004 Agreements.
18. As to paragraph 20 of the Statement of Claim, the Second Defendant:
- (a) admits the allegations;
 - (b) says that South Bulli Holdings Pty Ltd (**SBH**):
 - (i) was a subsidiary of Gujarat; and
 - (ii) was also a party to each of the Settlement Deeds.

19. The Second Defendant admits the allegations in paragraph 21 of the Statement of Claim.
20. As to paragraph 22 of the Statement of Claim, the Second Defendant:
- (a) as to subparagraph (a), admits that a legal proceeding was commenced by Gujarat against Bellpac in or about May 2009 and says further that this proceeding was commenced in the Supreme Court of New South Wales;
 - (b) as to subparagraph (b):
 - (i) admits a legal proceeding was commenced by LMIM and Bellpac against Gujarat in 2009 (the Bellpac proceedings);
 - (ii) denies that this proceeding was commenced on or about November 2009 and as the direct explanation for the belief that the allegation is untrue ~~this denial~~ repeats and relies upon subparagraph (b)(iii)(a) and (iii) below; ~~that this proceeding was commenced with LMIM and Bellpac as plaintiffs on or about early July 2009 and says further:~~
 - (iii)(a) says that this proceeding was commenced with LMIM and Bellpac as plaintiffs on in or about early July 2009;
 - (iii) says that PTAL, Coalfields, Bounty and GPC became parties to this proceeding from about November 2009.
 - (iv) ~~that this proceeding was also commenced by LMIM and Bellpac as plaintiffs in the Supreme Court of New South Wales;~~
- (bb) says further that:
- (i) insofar as LMIM was a party to the Bellpac proceedings, it was suing in relation to the rights and assets of LMIM as trustee of the MPF in respect of the subject matter of those proceedings as identified in the Amended List Summons dated 5 February 2010, New South Wales case number 298727/2009, paragraph 18 and Amended Commercial List Statement dated 5 February 2010, New South Wales case number 298727/2009 paragraphs 19 to 49; and
 - (ii) in the premises pleaded in (i) above, LMIM as trustee of the MPF was a party to the Bellpac proceedings;

- (c) admits that Coalfields commenced a cross-claim against Gujarat and Bellpac but denies that this cross-claim was in the Gujarat proceedings because this cross-claim was in the Bellpac proceedings.

Funding of Proceedings

21. ~~The Second Defendant admits the allegations in paragraph 23 of the Statement of Claim.~~
22. As to paragraph 24 of the Statement of Claim, the Second Defendant:
- (a) Admits that, from in or about July 2009, LMIM as trustee of the MPF funded the Gujarat Proceedings, the Bellpac Proceedings and the defence of the Coalfields Crossclaim;
- (b) ~~Does not admit the amount of that funding because, despite reasonable enquiries, the Second Defendant remains uncertain as to the truth or otherwise of the allegations~~ Further as to sub-paragraph (a):
- (i) Denies that from in about July 2009 that LMIM as trustee of MPF (MPF) funded the Proceedings in an amount of approximately \$1,950,421.69 and as to the basis for the belief the allegation is untrue says that such amount was not expended on funding the Proceedings and repeats and relies upon the allegations in sub-paragraphs (b)(ii) and (iii) and (e)(iv) and (v) below:
- (ii) says that the amount referred to in Loans Schedule MPF-418 [FMIF.017.001.1082]:
- (A) refers to funding only to 7 July 2011 whereas MPF continued funding after that date;
- (B) included costs and expenses of funding the settlement of the proceedings as alleged in sub-paragraph (e)(iv) below, but only to 7 July 2011;
- (C) included funding of the recovery proceedings alleged in sub-paragraph (e)(v) below, but only to 7 July 2011;
- (D) included funding of other costs;
- (iii) says that:
- (A) the amount of approximately \$1,597,566.19 was expended by MPF on funding the Proceedings or settlement thereof;

Particulars

Particulars of the funding are set in the MPF Funding Schedule which is delivered with this Amended Defence.

- (B) a total amount of approximately \$2,536,441.30 was funded by MPF from about July 2009 which includes funding other recoveries as referred to in sub-paragraphs (e)(v) below:

Particulars

Particulars of the funding are set in the MPF Funding Schedule which is delivered with this Amended Defence.

- (c) Denies that LMIM as trustee of the MPF funded the Proceedings as second mortgagee because it was providing funding in its capacity as plaintiff and to LMIM as RE of the FMIF to allow it and then PTAL to progress and defend (respectively) the Proceedings;
- (d) Admits that the funding provided by MPF was drawn-down by LMIM as trustee for the MPF against the MPF Bellpac Loan.
- (e) Says further that in addition to providing funding to LMIM as RE of the FMIF to allow it to progress and defend (respectively) the Proceedings, LMIM as trustee of the MPF also:
- (i) ~~gave an undertaking as to damages in the Bellpac proceedings;~~ and
 - (ii) ~~agreed~~ agreed to fund a \$1.3 million payment by LMIM as RE of the FMIF, or alternatively PTAL, to Coalfields in order to facilitate settlement of the Proceedings;
 - (iii) gave an undertaking to pay any costs awarded against Bellpac in favour of Gujarat in the Bellpac proceedings; and
 - (iv) funded the costs of settling the Proceedings;

Particulars

Particulars of the costs funded are:

- (1) in Schedule "A" to this Defence (save that the amounts of \$9,915.71 and \$9,223.46 stated therein dated 20 October 2011 are not pressed by the second defendant as only they only partly relate to funding by MPF of the costs of settling the Proceedings); and

(2) Woodbury Bell Valuers Tax Invoice V3110750PW dated 11 August 2011 in the sum of \$1,375.00.

(v) says that prior to and post 21 June 2011 LMIM as trustee of MPF did fund, other recoveries including against guarantors of the FMIF Bellpac Loan and MPF Bellpac Loan, and by the liquidators of Bellpac against bond holders.

(f) says that from about July 2009 onwards the funds of LMIM as RE of the FMIF were frozen and were not available to fund the Proceedings or settlement thereof.

Mediation Heads of Agreement

23. As to paragraphs 25 and 26 of the Statement of Claim, the Second Defendant:

(a) admits the existence of a handwritten document entitled, 'Heads of Agreement' and says further that this document is dated 9 November 2010;

(b) admits the existence of a typed document with some handwriting that is entitled, 'Heads of Agreement Recording Agreement in Principle' which sets out, in part, the matters pleaded at paragraph 26(a), (b) and (c).

24. The Second Defendant admits paragraph 27 of the Statement of Claim.

Settlement of the LMIM Bellpac Proceedings

25. The Second Defendant admits the allegations in paragraphs 28, of the Statement of Claim and says further that, on the proper construction of the Deed of Release and the Deed of Settlement and Release, LMIM as trustee of the MPF was also a party to those Deeds ~~and otherwise admits the allegations in paragraphs 29 and 30 of the Statement of Claim.~~

25A In the alternative, if the Deed of Release and Deed of Settlement and Release were executed by LMIM only in its capacity as RE of FMIF (which is denied) the parties to the Deed of Release and Deed of Settlement, Allens and Monaghan Lawyers acted and assumed that the these deeds would be binding on both LMIM as RE of the FMIF and as trustee of MPF.

25B Admit the allegations in paragraphs 29 and 30 of the Statement of Claim.

Advice

26. The Second Defendant:

(aa) denies paragraph 30A of the Statement of Claim. The direct explanation for ~~this denial~~ the belief that the allegation is untrue repeats and relies upon subparagraphs (a) to (c) below:

(a) says, that ~~B~~by an email dated 6 December 2010, ~~David~~ Monaghan, as the principal of Monaghan Lawyers, ~~a law firm engaged by LMIM,~~ communicated by email with WMS:-

(b) says ~~T~~that the email dated 6 December 2010 was not a request to provide an opinion about what would be a fair and reasonable split of the likely proceedings from the Proceedings but rather it was a request to:

(i) Advise what further information WMS required in addition to the information contained in the email, to provide an advice; and

(ii) To provide ~~David~~ Monaghan with an estimate of WMS's fees to provide the requested advice as a necessary step before WMS were formally engaged to provide advice.

(c) says that ~~T~~the email referred to in subparagraph (a) was responded to by WMS by that firm sending a proposed letter of engagement to David Monaghan dated 6 December 2010 which provided a fee estimate and also referred to discussions and correspondence in relation to WMS proposed engagement.

27. The Second Defendant admits the allegations in paragraph 30B of the Statement of Claim and says further that:

(a) the request for advice by LMIM was conveyed to Allens by ~~David~~ Monaghan, the principal of Monaghan Lawyers, a law firm engaged by LMIM to act on its behalf in email correspondence from ~~David~~ Monaghan to John Beckinsale dated 14 March 2011;

(b) the request for advice to Allens from ~~David~~ Monaghan attached various documents;

(c) the request for advice was an aspect of ongoing solicitor and client relationship between LMIM and Allens in relation to matters concerned with and incidental to the Proceedings and settlement thereof;

(d) during the currency of the solicitor and client relationship between LMIM and Allens, Allens had been provided or had access to the original or copies of the agreements and securities relevant to the FMIF Bellpac Loan and the MPF

Bellpac Loan as alleged in paragraphs 7 to 12 of the Statement of Claim and the Deed of Priority.

Particulars

Particulars of the possession of the securities and Deed of Priority by Allens are in Schedule "B" to this Defence.

28. As to paragraph 30C, the Second Defendant:

(a) Admits that what the Plaintiff refers to as 'the instructions', namely an email from David Monaghan to Aaron Lavell dated 6 December 2010 and two emails from David Monaghan to John Beckinsale dated 14 and 17 March 2011, did not include copies of the Gujarat Contract, the Deed of Release or the Deed of Release and Settlement and the Second Defendant says further that these documents were not in existence as at the date of those emails.

~~(b) Admits that the emails referred to in the preceding subparagraph did not state the matters set out in subparagraph (b)(i) of the Statement of Claim but denies that the matters set out in subparagraph (b)(i) were 'facts'. The direct explanation for the denial of the alleged 'facts' is but says that, as at the dates of those the emails referred to in paragraphs 30A and 30B of the Statement of Claim, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised as it was the subject of continuing discussions between the parties to the Mediation Heads of Agreement which would not be concluded until in or about mid June 2011.~~

~~(c) denies the allegations in subparagraph (b)(ii), because and as to the direct explanation for the belief the allegation is untrue repeats and relies upon subparagraph (i), (ia) to (ic) and (ii) below:~~

~~(i) settlement of the Proceedings did not involve the sale of security pursuant to a bona fide sale for approximately fair market value with the full proceeds of sale being distributed in accordance with the Deed of Priority, because:~~

~~(A) The value of the Property was not approximately the sale price for the Property under the Gujarat Contract;~~

Particulars

~~The 2007 Settlement Deed provided (in clause 4.2) that Bellpac then had a valuation of the Property at \$42M to \$52M and (by clause 4.3) Gujarat's nominee, SBH, agreed to pay \$56M for the Property.~~

~~The 2008 Settlement Deed provided (in clause 2.3(b)) that the Property would be sold to SBH for \$35M.~~

~~In the Proceedings, the plaintiffs alleged that Bellpac had acquired the Property and associated rights in 2003 for \$21M.~~

~~Under the Mediation Heads of Agreement, Gujarat or its nominee was to buy the Property for \$65.5M.~~

~~Further particulars will be provided after expert reports have been obtained.~~

~~(B) the sale of the Property was not a bona fide sale of the Property, but was part of the overall proposed settlement pursuant to which the bulk of the proceeds were not to be for the sale of the Property;~~

~~(i) says that the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of FMIF or PTAL to settle the Proceedings as:~~

~~(A) LMIM as the trustee of the MPF was a plaintiff to the Proceedings and the Second Defendant repeats and relies upon the allegations in in paragraph 20(bb) above;~~

~~(B) neither LMIM as RE of FMIF nor PTAL had the power or authority to enter into a compromise on behalf of LMIM as the trustee of the MPF;~~

~~(C) repeats and relies upon the allegations in paragraphs 25 and 25A above;~~

~~(D) was required to discontinue the Proceedings on settlement;~~

~~(ia) original certificates of title for the Property, which were required for any sale of the Property, were held by Allens on account of their unpaid fees in the amount of approximately \$25,000.00 and could not be released until those fees were paid in circumstances where only the MPF had capacity to do so (and did do so);~~

~~(ib) LMIM as trustee MPF was paying the legal fees of Allens, Monaghan Lawyers and Verekers Lawyers to enable settlement of the Proceedings to occur where only the MPF had capacity to do so;~~

Particulars

Particulars of the legal fees paid in Schedule "A" to this Defence:

~~(ic) settlement of the Proceedings would not have occurred if MPF did not pay the legal fees referred to in subparagraph (ib), above;~~

(ii) ~~therefore (or in any event), LMIM as trustee of the MPF was entitled:~~

(A) ~~to withhold its consent to the sale of the Property, in respect of which the Second Defendant repeats and relies on the matters pleaded in subparagraph (c) above;~~

~~(AA) to refuse to pay the Allens invoice and thereby prevent the release of the certificates of title required for the sale of the Property;~~

~~(AB) to refuse to pay the legal fees of Allens, Monahan Lawyers and Verekers Lawyers;~~

(B) ~~to refuse to hand over or release its securities;~~

(C) ~~to refuse to terminate the Bellpac Proceedings and the claims made against Gujarat in that proceeding;~~

(D) ~~to seek an injunction or other relief to prevent the sale of the Property or to sue the RE of the FMIF for damages or other relief, including:~~

(I) ~~for payment of a litigation funding fee;~~

(II) ~~for damages for misleading or deceptive conduct;~~

(III) ~~for an order that it pay a litigation funding fee in exchange for the agreement to the proposed settlement by LMIM as trustee of the MPF, on the basis that LMIM as RE of the FMIF was estopped from denying that there was an arrangement to that effect between LMIM in its respective capacities;~~

(E) ~~repeats and relies upon the matters alleged in paragraph 1(f) above.~~

(iii) ~~in the circumstances:~~

(A) ~~the Proceedings would not have settled on the proposed terms or at all without the consent and cooperation of LMIM as trustee of the MPF;~~

- (B) ~~unless LMIM as trustee of the MPF remained prepared to fund the ongoing costs of the Proceedings, LMIM as RE of the FMIF would be at risk of being unable to prosecute and defend the Proceedings further (because the FMIF had insufficient funds or cash flow to continue to funding the Proceedings if the settlement did not proceed and the MPF did not provide further funding for the proceeding) and being liable to judgments against it in default of taking steps, and consequently pay the other parties' costs thereof and suffer the relief claimed by Coalfields in the Coalfields cross claim;~~
- (C) ~~the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents referred to in paragraph 30C(b)(i) of the Statement of Claim and in order for the settlement to proceed at all (Settlement Documents);~~
- (d) Admits that the emails referred to in subparagraph (a) above did not include or attach a copy of the Deed of Priority but says further that:
- (i) on 9 December 2010, WMS was provided with access to a secure LMIM website which contained copies of the security documents for the FMIF Bellpac Loan and MPF Bellpac Loan, including the Deed of Priority;
 - (ii) Allens had been provided with a copy of the Deed of Priority by June 2007 on various occasions in the period from 11 January 2007 to 9 December 2009 as alleged in paragraph 27(d) above;
 - (iii) Allens had undertaken reviews of the securities documents and the Deed of Priority prior to 14 March 2011;

Particulars

The review by Allens of the securities documents and the Deed of Priority is to be inferred from particulars (10) and (11) of the particulars to paragraph 27(d) above, in the context of particulars (1) to (9) of those particulars.

- (e) Says further that the emails and attachments to those emails to WMS and to Allens set out that the loan by LMIM as RE of the FMIF was secured by a registered first mortgage and that as at 28 November 2010 approximately \$49M was outstanding in respect of FMIF's loan, and that the loans by LMIM as trustee

of the MPF were secured by a second registered mortgage and as at 28 November 2011 approximately \$24M was outstanding in respect of those loans; and

- (f) denies that the matters in subparagraph (d)(i) were 'facts' as alleged because:
 - (i) LMIM as trustee of the MPF was not funding the Proceedings as mortgagee because it was providing funding to LMIM as RE of the FMIF to allow it to progress and defend (respectively) the Proceedings; and
 - (ii) LMIM's directors always understood that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings;
- (fa) as to subparagraph (d)(ii), admits the allegation;
- (g) as to subparagraph (d)(iii):
 - (i) admits that there was no binding express prior agreement in terms of a contract for LMIM as trustee of the MPF to be paid any amount if the amount that LMIM as RE of the FMIF recovered did not cover the entirety of the amount that was owed by Bellpac with respect to the FMIF Belpac Loan;
 - (ii) otherwise denies the allegation and believes them to be untrue and as to the direct explanation for the belief the allegations in untrue and repeats and relies upon subparagraph (iii) and (iv) below;
 - (iii) repeats and relies upon the allegations in subparagraph (f)(ii) above and also paragraphs 22(c), and 22(e), ~~28(e)(i) to (iii)~~, above and paragraphs 34(c), 35(b)(iib), 38(a) and 39(c)(vi) below;

29. As to paragraph 30D of the Statement of Claim, the Second Defendant:

- (a) admits that on or about 7 March 2011, WMS provided a report bearing that date and says further:
 - (i) that this report was addressed to Monaghan Lawyers;
 - (ii) that WMS opined that a fair and reasonable split of the likely proceeds from the Proceedings would be 30% to 40% to the MPF and the balance to the FMIF;

- (iii) that the WMS Report was based on multiple sources of information including matters set out in the David Monaghan email dated 6 December 2010 and attachments to that email.

30. As to paragraph 30E of the Statement of Claim, the Second Defendant:

- (a) admits the allegations in paragraph 30E of the Statement of Claim;
- (ab) says that the Allens Advice was addressed to Monaghan of Monaghan Lawyers;
- (ac) says that on 29 March 2011 in an email of that date:
 - (i) Monaghan of Monaghan Lawyers provided the Allens Advice to the Second Defendant;
 - (ii) advised the Second Defendant in respect to that advice “[t]here is a lot to wade through, but the conclusion is that the transaction is OK”;
- (ad) says that on having read the 29 March 2011 email she reasonably believed that Monaghan (Monaghan Lawyers):
 - (i) had read the Allens Advice;
 - (ii) had read the Allens Advice as identifying that the proposed split of the settlement proceeds between FMIF and MPF as being “OK”;
 - (iii) will be undertaking a further review of the Allens Advice;
 - (iv) would inform or advise the Second Defendant and LMIM if the “transaction was not OK” and the reasons why;
 - (v) would inform or advise the Second Defendant and LMIM if the split of the settlement proceeds between FMIF and MPF on settlement ought not to occur or ought to be re-considered and the reasons why;
 - (vi) would identify to the Second Defendant and LMIM of any fact or circumstance regarding the Allens Advice which identified that the “transaction was not OK”;
- (ae) says further that by email of 10 June 2011 from Monaghan of Monaghan Lawyers, addressed to Bruce Wacker of Allens and cc to the Second Defendant [FMIF.200.013.9248] it was stated:

“In relation to your question about the split of the settlement monies, it is to be 65% PTAL (on behalf of the LM First Mortgage Income Fund) and 35% LM (on behalf of the LM Managed Performance Fund”.

- (af) says further that upon reading the email of 10 June 2011 she reasonably believed that Monaghan of Monaghan Lawyers:
- (i) had not identified at that time any fact or circumstance regarding the Allens Advice or otherwise that would cause the “transaction not to be OK”;
 - (ii) had not identified any fact or circumstance that would require that the split of the settlement proceeds between FMIF and MPF on settlement not occur or be varied;
- (ag) says that at no time did Monaghan, or Monaghan Lawyers or Allens, inform or advise the Second Defendant, or LMIM to the knowledge of the Second Defendant, that:
- (i) the “transaction was not OK”;
 - (ii) that the split of the settlement proceeds between FMIF and MPF on settlement ought not to occur or ought to be re-considered by LMIM;
 - (iii) of any fact or circumstance regarding the Allens Advice which identified that:
 - (A) the “transaction was not OK”;
 - (B) the advice did not reach an opinion that the proposed transaction was “legally acceptable”;
- (b) says further that, in the Allens Advice, Allens:
- (i) opined that it was legally acceptable for LMIM to split the proceeds of the settlement on the basis of the opinion in the WMS Report;
 - (ii) did not advise (nor had Allens advised before providing the Allens Advice) that Allens should be provided with particular relevant documents, such as the Settlement Documents, nor any other documents concerning the respective rights and obligations of LMIM as RE of the FMIF and as trustee of the MPF respectively, as lenders to Bellpac and as between themselves;
 - (iii) stated that Allens were not aware of any reason why agreeing to split the litigation proceeds between the FMIF and the MPF on the basis of the opinion in the WMS Report would raise any issues concerning the general law and statutory duties of the directors of LMIM;.
 - (iv) ~~was addressed to David Monaghan of Monaghan Lawyers and was provided to LMIM by Monaghan Lawyers.~~

30A As to paragraph 30F of the Statement of Claim, with the qualifications set out below, the Second Defendant admits that the plaintiff has accurately set out some extracts from the Allens Advice. The qualifications are that the Second Defendant denies:

- (a) that the matters described in paragraph 16(a) to (b) are described in the advice as a summary of various obligations set out subsequently in the advice because the advice is not described in such term;
- (b) that subparagraph 30F(f) contains what is stated at paragraph 16(f) of the Allens Advice because these statements are contained in paragraph 16(g) of the Allens Advice;
- (c) that subparagraph 30F(l) contains what is stated in paragraph 55 of the Allens Advice because these statements are contained in paragraph 56 of the Allens Advice;
- (d) that subparagraph 30F(o), contains what is stated in paragraph 63 of the Allens Advice because the quote omits the word “direct” before the word “fiduciary”.

30B As to paragraph 30G of the Statement of Claim the Second Defendant:

- (a) admits that LMIM’s Conflict Management Policy at the time of the Allens Advice contained the words set out in paragraph 30G.
- (b) says further that the Conflict Management Policy also provided that:
 - (i) The Board relies on the Risk Manager, amongst others, to implement this policy;
 - (ii) The Risk Manager has primary responsibility for implementing this policy;
 - (iii) The Risk Manager has primary responsibility for identifying conflicts;
 - (iv) The Risk Manager has primary responsibility for assessing and evaluating conflicts;
 - (v) In considering the appropriate response, the Risk Manager must have regard to the various duties that apply at law;
 - (vi) The Risk Manager has primary responsibility for undertaking appropriate action in relation to a conflict;
 - (vii) Where there is doubt about what action to take to resolve a conflict, the Risk Manager will consult with LM’s external lawyers and/or the Compliance Committee and/or the Board;

- (viii) The Risk Manager reports to the Compliance Committee and the Board on a regular basis (at each Compliance Committee and Board meeting or more frequently if required) in relation to identified conflicts and how they are dealt with;
- (ix) This Policy is to be subject to internal review at least once a year, or more frequently where required. The Risk Manager is responsible for conducting the internal review; and
- (x) This Policy is to be subject to external review at least once a year. The reviewer may be LM's auditor or LM's external lawyers. The Risk Manager is responsible for procuring the external review;
- (c) says that it is not alleged that:
 - (i) there is any contravention of Part 2D.1 of the Act;
 - (ii) the Second Defendant gave priority to duties under Part 2D.1 to any conflicting duty under ss 601FC(1) or 601FD(1);
- (d) says that the passages of the components of the Conflict Management Policy alleged are irrelevant to any alleged breach of duty against the Second Defendant.

30C As to paragraph 30H of the Statement of Claim, the Second Defendant:

- (a) relies on the full terms of the Allens Advice;
- (b) repeats and relies upon the matters alleged in paragraphs 2(b), 2(c) to (i), 30(ab) to (ae) and 30(b) above;
- (c) says that in the premises of the matters alleged in subparagraphs (a) and (b) above, says that a reasonable person in the position of the Second Defendant would have formed a view that the Allens Advice provided an opinion that the proposed split of the proceeds of settlement was legally acceptable;
- (d) further, as to subparagraph 30H(a):
 - (i) admits that the Allens Advice recognised, in paragraphs 27 and 37, that there was a position of conflict for LMIM as trustee for the MPF and LMIM as the RE for the FMIF;
 - (ii) says that:
 - (A) at paragraph 16 of the Allens Advice, Allens advised that, subject to certain matters that were then set out, it was legally acceptable for

LMIM to split the litigation proceeds between the FMIF and the MPF on the basis set out in the opinion provided by WMS despite LMIM being in a position of conflict;

(B) the Allens Advice did not state or warn that the proposed split of the proceeds of the settlement proceedings would constitute, or would be, a contravention of s 601FD(1)(b) or (c) of the Act;

(e) further, as to subparagraph 30H(b):

(i) admits that the Allens Advice sets out a number of matters that the directors of LMIM would need to take into account; but

(ii) denies that these matters relate to a “Settlement payment” on the basis that the Allens Advice, in paragraph opines that it would be legally acceptable for LMIM to split the then prospective litigation proceeds on the basis set out in the report provided by WMS Chartered Accountants subject to 7 matters set out in subparagraphs (a) to (g) of paragraph 16 of the Allens Advice;

(f) further as to subparagraph 30H(c):

(i) admits that the Allens Advice at paragraph 25 and 27 referred to the need of LMIM as RE of the FMIF to act in the best interests of the members of the FMIF;

(ii) admits that paragraphs 25 and 27 of the Allens Advice did not state specifically how paying 35% of Settlement proceeds to LMIM as trustee of MPF would be consistent with the obligation of LMIM as RE of FMIF to act in the interests of the members of FMIF;

(iii) says the Allens Advice did not state that paying 35% of the “Settlement proceeds” to LMIM would be;

(A) inconsistent with the interest of members;

(B) inconsistent with the duties owed under s 601FD(1)(b) and (c) of the Act;

(iv) says that the Allens Advice opines in paragraph 16 on the assumptions set out therein that it would be legally acceptable for LMIM to split the ‘litigation proceeds’ on the basis of the opinion provided by WMS Chartered Accountants and says that paragraph [14] of the Allens Advice

states that "WMS Chartered Accountants provided their report in March 2011 and that report concluded:

"In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions":

- (g) further as to subparagraph 30H(d):
 - (i) admits that paragraph 56 of the Allens Advice stated words to the effect as alleged; but
 - (ii) says that paragraph 56 of the Allens Advice addresses issues of a responsible entity as the holder of an Australian Financial Service Licence and not ss 601FC(1)(c) and 601FD(1)(c);
 - (iii) denies that the words set out in paragraph 56 misconstrued the effect of ss 601FC(1)(c) and 601FD(1)(c) of the Act and as to the basis of the belief the allegations in untrue repeats and relies upon subparagraph)(ii) above;
- (h) further as to subparagraph 30H(e):
 - (i) admits that paragraph 56 of the Allens Advice employed the term 'vice versa';
 - (ii) repeats and relies upon subparagraph (f)(iii) and (iv) and (g)(ii) above;
 - (iii) otherwise denies the allegations and as to the basis for the belief that the allegation is untrue repeats and relies upon sub-paragraph (ii) above.;
- (i) further as to subparagraph 30H(f):
 - (i) denies the allegation and as to the basis for the belief the allegations is untrue repeats and relies upon subparagraph (ii) and (iii) below;
 - (ii) paragraph 9 of the Allens Advice states "*The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation*":
 - (iii) neither paragraph 9 nor the Allens Advice was premised on the assumption that there was an existing agreement, rather it was premised on the basis that there was no formal agreement;

- (j) further as to paragraph 30H(g):
- (i) denies that the Allens Advice sets out inconsistent conclusions on the basis that the Plaintiff's allegation is not premised on a proper interpretation of the Allens Advice as the conclusion of the Allens Advice is set out in paragraph 16 thereof;
 - (ii) or, in the alternative, if the Allens advice did set out inconsistent matters as alleged (which is denied), paragraph 16 of the Allens Advice, set out the conclusion, that it was legally acceptable for LMIM to split the litigation proceeds when they were paid on the basis of the opinion provided by WMS Chartered Accountants which was that that the split of 65% to FMIF and 35% to MPF would be legally acceptable.
- (k) further as to subparagraph 30H(h):
- (i) admits that the Allens Advice at paragraph 16(e) referred to 'any procedures in the FMIF compliance plan';
 - (ii) denies that the "Compliance Plan" contained the terms pleaded in paragraph 30G of the Statement of Claim because those terms are not referred to in the "Compliance Plan";
 - (iii) repeats and relies upon the allegations in paragraph 30B above to the allegations in paragraph 30G of the Statement of Claim;
 - (iv) says that
 - (A) paragraph 16(e) of the Allens Advice referred to paragraphs 54 and 57 of that advice;
 - (B) paragraph 57 of the Allens Advice addresses issues of a responsible entity as the holder of an Australian Financial Service Licence and not ss 601FC(1)(c) and 601FD(1)(c);
 - (v) repeats and relies upon subparagraphs (d)(iii) and (f)(iii) and (iv) above;
 - (vi) otherwise denies the allegations and as to the basis for the belief that allegations is untrue repeats and relies upon subparagraphs (iii) to (v) above;
- (l) further as to subparagraph 30H(i):
- (i) admits that paragraph 57 of the Allens Advice states in part "[LMIM] will also need to ensure that it follows any procedures or policies it has

established in accordance with section 912(A)(1)(aa) for managing conflicts of interest”;

- (ii) repeats and relies upon subparagraphs (d)(iii) and (f)(iii) and (iv) and (k) above;
- (iii) says there is no allegation that the Second Defendant failed to comply with the LMIM Conflicts Management Policy; and
- (iv) otherwise denies that the allegations and as to the basis for the belief that allegations is untrue repeats and relies upon subparagraphs (ii) and (iii) above;
- (m) further as to subparagraph 30H(j):
 - (i) says that paragraph 63 of Allens Advice states:

“Generally, the directors of a trustee company do not themselves owe direct fiduciary obligations to the beneficiaries of the trust. However, section 601FD(2) of the Corporations Act provides that the duties outlined in section 601FD(1) override any conflicting duty an officer has under Part 2D.1 of the Corporations Act. Although this point has not yet been decided by case law, it is possible that section 601FD(2) will mean that directors of a responsible entity will have a direct fiduciary relationship with members of a registered scheme. This would mean that the directors would owe the scheme members all of the proscriptive fiduciary duties that arise as between the RE itself and the scheme members”
 - (ii) admits that the Allens Advice did not elaborate upon the fiduciary duties referred to in paragraph 63;
 - (iii) repeats and relies upon subparagraphs (d)(iii) and (f)(iii) and (iv) above;
 - (iv) says that it is not alleged:
 - (A) that s 601FD(2) imposes on directors of a responsible entity a direct fiduciary relationship with members of a registered scheme; or
 - (B) directors of a responsible entity owe the members of registered scheme proscriptive fiduciary duties that arise between the responsible entity itself and the scheme;

- (v) says that this allegation is not tied to the matters alleged in paragraph 30H(k)
- (vi) says that otherwise the allegation is embarrassing;
- (n) further as to subparagraph 30H(k), denies the allegation and as to the basis for the belief the allegation is untrue repeats and relies upon the subparagraphs (a) to (m) above and subparagraph (o) below;
- (o) in further answer to each of the allegations in subparagraphs 30H(a) to (k):
 - (i) says the proper construction of the Allens Advice requires the:
 - (A) advice is to be read as a whole;
 - (B) in the context of the opinion expressed in paragraph 16 of that advice;
 - (ii) that such allegations are not premised upon a proper construction of the Allens Advice.

Deed Poll

31. ~~The Second Defendant admits the allegations in paragraph 31 of the Statement of Claim.~~ As to the allegations in paragraph 31 of the Statement of Claim, the Second Defendant:
- (a) admits that a Deed Poll was executed by each of the first to sixth defendants prior to 21 June 2011;
 - (b) admits that the Deed Poll was executed in counterparts;
 - (c) repeats and relies upon the allegation in paragraph 2(c)(vi)(C)(IV) above.
32. As to paragraph 31A of the Statement of Claim, the Second Defendant:
- (a) repeats and relies on the allegations in and paragraphs 2(c) to (i) above and to paragraphs 5 to 20, 22 to 25B, 26 to 30 and 30C above in response to the allegations in paragraphs 5 to 22, 24 to 30, 30A to 30E and 30H of the Statement of Claim. admits that, prior to executing the Deed Poll, she knew the facts alleged in the paragraphs referred to which she has admitted above;
 - (b) does not admit whether the First and Third to Sixth Defendants had such knowledge, as those are matters within the knowledge of those defendants;
 - (c) otherwise respectively denies or does not admit that she knew or ought to have known the facts alleged because of the matters pleaded above in response to the allegations in the paragraphs referred to, on which she relies.

33. The Second Defendant admits the allegations in paragraph 32 and 32A of the Statement of Claim and relies on the full terms of the Deed Poll.

33A. As to the allegations in paragraph 32A of the Statement of Claim, the Second Defendant:

- (a) as to subparagraph (a):
 - (i) admits that the Deed Poll did not expressly refer to the Allens Advice;
 - (ii) says that by clause 2.1(e)(vii) the Deed Poll expressly refers to a consideration being “any expert advice received by the Relevant Funds in relation to the Settlement Proposals”;
 - (iii) says that by clause 3.1(n) of the Deed Poll it was expressly entered into “in light of the independent advice” received by LMIM;
 - (iv) says further that in the premises of the matters referred to in subparagraph (ii) and (iii):
 - (A) the Allens Advice is referred to in Deed Poll as it is expert and independent advice received by LMIM;
 - (B) the Deed Poll was entered into upon the Second Defendant, on her own behalf and on behalf of the LMIM, giving careful consideration to the Allens Advice in the context of the matters alleged in paragraph 2(b), 2(c) to (i), 30(ab) to (ae) and 30(b) above;
 - (v) says further that in so far as the Second Defendant executed the Deed Poll, in her own capacity and as a director of LMIM, the expert and independent advice includes the WMS report and the matters referred to in paragraphs 2(b), 2(c) to (i), 30(ab) to (ae) and 30(b) above;
- (b) as to subparagraphs (b) and (c):
 - (i) admits that the Deed Poll did not expressly refer to the Conflicts Management Policy pleaded in paragraph 30G of the Statement of Claim or ss 601FC or 601FD of the Act;
 - (ii) says that clause 2.1(b) of the Deed Poll expressly refers to “possible conflicts that may arise as a result of the Settlement Proceeds flowing from LM preferring the interests of the Relevant Funds against the other”;

- (iii) says that clause 2.1(c) of the Deed Poll expressly refers to “procedures in the Constitution, the Trust Deed and the Compliance Plans (and other procedures that are in place) in respect to conflicts of interest”;
- (iv) says that clause 2.1(d) of the Deed Poll expressly refers to “general law and statutory duties that relate to directors under the Corporations Act” and that includes ss 601FC or 601FD of the Act;
- (v) says that clause 3.1(f) of the Deed Poll expressly refers to “the Settlement Proposals are permitted by ...the Compliance Plan...”;
- (vi) says that clause 1.1 of the Deed Poll defines the “Compliance Plan” to mean the compliance plans of MPF and FMIF;
- (vii) says that on 16 March 2011 the compliance plan of FMIF was replaced by the Replacement Compliance Plan;
- (viii) says that the Replacement Compliance Plan:
 - (A) was signed by the First to Sixth Defendants;
 - (B) refers to and sets out the duties under ss 601FC and 601FD of the Act;
 - (C) provides for conflicts of interest and refers to the management of the conflicts of interest policy;
- (ix) says that there was no requirement for the Deed Poll to have specifically referred to the Conflicts Management Policy pleaded in paragraph 30G of the Statement of Claim or ss 601FC or 601FD of the Act;
- (x) says that an absence of any express reference to Conflicts Management Policy pleaded in paragraph 30G of the Statement of Claim or the sections 601FC or 601FD of the Act is not relevant to any cause of action against the Second Defendant in this proceeding;
- (c) otherwise denies the allegations and as to the basis for belief that the allegation is otherwise untrue repeats and relies upon subparagraphs (a)(i) to (iv) and (b)(i) to (viii) above.

34. As to the The Second Defendant denies the allegations in paragraph 33 of the Statement of Claim, the Second Defendant:

- (aaa) denies the allegations and as to the basis for the belief the allegation are untrue repeats and relies upon subparagraphs (aa) to (c) below because;

- (aa) says that LMIM as trustee of the MPF did not “agreed” to fund the Proceedings as second mortgagee with second priority under the Deed of Priority, ~~because of the matters pleaded~~ and repeats and relies upon the allegations in paragraph 28 above and the paragraphs referred to therein;
- (a) ~~the Second Defendant says that she~~ did not have an expectation that, if LMIM and PTAL were successful in the Proceedings and the Property was developed by LMIM as RE of the FMIF, then the FMIF Bellpac loan would be repaid in full and the MPF Bellpac loan would be repaid in full or in part;
- (b) says that in July 2009, there was a possibility that the MPF Bellpac loan would be repaid in full or in part as a result of the Proceedings and LMIM as RE of the FMIF developing the Property, however the outcome of the Proceedings was still entirely uncertain;
- (c) says that as the outcome of the Proceedings was uncertain, there was no formal agreement entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF, however LMIM's directors always understood that if the Proceedings did not result in full recovery of the FMIF Bellpac loan and the MPF Bellpac loan, then the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings.

35. As to paragraph 34 of the Statement of Claim, the Second Defendant:

- (aa) denies the allegation in subparagraph (aa) because she had read and considered the Allens Advice, and repeats and relies upon the allegations in paragraphs 2(c) to (i) and 30(ab) to (b) above and to the allegations in paragraphs 30C and 33A herein in response to the allegations in paragraphs 30H and 32A of the Statement of Claim;
- (a) as to subparagraph (a):
 - (i) ~~denies the allegations in subparagraph (a) insofar as they are alleged against her because~~ and as to the basis for the belief the allegation is untrue repeats and relies upon subparagraphs (iii) to (iv) below:
 - (ii) ~~the sale of the Property to Gujarat by PTAL was not the sale of security pursuant to a bona fide sale for approximately fair market value with the full proceeds of sale being distributed in accordance with the Deed of Priority; and therefore~~

- (iii) says that MPF was entitled to withhold its consent and also repeats and relies upon the allegations in paragraph 28(e) 35(b)(iib) below above;
- (iv) repeats and relies upon the allegations in paragraphs 20, 22, 27(d), 28 and 30(ac) to (b) above;
- (b) as to the allegations in subparagraph (b):
 - (ia) denies the allegation and as to the basis for the belief that the allegation in untrue repeats and relies upon subparagraphs (i) to (ii) below;
 - (i) ~~denies that she knew the fact alleged in subparagraph (b)(i) because it was not a fact, for the reason pleaded in paragraph 25 above;~~
 - (iia) repeats and relies upon the allegations in paragraph 28(g) above in response to the allegations in paragraph 30C(d)(iii) of the Statement of Claim;
 - (iib) says further that:

(A) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of FMIF or PTAL to settle the Proceedings as:

(1 LMIM as the trustee of the MPF was a plaintiff to the Proceedings and the Second Defendant repeats and relies upon the allegations in in paragraph 20(bb) above;

(2) neither LMIM as RE of FMIF nor PTAL had the power or authority to enter into a compromise on behalf of LMIM as the trustee of the MPF;

(3) repeats and relies upon the allegations in paragraphs 25 and 25A above;

(4) consent was required to discontinue the Proceedings on settlement;

(B) original certificates of title for the Property, which were required for any sale of the Property, were held by Allens on account of their unpaid fees in the amount of approximately \$25,000.00 and could not be released until those fees were paid in circumstances where only the MPF had capacity to do so (and did do so);

(C) LMIM as trustee MPF was paying the legal fees of Allens, Monaghan Lawyers and Verekers Lawyers to enable settlement of the Proceedings to occur where only the MPF had capacity to do so;

Particulars

Particulars of the legal fees paid in Schedule "A" to this Defence.

(D) settlement of the Proceedings would not have occurred if MPF did not pay the legal fees referred to in subparagraph (ib), above;

(E) therefore (or in any event), LMIM as trustee of the MPF was entitled:

(1) to withhold its consent to the sale of the Property, in respect of which the Second Defendant repeats and relies on the matters pleaded in subparagraph (c) above;

(2) to refuse to pay the Allens invoice and thereby prevent the release of the certificates of title required for the sale of the Property;

(3) to refuse to pay the legal fees of Allens, Monahan Lawyers and Verekers Lawyers;

(4) to refuse to hand over or release its securities;

(5) to refuse to terminate the Bellpac Proceedings and the claims made against Gujarat in that proceeding;

(6) to seek an injunction or other relief to prevent the sale of the Property or to sue the RE of the FMIF for damages or other relief, including:

(I) for payment of a litigation funding fee;

(II) for damages for misleading or deceptive conduct;

(III) for an order that it pay a litigation funding fee in exchange for the agreement to the proposed settlement by LMIM as trustee of the MPF, on the basis that LMIM as RE of the FMIF was estopped from denying that there was an arrangement to that effect between LMIM in its respective capacities;

(7) repeats and relies upon the matters alleged in paragraph 1(f) above.

(F) in the circumstances:

(1) the Proceedings would not have settled on the proposed terms or at all without the consent and cooperation of LMIM as trustee of the MPF;

(2) unless LMIM as trustee of the MPF remained prepared to fund the ongoing costs of the Proceedings, LMIM as RE of the FMIF would be at risk of being unable to prosecute and defend the Proceedings further (because the FMIF had insufficient funds or cash flow to continue to funding the Proceedings if the settlement did not proceed and the MPF did not provide further funding for the proceeding) and being liable to judgments against it in default of taking steps, and consequently pay the other parties' costs thereof and suffer the relief claimed by Coalfields in the Coalfields cross-claim;

(3) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents referred to in paragraph 30C(b)(i) of the Statement of Claim and in order for the settlement to proceed at all (Settlement Documents);

(ii) ~~denies that she failed to have proper regard or give consideration to the fact alleged in the chapeau to subparagraph (b) and denies that she knew the 'facts' alleged in subparagraph (b)(ii) because those 'facts' are untrue as~~ says further that it was necessary for LMIM as RE of the FMIF to reach agreement with LMIM as trustee of the MPF about sharing the settlement proceeds, and the agreement of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract (as well as the Deed of Settlement and Release) in circumstances where:

- (A) LMIM as trustee of the MPF held a registered mortgage over the relevant property and a charge over the assets of Gujarat;
- (B) on its face, the sale of the Property pursuant to the Gujarat Contract was a sale at an undervalue;
- (C) LMIM as trustee of the MPF was a party to the Bellpac Proceedings and its consent to terminate that proceeding was necessary for the Bellpac Settlement (as defined in the Deed Poll) to proceed;
- (D) ~~Allens as solicitors for LMIM as trustee for the MPF~~ had possession of, and had a lien over, the certificates of title for the Property;

(c) denies the allegations in subparagraph (c) insofar as they are alleged against her because:

(i) the Second Defendant did have regard to and gave adequate consideration to (and admits that she knew) the matters identified in (i), ~~(ii)~~, (iv) and (v);

(ii) the Second Defendant did have regard and gave adequate consideration to the matters identified in (iii) (to the extent that she has admitted those matters above), but also had regard to the fact that LMIM's directors always understood that MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings, and repeats and relies upon the allegations in paragraphs 22 in response to the allegations in paragraph 24 of the Statement of Claim and repeats and relies upon paragraphs 34(c), 38(a) and 39(c)(vi) below;

~~(iii) the Second Defendant was not required to consider the matters identified in (vi) (and denies that those matters were facts), because LMIM as trustee of the MPF was entitled to more than merely being reimbursed, because LMIM's directors always understood that MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings and because of the matters pleaded in paragraph 28(c) above.~~

(d) denies the allegations in subparagraph (d) insofar as they are alleged against her because:

(i) the Second Defendant not only considered whether LMIM as trustee of the MPF could be treated as an arm's length litigation funder, on behalf of LMIM she also arranged for the provision of specific advice on this point from Allens and she relied on that advice, and repeats and relies upon the allegations in paragraphs 2(b), 2(c) to (i), 30(ab) to (ae) and 30(b) above;

(ii) the fact that LMIM as trustee of the MPF was a registered mortgagee with second priority did not impair its ability to act separately as a litigation funder;

(iii) says further that it was not necessary for the Second Defendant as a director of LMIM in its capacity as the RE of FMIF to consider whether or not

LMIM in its capacity as trustee of the MPF was treated as a arm's length litigation funder in the context of the Allens Advice and the WMS Advice;

- (iv) says that the Second Defendant did give consideration to whether it was appropriate to split the proceeds of the settlement between FMIF and MPF on settlement of the Proceedings in terms provided in the Deed Poll;
- (e) denies the allegations in subparagraph (e) insofar as they are alleged against her because the Allens Advice was substantially to the effect alleged in the circumstances alleged insofar as she has admitted them;
- (f) alternatively to subparagraph (e), says that no such advice was necessary, as:
 - (i) there was no legal impediment to LMIM as trustee of the MPF being treated as if it were an arm's length litigation funder;
 - (ia) repeats and relies upon subparagraph (d)(iii) above;
 - (ib) repeats and relies upon the response above to the allegations in subparagraphs (ai), (ii) and (iii), (b)(i), (ia) and (ii) and (c)(i), (iii), (iv) and (v) of the Statement of Claim;
 - (ii) there was no need to seek advice on whether it was reasonable for LMIM as trustee of the MPF to be paid an amount over and above the amount paid in funding the Proceedings, in circumstances where LMIM's directors always understood that MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings and in circumstances pleaded in subparagraph (c) above.
 - (iii) there was no need to seek advice as to whether it was in the interests of the FMIF for LMIM as trustee of the MPF to be paid in accordance with the Proceeds Split, as it was clearly in the interests of the FMIF to do so in the circumstances pleaded in subparagraph (c) above and where:
 - (A) the FMIF was unable to fund the litigation and was likely to have recovered nothing, but for the funding advanced by the MPF;
 - (B) LMIM's directors always understood that MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings;

- (C) in the absence of LMIM as trustee of the MPF agreeing to the Bellpac Settlement and to the termination of the Bellpac Proceedings, the Bellpac Settlement would not proceed and FMIF was likely to receive substantially less, or nothing, in respect of the sum owed to it by Bellpac under the FMIF Bellpac Loan Agreement without continuing the Proceedings;
- (iv) in any event the advice that LMIM did seek and receive, from both WMS and Allens, and on which the Second Defendant relied, was adequate for the purposes of the directors of LMIM considering whether to agree to the Bellpac Settlement and the Proceeds Split and the Second Defendant also repeats and relies upon the allegations in paragraphs 2(b), 2(c) to (i), 30(ab) to (ae) and 30(b);
- (g) as to the allegations in subparagraph (f), insofar as they are alleged against her:
- (i) admits that she took into consideration the Allens Advice and the WMS Report;
- (ii) denies that she ought to have known that it did not constitute the advice identified in subparagraph (e) thereof because:
- (A) it was appropriate for the Second Defendant to take the Allens Advice and the WMS Report into consideration;
- (B) for the reasons pleaded in (e), alternatively (f), above, it was not necessary to seek the advice identified in paragraph 34(e) of the Statement of Claim;
- (h) denies the allegations in subparagraph (g), insofar as they are alleged against her, for the reasons pleaded in (a) to (g) above;
- (i) does not admit the allegations insofar as they are alleged against the First and Third to Sixth Defendants because she is not certain what each of them did and did not take into consideration, other than as stated by them in the Deed Poll, and therefore she remains uncertain as to the truth or otherwise of the allegations.

Payment to MPF of moneys payable to FMIF by Gujarat under Gujarat Contract and Deed of Release

36. As to paragraph 35 of the Statement of Claim, the Second Defendant says that:
- (a) she denies the allegations because the true facts are as alleged below;

- (b) the Gujarat Contract, the Deed of Release and the Deed of Settlement and Release were all executed on or about 21 June 2011 with simultaneous effect and with immediate completion on that date ("Completion");
- (c) the Gujarat Contract, the Deed of Release and the Deed of Settlement and Release were all completed on 21 June 2011;
- (d) at Completion, PTAL as custodian for LMIM as RE of the FMIF was entitled to receive:
 - (i) \$35.5M pursuant to cl.7 of the Deed of Release; and
 - (ii) \$10M pursuant to cl.16.7 of the Gujarat Contract
 (together, the "**Gujarat Settlement Payment**");
- (e) of the Gujarat Settlement Payment, LMIM as RE of the FMIF, by its lawyers Allens in their letter dated 21 June 2011 to Gujarat, directed Gujarat to pay the Gujarat Settlement Payment to seven different payees, by drawing nine separate bank cheques, totalling \$50,111,300.88;
- (f) LMIM as Trustee of the MPF received a sum of money upon and after completion.
 - (i) by its receipt in June 2011 of an amount (after adjustments) of \$13,601,547.38; and
 - (ii) by its receipt, on the extended settlement date, of a bank cheque dated 8 September 2011 in the sum of \$1,944,600.47,
 both cheques amounting to a total sum of \$15,546,147.80 ("**Litigation Funding Fee**");
- (g) on the extended settlement date, LMIM as RE of the FMIF received \$3,611,405.51, being the balance of the monies payable from the Gujarat Settlement Payment plus GST and adjustments; and
- (h) in the premises, the Litigation Funding Fee was paid to it out of the proceeds of the amounts payable to PTAL as custodian of LMIM as RE of the FMIF pursuant to the terms of the Gujarat Contract and the Deed of Release.

37. The Second Defendant:

- (a) admits the allegations in paragraph 36 of the Statement of Claim to the extent of the payment of the Litigation Funding Fee pleaded in paragraph 36 above;

- (b) otherwise denies the allegations because of the matters pleaded in paragraph 36 above.
38. As to paragraph 37 of the Statement of Claim, the Second Defendant denies the allegations because:
- (a) as recorded in the Deed Poll, it was always the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings;
 - (b) of the matters pleaded in paragraph ~~28(e)~~ 35(b)(iib) above;
 - (c) further or alternatively, of the matters pleaded in paragraphs ~~28(e)~~ 35(b)(iib) above and 39 below;
 - (d) LMIM as RE of the FMIF had a legal entitlement at Completion to the entire Gujarat Settlement Payment;
 - (e) the entire Gujarat Settlement Payment less adjustments was recorded in the accounts of LMIM as RE of the FMIF as:
 - (i) \$42,930,417.25 on 22 June 2011; and
 - (ii) \$5,566,005.98 on 8 September 2011;
 - (f) LMIM as RE of the FMIF directed, as it was entitled to do, part of the Gujarat Settlement Payment, to LMIM as trustee for the MPF, as it similarly directed other parts of the Gujarat settlement sum to another six parties;
 - (g) The funds paid to LMIM as trustee of MPF upon settlement of the Proceedings were not moneys paid in respect of any security held by either LMIM as RE of FMIF or LMIM as trustee of MPF and were not subject to, or required to, be applied in terms of the Deed of Priority.
39. The Second Defendant denies the allegations in paragraph 37A of the Statement of Claim because:
- (a) for the reasons pleaded in paragraph 35 above:
 - (i) she did have proper regard and gave adequate consideration to those matters that were true and were relevant; and
 - (ii) she did act with the necessary degree of reasonable care and diligence;

- (b) it was reasonable for the Second Defendant, having discussed matters with the First and Third to Sixth Defendants, to conclude that it was appropriate for LMIM as RE of the FMIF and as trustee of the MPF to agree on and fix the Litigation Funding Fee after the outcome of the Proceedings was known because:
- (i) of the advice received in the WMS Report and the Allens Advice (on which the Second Defendant relied);
 - (ii) agreement on the rate or amount of the Litigation Funding Fee in the light of that outcome was appropriate in order properly to protect the interests of both the FMIF and the MPF, particularly having regard to the following factors:
 - (A) the nature and extent of the litigation risks that had been taken on by the LMIM as trustee of the MPF in funding the Proceedings;
 - (B) the risk and potential quantum of adverse costs orders that might have been made against LMIM as the RE of the FMIF and as the trustee of the MPF respectively in the event that LMIM had not succeeded in the Proceedings;
 - (C) the legal costs in fact expended by LMIM as trustee of the MPF;
 - (D) the amount and structure of the proposed settlement;
 - (E) the fact that LMIM as trustee of the MPF gave the undertaking as to costs alleged in paragraph 23(e)(iii) above had given an undertaking as to costs in security for costs in the Bellpac proceedings; and
 - (F) the fact that none of the advices from WMS, Allens, Monaghan or Monaghan Lawyers said anything to the contrary; and
 - (iia) the matters alleged in paragraphs 2(b), 2(c) to (i), 30(ab) to (ae), 30(b) and 30C above;
 - (iii) all of the circumstances and matters known to and considered by the First to Sixth Defendants at the time, as pleaded above;
- (c) having given proper regard and adequate consideration to those matters and having discussed those matters with the First and Third to Sixth Defendants, it was reasonable for the Second Defendant to conclude that:
- (i) the overall settlement could not occur without the agreement of the MPF trustee, for the reasons pleaded in paragraph ~~28(e)~~ 35(b)(iib) above;

- (ii) LMIM as RE of the FMIF needed to reach an agreement with LMIM as trustee of the MPF about the sharing of settlement proceeds, as LMIM's directors always understood that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings and by reason of the facts pleaded in paragraph ~~28(e)~~ 35(b)(iib) above;
- (iii) the Proceeds Split was fair to the FMIF, as without the funding from the MPF, PTAL on behalf and as custodian of the FMIF would have been unable to pursue and defend the Proceedings, and by reason of the facts pleaded in paragraphs ~~28(e)~~ 35(b)(iib) and 39(b) above;
- (iv) the Proceeds Split was in the best interests of the FMIF's members, as it was likely that LMIM as trustee of the MPF would have been entitled to sue LMIM as RE of the FMIF if the former did not receive a fair split of the Proceeds and by reason of the facts pleaded in paragraph ~~28(e)~~ 35(b)(iib) above;
- (v) the Proceeds Split was not unreasonable, as it fairly recognised the contribution made by the MPF to the litigation and because of the facts pleaded in paragraphs ~~28(e)~~ 35(b)(iib) and 39(b) above;
- (vi) LMIM as trustee of the MPF was in an analogous position to a litigation funder, as it had agreed to fund the Proceedings on the understanding that its contribution would be recognised by providing it with a share of any proceeds which resulted from the Proceedings;
- (d) having given proper regard and adequate consideration to those matters and having discussed those matters with the first and third to sixth defendants, it was reasonable for the Second Defendant to agree that LMIM as RE of the FMIF pay the Litigation Funding Fee to LMIM as trustee of the MPF, on the basis that:
- (i) LMIM as trustee of the MPF was entitled to be paid the Litigation Funding Fee, as LMIM's directors always understood that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings and by reason of the facts pleaded in paragraphs ~~28(e)~~ 35(b)(iib) and 39(b) above;

- (ii) it was in the best interests of the FMIF's members, as it was likely that LMIM as trustee of the MPF would have been entitled to sue LMIM as RE of the FMIF if the former did not receive a fair split of the Proceeds;
 - (iii) it would not cause a detriment to LMIM as RE of the FMIF if the Litigation Funding Fee was paid, as the FMIF could not have funded the litigation and LMIM's directors always understood that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings and by reason of the facts pleaded in paragraphs ~~28(e)~~ 35(b)(iib) and 39(b) above; and
 - (iv) LMIM as trustee of the MPF would not otherwise have allowed the settlement to occur.
- (e) having given proper regard and adequate consideration to those matters, the Second Defendant would not have applied all of the proceeds of the settlement against the amount owed to LMIM as RE of the FMIF by Bellpac, as this would not have reflected the fact that LMIM's directors always understood that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings or the facts pleaded in paragraphs ~~28(e)~~ 35(b)(iib) and 39(b) to (d) above.

40. The Second Defendant admits paragraph 37B of the Statement of Claim to the extent of the payment of the Litigation Funding Fee pleaded in paragraph 36 above.

~~**Contraventions of sections 180 and 182 of the Corporations Act**~~

41. ~~As to paragraph 38 of the Statement of Claim, the Second Defendant:~~

- (a) ~~admits that, in their capacity as directors of LMIM, the First to Sixth Defendants owed the duties alleged to LMIM;~~
- (b) ~~denies that those duties were owed to LMIM as RE of the FMIF because;~~
 - (i) ~~the duties were owed solely to LMIM without regard to its role as RE of the FMIF; and~~
 - (ii) ~~the statutory duties of officers of a responsible entity of a registered scheme are those prescribed in s.601FD of the Act.~~

42. ~~The Second Defendant denies the allegations in paragraph 39 of the Statement of Claim because:~~

- (a) ~~for the reasons pleaded in paragraph 41 above, the first to sixth defendants did not owe the duties alleged to LMIM as RE of the FMIF;~~
- (b) ~~if there was a duty, for the reasons pleaded in paragraph 39 above, the Second Defendant exercised her powers and discharged her duties with the relevant degree of care and diligence;~~
- (c) ~~LMIM suffered no harm as a result of the decision to pay the Litigation Funding Fee to LMIM as trustee for the MPF;~~
- (d) ~~it was not possible for the MPF to gain an advantage as the MPF is not a separate legal entity.~~
- (e) ~~it was not reasonably foreseeable that LMIM would or could suffer any harm as a result of the Proceeds Split or the decision to pay the Litigation Funding Fee to LMIM as trustee for the MPF because:~~
 - (i) ~~none of the moneys resulting from the settlement of the Proceedings was, or ever was to be, payable to LMIM in its own right;~~
 - (ii) ~~further or alternatively:~~
 - (A) ~~the Proceeds Split and the payments made to LMIM as trustee of the MPF were not contrary to the FMIF Constitution or duties owed by LMIM as RE of the FMIF;~~
 - (B) ~~the Proceeds Split and the payments made to LMIM as trustee of the MPF were not made without a belief, on the part of LMIM as RE of the~~
~~FMIF, held in good faith, that it was acting in accordance with the~~
~~FMIF Constitution or duties owed by LMIM as RE of the FMIF;~~
 - (C) ~~the Proceeds Split and the payments made to LMIM as trustee of the MPF were made by LMIM as RE of the FMIF in reliance, in good~~
~~faith.~~
~~on the services and advice of Monaghan Lawyers and Allens;~~
 - (D) ~~in the premises, pursuant to cl.19.1(a) and (b) of the FMIF~~
~~Constitution. LMIM a RE of the FMIF could not be Liable for any~~
~~loss or damage arising from, or in respect of. the Proceeds Split or~~
~~any payment made thereunder.~~

43. ~~The Second Defendant denies the allegations in paragraph 39A of the Statement of Claim:~~

~~(a) because, for the reasons pleaded in paragraphs 39, 41 and 42 above, there was no breach of duty; and~~

~~(b) because:~~

~~(i) the assets of LMIM were not depleted by the amount of the Settlement payment or the Litigation Funding Fee;~~

~~(ii) it is incorrect to allege that the assets of LMIM as RE of the FMIF were depleted, as LMIM received all of the proceeds from the settlement of the Proceedings;~~

~~(iii) any allocation of the proceeds from the settlement of the Proceedings between the two funds did not cause any loss to be suffered by LMIM.~~

44. ~~The Second Defendant denies the allegations in paragraph 39B of the Statement of Claim because:~~

~~(a) for the reasons pleaded in paragraphs 39, 41 and 42 above, there was no breach of duty;~~

~~(b) it is not possible for LMIM as RE of the FMIF to suffer damage in the circumstances alleged, as:~~

~~(i) LMIM received all of the proceeds from the settlement of the Proceedings; and~~

~~(ii) any allocation of the proceeds from the settlement of the Proceedings between the two funds did not cause any loss to be suffered by LMIM.~~

45. ~~The Second Defendant denies the allegations in paragraph 40 of the Statement of Claim because:~~

~~(a) for the reasons pleaded in paragraph 41 above, there were no duties owed as alleged;~~

~~(b) if there were duties owed as alleged, for the reasons pleaded in paragraphs 39 and 42 above, there was no breach of those duties;~~

~~(c) for the reasons pleaded in paragraphs 42, 43 and 44, there was no loss suffered by LMIM.~~

~~LMIM's involvement in contraventions by directors~~

46. ~~The Second Defendant does not admit the allegations in paragraph 41 of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
47. ~~The Second Defendant does not admit the allegations in paragraph 42 of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
48. ~~The Second Defendant does not admit the allegations in paragraph 42A of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
49. ~~The Second Defendant does not admit the allegations in paragraph 42B of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
50. ~~The Second Defendant does not admit the allegations in paragraph 43 of the Statement of Claim, because the paragraph does not contain any allegations against her.~~

Contravention of s 601FD of the *Corporations Act*

51. The Second Defendant admits the allegations in paragraph 44 subparagraphs (a) and (b) of the Statement of Claim.
52. The Second Defendant denies the allegations in paragraph 45 subparagraphs (a) and (b) of the Statement of Claim because, for the reasons pleaded in paragraphs 39, ~~42(b), (c) and (d)~~ above and paragraph 67(bc), there was no breach of duty or contravention of subsections 601FD(1)(b) or (c) of the Act and the payment of the part of the settlement sum to MPF was within the power conferred by the Constitution of FMIF as referred to in paragraph 1(f) above.
- 52A. As to paragraph 45AA of the Statement of Claim, the Second Defendant:
- (a) as to the whole paragraph, denies that the Second Defendant did not comply with her duties as alleged and, as to the basis for the belief that the allegation is untrue, repeats and relies on paragraph 39 and 52 above;
- (b) as to subparagraphs (a) to (b) and (f), denies the allegations and, as to the basis for the belief that the allegations are untrue:
- (i) repeats and relies upon paragraphs 35(b)(iib) and 35(b)(ii) above;
- (ii) says further that it would have been a breach of duty for the directors of LMIM as trustee of the MPF to have approved a settlement without LMIM as trustee of the MPF receiving the financial benefit on the settlement, by the Settlement payment;

(iii) says further that, in the Bellpac proceedings, LMIM as trustee for MPF asserted valuable claims against Bellpac and Gujarat;

Particulars

This is to be inferred from the Amended Commercial List Statement filed 8 February 2010 [FMIF.005.006.0012].

(iv) says further that, but for receiving the financial benefit on the settlement, by the Settlement Payment, LMIM as trustee of the MPF would not have entered into the Deed of Release and the Deed of Settlement and Release:

Particulars

This is also to be inferred from:

- (1) The matters pleaded in (i)-(iii) above; and
 - (2) LMIM as trustee of the MPF's funding of the Proceedings in the manner pleaded in paragraphs 22(b)(ii)-(iii) and 22(e) above;
 - (3) LMIM as trustee of the MPF would not have received any benefit from entering into the Deed of Release and Deed of Settlement and Release;
 - (4) LMIM as trustee of the MPF could otherwise withhold its consent to granting of the Notice of Discontinuance of the Proceedings.
- (v) says further that, but for receiving the financial benefit on the settlement, by the Settlement Payment, LMIM as trustee of the MPF would not have:
- (A) provided a release of the Proceedings;
 - (B) provided a discontinuance of the Proceedings;
- (vi) says further that, but for receiving the financial benefit on the settlement, by the Settlement payment, LMIM as trustee of the MPF would withhold its consent from:
- (C) entering into the Deed of Release and the Deed of Settlement and Release;
 - (D) discontinuing the Proceedings
- (vii) says further that, in the premises, without receiving the financial benefit on the settlement, by the Settlement payment, the Proceedings would not have

settled on the terms of the Deed of Release, the Deed of Release and Settlement and the Gujarat Contract, or at all; and

(vii) says further that if the directors of LMIM would not make, cause or direct the settlement sum to paid in accordance with the proceeds split then the settlement would not have occurred;

(c) otherwise denies the subparagraphs and, as to the basis for the belief that the allegations are untrue, repeats and relies on paragraphs 39 and 52 herein and subparagraph (b) above.

52AA. As to paragraph 45AB of the Statement of Claim, the Second Defendant denies that the Second Defendant did not comply with her duties as alleged and repeats and relies on paragraph 39 and 52 herein, and otherwise denies the allegations for the reasons pleaded in paragraph 52A above.

53. The Second Defendant:

(a) denies the allegations in paragraph 45A of the Statement of Claim because, for the reasons pleaded in paragraphs 39 and 52 42(b), (c) and (d) and 43(b) above, there was no breach of duty or breach of subsection 601FD(1)(b) of the Act and further also repeats and relies upon the allegations in paragraphs 22, 27(d), ~~28(e)(i) to (iii)~~ 35(b)(iib) and 35(iii) (A) to (C) and 52A-52AA above and also repeats and relies upon sub-paragraphs (b) and (c):

(b) says further or in the alternative, that if the Second Defendant, and the directors of LMIM did not agree to make, cause or direct the settlement sum to paid in accordance with the proceeds split then the settlement would not have occurred and the repeats and relies upon the allegations in paragraph paragraphs 22, 27(d), 35(b)(iib), 35(iii) (A) to (C) and 52A to 52AA above and the payments or funding alleged in paragraphs 22(b)(ii)(A) to (C), (iii) and 22(e)(ii) and (iv) would not have be made or provided.

54. The Second Defendant:

(a) denies the allegations in paragraph 45B of the Statement of Claim and says they are untrue because, for the reasons pleaded in paragraphs 39 and 52 42(b), (c) and (d) and 44(b) above, there was no breach of duty or breach of subsection 601FD(1)(b) of the Act and no loss suffered by LMIM and further also repeats and relies upon the allegations in paragraphs 22, 27(d), ~~28(e)(i) to (iii)~~ 35(b)(iib)

and 35(iii) (A) to (C) above and also repeats and relies upon sub-paragraphs (b) and (c):

- (b) says further or in the alternative, that if the Second Defendant, and the directors of LMIM did not agree to make, cause or direct the settlement sum to paid in accordance with the proceeds split then the settlement would not have occurred and the repeats and relies upon the allegations in paragraph paragraphs 22, 27(d), 35(b)(iib) and 35(f)(iii) (A) to (C) and and 52A to 52AA above and the payments or funding alleged in paragraphs 22(b)(ii)(A) to (C), (iii) and 22(e)(ii) and (iv) would not have be made or provided.

55. The Second Defendant:

- (a) denies the allegations in paragraph 46 of the Statement of Claim and says they are untrue because, for the reasons pleaded in paragraphs 39, 42(b), (c) and (d) and 45(b) and (c) and 51 to 54 above, there was no breach of duty or breach of subsection 601FD(1)(b) of the Act and no loss suffered by LMIM and also repeats and relies upon sub-paragraphs (b) and (c):
- (b) says the matters alleged by the plaintiff do not plead a causal link between the alleged conduct of the Second Defendant or breach of duty or breach of s 601FD(1)(b) of the Act and the loss or damage alleged;
- (c) says further or in the alternative, that if the Second Defendant, and the directors of LMIM did not agree to make, cause or direct the settlement sum to paid in accordance with the proceeds split then the settlement would not have occurred and the repeats and relies upon the allegations in paragraph paragraphs 22, 27(d), 35(b)(iib), 35(iii) (A) to (C) and and 52A to 52AA above and the payments or funding alleged in paragraphs 22(b)(ii)(A) to (C) and 22(e)(iv) would not have be made or provided.

~~LMIM's involvement in contraventions by officers~~

~~56. The Second Defendant does not admit the allegations in paragraph 47 of the Statement of Claim, because the paragraph does not contain any allegations against her.~~

~~56A. The Second Defendant does not admit the allegations in paragraph 47A of the Statement of Claim because the paragraph does not contain any allegations against her.~~

~~56B. The Second Defendant does not admit the allegations in paragraph 47B of the Statement of Claim because the paragraph does not contain any allegations against her.~~

57. ~~The Second Defendant does not admit the allegations in paragraph 48 of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
58. ~~The Second Defendant does not admit the allegations in paragraph 48A of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
59. ~~The Second Defendant does not admit the allegations in paragraph 48B of the Statement of Claim, because the paragraph does not contain any allegations against her.~~
60. ~~The Second Defendant does not admit the allegations in paragraph 49 of the Statement of Claim, because the paragraph does not contain any allegations against her.~~

~~**Rights of LMIM as trustee of the MPF and the plaintiff's right of subrogation**~~

61. ~~The Second Defendant does not admit the allegations in paragraph 50 of the Statement of Claim. The Second Defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~
62. ~~The Second Defendant does not admit the allegations in paragraph 51 of the Statement of Claim. The Second Defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~
63. ~~The Second Defendant does not admit the allegations in paragraph 52 of the Statement of Claim. The Second Defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~
64. ~~The Second Defendant admits the allegation in paragraph 53 of the Statement of Claim.~~
65. ~~The Second Defendant does not admit the allegations in paragraph 54 of the Statement of Claim. The Second Defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~

~~**Defences under Parts 5.2C, 9.4B and 9.5 of the Act**~~

66. Further as to the allegations that the Second Defendant contravened s.180(1) of the Act, the Second Defendant says that:
- (a) ~~in executing the Deed Poll and thereby making, permitting or directing the Litigation Funding Fee to be paid to LMIM as trustee for the MPF, she made a business judgment;~~
 - (b) ~~the business judgment was made in good faith and for a proper purpose, in that:~~

- (i) ~~the Litigation Funding Fee was intended to appropriately compensate LMIM as trustee of the MPF for the risks it had assumed in funding the litigation in circumstances where the FMIF was unable to do so;~~
 - (ii) ~~LMIM's directors always understood that the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of any proceeds which resulted from the Proceedings;~~
 - (iii) ~~the Second Defendant relies on the matters pleaded in paragraph 28(e) above;~~
- (c) ~~she did not have a material personal interest in making, permitting or directing the Litigation Funding Fee to be paid to LMIM as trustee for the MPF;~~
- (d) ~~she informed herself about the Litigation Funding Fee to be paid to LMIM as trustee for the MPF, and in particular:~~
- (i) ~~obtained and considered the Allens Advice prior to executing the Deed Poll;~~
 - (ii) ~~obtained and considered the WMS Report prior to executing the Deed Poll;~~
 - (iii) ~~obtained, considered and relied on advice provided to her by David Monaghan to the effect that it was not necessary to document the funding arrangement between the FMIF and the MPF, other than in the Deed Poll;~~
- (e) ~~in light of the information received and considered by the Second Defendant, the Second Defendant rationally believed that the judgment she made was in the best interests of LMIM, including in its capacities as RE of the FMIF and trustee of the MPF;~~
- (f) ~~in the premises pleaded in (a) to (e), pursuant to s.180(2) of the Act the Second Defendant's belief that the judgment was in the best interests of LMIM is taken to be rational unless the belief is one that no reasonable person in her position would hold (which it is not);~~
- (g) ~~in the premises pleaded in (a) to (f), pursuant to s.180(2) of the Act the Second Defendant met, or is taken to have met, the requirements of s.180(1) of the Act.~~
67. Further or alternatively, should the Court find, contrary to the matters pleaded above, that the Second Defendant contravened any of ss 180(1), 182(1) or s 601FD(1) of the Act as alleged in the Statement of Claim, then:
- (a) the Second Defendant acted honestly in making, permitting or directing the Litigation Funding Fee to be paid to LMIM as trustee for the MPF; and

- (ba) the Second Defendant repeats and relies upon the allegations in this Defence in response to the allegations in the Statement of Claim;
- (bb) the Second Defendant did not receive any personal benefit from the split of the settlement proceeds as between the FMIF and MPF;
- (bc) as to the proposed split of the settlement proceeds as between the FMIF and MPF (proposal):
 - (i) the Second Defendant did in about March 2011 raise with the auditors of LMIM as RE of FMIF, Ernst & Young, the proposal;
 - (ii) the WMS advice was provided to Ernst & Young;
 - (iii) the Allens Advice was provided to Ernst & Young;
 - (iv) the Deed Poll was provided Ernst & Young;
 - (v) Ernst & Young did not inform the Second Defendant or LMIM, to the knowledge of the Second Defendant that in their opinion the proposal ought not to occur or that it should be reconsidered;
 - (vi) neither the compliance manager nor the compliance officer or compliance committee of LMIM as RE of FMIF identified to the Second Defendant that the proposed split of the settlement proceeds as between the FMIF and MPF should not occur or should be reconsidered;
- (b) having regard to all of the circumstances of the case, the Second Defendant ought fairly to be excused for any contravention;
- (c) in the premises pleaded in subparagraphs (a) and to (b), the Second Defendant seeks an order pursuant to s.1317S(2) of the Act, or s.1318(1) of the Act, or both, relieving her wholly or partly from any liability to which she would otherwise be subject.

68. ~~In relying on the information and advice referred to in paragraph 66(d) above, the Second Defendant acted:~~

- ~~(a) in good faith; and~~
- ~~(b) after she had made an independent assessment of the information and advice, which included:~~
 - ~~(i) reading and considering the Allens Advice and the WMS Report;~~

(ii) ~~making enquiries of David Monaghan as to the appropriateness of proceeding without a formal agreement in place other than the Deed Poll and considering his advice.~~

69. ~~In the premises pleaded in paragraph 68 above, pursuant to s.189 of the Act the Second Defendant's reliance on the information and advice referred to in paragraph 66(d) is taken to be reasonable unless the contrary is proved.~~

Signed: 

Description: Solicitors for the Second Defendant

This amended pleading was settled by P P McQuade of Queen's Counsel.

NOTICE AS TO REPLY

You have fourteen days within which to file and serve a reply to this defence. If you do not do so, you may be prevented from adducing evidence in relation to allegations of fact made in this amended defence.

Schedule "A"

Particulars of LMIM as trustee paying legal fees of Allens, Monaghan Lawyers and Verekers Lawyers to enable settlement of the Proceedings to occur (Paragraphs 22(e)(iv) and 25(d) of the Defence)

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
22/11/2010	\$30,000.00	Verekers Lawyers Trust Account	Transfer to the trust account Verekers Lawyers for the purpose of " <i>Funds required to complete documentation</i> " which was requested by Monaghan in his email dated 22 November 2011 stating " <i>Can you please approve a draw of say \$30k to Verekers Lawyers Trust Account to complete the documentation of the deal with Gujarat</i> ". [FMIF.100.001.0254].
08/12/2010	\$30,000.00	Allens Arthur Robinson Trust Account	Transfer to the trust account of Allens for the purpose of " <i>Anticipated legal fees</i> " which was requested by Monaghan in his email dated 22 November 2011 stating " <i>I have engaged Allens to assist in finalising the Gujarat deal. Is MPF in a position to pay them \$30k on account of their costs</i> ". [FMIF.100.001.0262].
31/01/2011	\$24,395.25	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers tax invoice 150 dated 8 November 2010, which tax invoice in part was related to the settlement of the Proceedings and included services such as " <i>attending mediation</i> ". [FMIF.100.001.0277].
	\$29,975.00	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers tax invoice 206 dated 7 December 2010, which tax invoice in part related to the settlement of the Proceedings and included services such as " <i>Confer Simon Tickner re security position, position</i> ".

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
			<i>between funds, Deutsche Bank release price, confer Trevor Fenwick re security position".</i> [FMIF.100.001.0277].
	\$8,669.65	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers tax invoice 263 dated 6 January 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as "review draft security documents", "review sale contract" and "Email Aaron Lavell". [FMIF.100.001.0273]; [FMIF.100.001.0277].
10/03/2011	\$6,011.28	Allens	Transfer on account of payment of Allens invoice 90708848 dated 31 January 2011, which tax invoice related to the settlement of the Proceedings. [FMIF.100.001.0326].
	\$20,647.65	Allens	Transfer on account of payment of Allens invoice 90704835 dated 21 December 2010 which tax invoice related to the settlement of the Proceedings. [FMIF.100.001.0322]; [FMIF.100.001.0326].
26/05/2011	\$9,261.45	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers invoice 398 dated 5 May 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as "perusal of documentation and drafting deed poll", "amendment to deed poll", "perusal of compliance plan" and "drafting settlement deed". [FMIF.100.001.0373].
	\$8,669.95	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers invoice 263 dated 6 January 2011, which

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
			<p>tax invoice in part related to the settlement of the Proceedings and included services such as “<i>review draft security documents</i>”, “<i>review sale contract</i>” and “<i>Email Aaron Lavell</i>”.</p> <p>[FMIF.100.001.0373].</p>
	<u>\$5,553.90</u>	<u>Monaghan Lawyers</u>	<p>Transfer on account of payment of Monaghan Lawyers tax invoice 290 dated 3 February 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as “<i>review and amend call option deed and contract, email Bruce Wacker</i>”, and “<i>review call option deed and contract</i>”</p> <p>[FMIF.100.001.0373].</p>
	<u>\$6,485.60</u>	<u>Monaghan Lawyers</u>	<p>Transfer on account of payment of Monaghan Lawyers invoice 320 dated 1 March 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as “<i>Email in Bruce Wacker re Gujarat's amendments, peruse amendments, draft email to Bruce Wacker, email directors, emails in Lisa Darcy, Simon Tickner and Eghard van der Hoven</i>”.</p> <p>[FMIF.100.001.0373].</p>
	<u>\$10,769.55</u>	<u>Monaghan Lawyers</u>	<p>Transfer on account of payment of Monaghan Lawyers tax invoice 365 dated 12 April 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as “<i>email in John Beckinsale, email Lisa Darcy</i>”, “<i>Draft Bellpac Deed Poll</i>” and “<i>Further drafting Bellpac Deed Poll</i>”.</p>

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
			[FMIF.100.001.0373]
<u>22/09/2011</u>	<u>\$1,460.25</u>	<u>Allens</u>	<u>Transfer on account of payment of Allens tax invoice 90716873 dated 30 March 2011, which tax invoice related to the settlement of the Proceedings.</u> [FMIF.100.001.0419]; [FMIF.100.001.0426].
	<u>\$135.13</u>	<u>Allens</u>	<u>Transfer on account of payment of Allens tax invoice 90723829 dated 30 May 2011, which tax invoice related to the settlement of the Proceedings.</u> [FMIF.100.001.0422]; [FMIF.100.001.0426].
	<u>\$631.81</u>	<u>Allens</u>	<u>Transfer on account of payment of Allens tax invoice 90712318 dated 24 February 2011, which tax invoice related to the settlement of the Proceedings.</u> [FMIF.100.001.0416]; [FMIF.100.001.0426].
<u>07/07/2011</u>	<u>\$3,829.65</u>	<u>Monaghan Lawyers</u>	<u>Transfer on account of payment of Monaghan Lawyers tax invoice 430 dated 30 May 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as "review amended contract of sale, telephone out Bruce Wacker, telephone in Bruce Wacker, email in Bruce Wacker, email Lisa Darcy, Simon Tickner".</u> [FMIF.100.001.0435]; [FMIF.100.001.0437].
<u>22/07/2011</u>	<u>\$34,841.04</u>	<u>Allens</u>	<u>Transfer on account of payment of Allens tax invoice 90732196 dated 4 July 2011, which tax invoice related to the settlement of the Proceedings.</u> [FMIF.100.001.0440]; [FMIF.100.001.0442]
<u>07/09/2011</u>	<u>\$1,063.15</u>	<u>Allens</u>	<u>Transfer on account of payment of Allens tax invoice 90733747 dated 27 July 2011, which tax</u>

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
			invoice related to the settlement of the Proceedings. [FMIF.100.001.0461].
	<u>\$2,527.62</u>	<u>Allens</u>	<u>Transfer on account of payment of Allens tax invoice 90738726 dated 29 August 2011, which tax invoice related to the settlement of the Proceedings.</u> [FMIF.100.001.0457]; [FMIF.100.001.0461].
	<u>\$2,597.47</u>	<u>Verekers</u>	<u>Transfer on account of payment of Verekers Lawyers tax invoice 11367 dated 11 July 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as "Attendance at settlement" and "attendance at settlement & completion".</u> [FMIF.100.001.0461].
	<u>\$11,590.46</u>	<u>Monaghan Lawyers</u>	<u>Transfer on account of payment of Monaghan Lawyers tax invoice 530 dated 2 August 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as "reviewing application for certificate of title".</u> [FMIF.100.001.0461].
	<u>\$28,207.42</u>	<u>Monaghan Lawyers</u>	<u>Transfer on account of payment of Monaghan Lawyers tax invoice 477 dated 5 July 2011, which tax invoice related to the settlement of the Proceedings.</u> [FMIF.100.001.0461].
<u>20/09/2011</u>	<u>\$9,040.00</u>	<u>Allens</u>	<u>Transfer on account of payment to Allens for the purpose of "Bellpac Stamping Costs".</u> [FMIF.100.001.0493].

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
05/10/2011	\$11,771.77	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers tax invoice 578 dated 1 September 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as <i>"Email in Rob Tassell, telephone in Rob Tassell, review contract/settlement deed, email Rob Tassell, email directors"</i> . [FMIF.100.001.0501].
	\$12,883.40	Allens	Transfer on account of payment of Allens tax invoice 90743074 dated 28 September 2011, which tax invoice related to the settlement of the Proceedings. [FMIF.100.001.0501].
20/10/2011	\$9,915.71	Monaghan Lawyers	Transfer on account of payment of Monaghan Lawyers tax invoice 644 dated 4 October 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as <i>"Emails to and from Adrien Armes and Grant Fischer re debt amount, review settlement statement, tax invoices"</i> . [FMIF.100.001.0509].
	\$9,223.46	Verekers Lawyers	Transfer on account of payment of Verekers Lawyers tax invoice 11518 dated 13 September 2011, which tax invoice in part related to the settlement of the Proceedings and included services such as <i>"draw email to DM re effect of settlement"</i> . [FMIF.100.001.0509].
25/11/2011	\$8,966.56	Verekers Lawyers	Transfer on account of payment of Verekers Lawyers tax invoice 11592 dated 18 October 2011,

<u>Date of funding</u>	<u>Amount</u>	<u>Recipient</u>	<u>Description</u>
			<p>which tax invoice in part related to the settlement of the Proceedings and included services such as <i>“Attendance prepare for settlement: direction, banking details, sign out CTs etc”</i> and <i>“Attendance settlement, deposit cheques, letter & emails reporting”</i>.</p> <p>[FMIF.100.001.0535].</p>

Schedule "B"

Particulars of the possession of the Deed of Priority by Allens (Paragraph 27(d) of the Defence)

The possession of the Deed of Priority by Allens is inferred from the following written communications:

- (1) an email from Shelley Chalmers of LMIM to Brett Cook of Allens dated 11 January 2007 [FMIF.300.002.2030] which attached, amongst other documents, a document identified as "Priority Deed final version Do..." being an unsigned electronic version of the Deed of Priority [FMIF.300.002.2043];
- (2) an email from Shelley Chalmers to Brett Cook of Allens dated 15 January 2007 [FMIF.049.002.0003] which attached, amongst other documents, a document identified as "Priority Deed final version Docs_bne_1343268_1.pdf";
- (3) an email from Shelley Chalmers to Brett Cook of Allens dated 6 June 2007 [FMIF.049.003.0024] attaching a document identified as "Priority Deed between Permanent Trustee Australia Limited, LM Investment Management Limited, Bellpac Pty Ltd and Others dated 23 June 2006.pdf" [FMIF.049.003.0025];
- (4) an email from Brett Cook to Adam Fuller of Sparke Helmore dated 6 June 2007 [FMIF.100.006.6814] attaching a document identified as "Priority Deed between Permanent Trustee Australia Limited, LM Investment Management Limited, Bellpac Pty Ltd and Others dated 23 June 2006.pdf" [FMIF.100.006.6815];
- (5) an email from Brett Cook to dmonaghan@lmaustralia.com dated 13 August 2007 [FMIF.100.006.6709] which attached a document identified as "Priority Deed 23.6.06 Bellambi Site.pdf" [FMIF.100.006.6710];
- (6) an email from Shelley Chalmers to Brett Cook and David Monaghan dated 8 April 2008 [FMIF.049.005.0084] which states "Brett already has the original security docs on Bellpac and GPC" and attaching a document identified as "List of Securities 18.3.08.doc" [FMIF.049.005.0085] which identifies, at document number 66, a priority deed dated 23 June 2006".
- (7) An email from Shelley Chalmers to Brett Cook of Allens dated 8 May 2008 which states "Brett, Can you call me regarding this Priority deed" [FMIF.049.006.0068] which attaches a document identified as "Priority Deed 23.6.06 Bellambi site.pdf" [FMIF.049.006.0069] to which Brett Cook provided advice on 18 May 2008 [FMIF.040.003.0001] which states

"As requested , we reviewed the LM lending and legal files for the purpose of understanding the position of GPC No.8, GPC No.12 and GPC No.13. All of the documentation on your files referred to PTAL receiving a first ranking priority and LM receiving a second ranking priority. A copy of that documentation is attached"

"Given the terms of that documentation, we undertook a more detailed review of the Priority Deed which you forward to us".

"Hopefully this clarifies the issues arising from the Priority Deed dated 23 June 2006. However, if you have any further queries, please do not hesitate to contact us".

- (8) A letter from PTAL to Alf Pappalardo of Allens dated 3 December 2009 [FMIF.039.001.0118] which enclosed security documents and a schedule of security documents. The schedule of security documents [FMIF.039.001.0119] identifies, at number 3, "DEED OF PRIORITY 23.06.06BELLPAC, GPC NO 8, GPC 11, 12".
- (9) an email chain ending in an email from Alf Pappalardo of Allens dated 9 December 2009 [MPF.906.002.0006] stating "I had someone check and I can confirm that we have received all of the documents in this list except for document No 50(a) (a priority deed) and document 54 (a confidentiality deed) which were not included" and attaching a document identified as "0 Schedule of Securities FMIF.doc" which identifies, at document number 52, a Priority Deed dated 23 June 2006;
- (10) an invoice of 1 May 2009 [FMIF.100.001.0923] in which Allens identifies as work performed in the period 31 March 2009 to 29 April 2009 as:

"reviewing various securities relating to the mortgage income fund facility and the managed performance fund facilities provided by Shelley at various stages throughout the period"

"reviewing, amending and settling statutory notices of exercise of power of sale in respect of the mortgage income fund facility and the managed performance fund facilities".

- (11) an invoice of 23 December 2010 [FMIF.100.001.0322]in which Allens identifies as work performed in the period 29 November 2010 to 20 December 2010 "reviewing the securities granted in favour of PTAL".

"SC-6"

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

Amended pursuant to rule 378 of the Uniform Civil Procedure Rules 1999 (Qld).
James Conomos Lawyers Pty Ltd, Dated 3 April 2019.

Plaintiff: **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 Defendant: **PETER CHARLES DRAKE**

and

Second Defendant: **LISA MAREE DARCY**

and

Third Defendant: **EGHARD VAN DER HOVEN**

and

Fourth Defendant: **FRANCENE MAREE MULDER**

and

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

and

Sixth Defendant: **SIMON JEREMY TICKNER**

and

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

and

Eighth Defendant: **KORDA MENTHA PTY LTD ACN 100 169 391 AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND**

Filed in the Brisbane Registry on:

AMENDED DEFENCE OF THE THIRD DEFENDANT TO THE FIFTH ~~THIRD~~ FURTHER AMENDED STATEMENT OF CLAIM DATED 2 APRIL 4 FEBRUARY 2019 ("STATEMENT OF CLAIM")

The third defendant relies on the following facts in defence of the claim. For the purposes of this pleading, and save as indicated otherwise, the third defendant adopts the definitions as used in the statement of claim.

AMENDED DEFENCE OF THE THIRD DEFENDANT TO THE FIFTH ~~THIRD~~ FURTHER AMENDED STATEMENT OF CLAIM
Filed on behalf of the Third Defendant
Form 17 Rule 146

JAMES CONOMOS LAWYERS PTY LTD
Level 12 179 Turbot Street
BRISBANE QLD 4000
Telephone: 07 3004 8200
Facsimile: 07 3221 5005

Parties and roles

1. The third defendant admits paragraphs 1, 4 and 4A of the statement of claim.
2. As to paragraph 2 of the statement of claim, the third defendant admits the allegations therein and says that:
 - a) ~~admits that he is and has been a director of LMIM since 22 June 2006;~~
 - b) ~~admits that the fourth defendant is presently a director of LMIM;~~
 - c) ~~admits that the company extract for LMIM records that~~:
 - (i) ~~the first defendant was a director of LMIM between 31 January 1997 and 9 January 2015;~~
 - (ii) ~~the second defendant was a director of LMIM between 12 September 2003 and 21 June 2012;~~
 - (iii) ~~the third defendant is and has been a director of LMIM since 22 June 2006;~~
 - (iv) ~~the fourth defendant is and has been a director of LMIM since 30 September 2006;~~
 - (v) ~~the fifth defendant was a director of LMIM between 27 November 2007 and 30 September 2012; and~~
 - (vi) ~~the sixth defendant was a director of LMIM between 18 September 2008 and 13 July 2012;~~
 - d) ~~save as admitted above, does not admit the allegations therein because despite having made reasonable inquiries, he remains uncertain as to the truth or falsity of the allegations; and~~
 - e) ~~says further that~~
 - a) Grant Peter Fischer (**Fischer**) was:
 - (i) LMIM's Chief Financial Officer from about 2008 onwards around February 2013; and
 - (ii) appointed as an executive director of LMIM from on or about March 2012 until around 12 August 2012.
 - f) ~~says further that~~
 - b) David Monaghan (**Monaghan**) was:
 - (i) at all material times was a solicitor admitted as such in the State of Queensland;
 - (ii) between in or about 2004 until 2010, was employed as an internal legal adviser to LMIM;
 - (iii) between about 2005 and early 2010, was the Commercial Lending Manager within the commercial lending team;

- (iv) in or around early 2010, established a legal practice called Monaghan Lawyers; and
- (v) at all material times from 2010, through his firm Monaghan Lawyers, continued to act as solicitor to LMIM.

2A. As to paragraph 3 of the statement of claim, the third defendant:

- a) admits the allegations therein; but
- b) says, by reason of the allegations in subparagraphs (d)(ii) and (e), that:
 - (i) the plaintiff's standing is limited to proceedings brought under Part 9.4B, for alleged breaches of duties under Part 5C.2, of the *Corporations Act 2001* (Cth) ("**the Act**"); and
 - (ii) the plaintiff has no standing or entitlement to bring proceedings for alleged breaches of duties under Part 2D.1 of the Act.

2B. At all material times prior to the appointment of voluntary administrators in March 2013:

- a) LMIM directly, or through related entities, employed approximately 100 staff working at offices nationally and internationally;
- b) LMIM operated offices at the Gold Coast, Sydney, Perth, Hong Kong, London, Auckland, Queenstown, Dubai, Johannesburg, Bangkok, Tokyo, Toronto and Seattle;
- c) the organisational structure of LMIM was divided into, and operated as, several separate management teams, each responsible for the conduct and management of different aspects of the business of LMIM, including:
 - (i) the property asset management team (referred to, until 2010, as the commercial lending team), which was responsible for the approval, documentation and management of the loan portfolio of the various funds managed by LMIM;
 - (ii) the portfolio management and foreign exchange team, which managed the cash flow requirements and foreign exchange exposure of the various funds under management;
 - (iii) the finance team, which was responsible for the preparation of accounts and financial reports as well as paying bills and managing accounts payable; and
 - (iv) the marketing team, which was responsible for the domestic and international marketing and communications engaged in by LMIM to financial adviser clients and, thereby, to existing and potential investors in the various funds managed by LMIM;
- d) subject to general oversight of the first defendant, responsibility for the conduct and business of each of the above teams was distributed amongst each of the second, third, fourth and sixth directors of LMIM, together with Monaghan and Fischer, as follows:
 - (i) the property asset management team was led by Monaghan until about early 2010 and was, thereafter, led by the sixth defendant;
 - (ii) the portfolio management and foreign exchange team was led by the third defendant;

- (iii) the finance team was led by the second defendant and Fischer; and
- (iv) the marketing team was led by the fourth defendant;
- e) each of the persons referred to in the preceding subparagraph occupied leadership positions of the distinct teams operated by LMIM, had expert qualifications and experience relevant to their particular team.

2C. The third defendant:

- a) in his capacity as a director, occupied the role of head of Foreign Exchange Team from around 2006 and 2007 and the role of Portfolio Manager from around 2003 until around 2009 or 2010 within LMIM, which roles occupied his daily activities within LMIM;
- b) in his role within LMIM:
 - (i) the third defendant was:
 - (A) responsible for monitoring the cash flow of each of the funds under management of LMIM; and
 - (B) from time to time received requests to confirm the existence of sufficient cash funds in respect of proposed drawings from the funds under management, including from the MPF for the purposes of advancing funds to the FMIF to pay for costs of the Proceedings; and
 - (ii) otherwise was not the director or person within LMIM with responsibility for the management of the transactions and events alleged in paragraphs 17 to 22, 24 to 30E and 35 of the statement of claim, which were matters under the carriage, control and management of the property asset management team, including the sixth defendant, together with the second defendant;
- c) save as stated above hereof, was not directly or materially involved in the transactions and events alleged in paragraphs 17 to 22, 24 to 30E and 35 of the statement of claim; and
- d) in so far as he was involved in any of the transactions and events alleged in paragraphs 5 to 36 of the statement of claim, acted:
 - (i) in the belief that the persons with carriage of and responsibility for those transactions and events had taken all necessary and appropriate steps, including as to obtaining all necessary and appropriate advices, to ensure that there was no breach of duty towards either the FMIF or the MPF;
 - (ii) further and specifically, in the belief that ~~the~~ all aspects of the Proceedings and the settlement thereof, including as to the split of settlement proceeds between the FMIF and the MPF, were being properly managed by the second defendant, the sixth defendant and Monaghan; and
 - (iii) in consideration of the fact that the funds split between the FMIF and the MPF was carried out with the assistance of Monaghan Lawyers and was subject of independent legal and accounting advice from Allens and WMS accountants respectively, neither of which raised any concerns or impediments to that arrangement;

- (iv) in the belief that Allens would give and gave proper regard and consideration to all of the relevant facts and circumstances when acting on behalf of LMIM, including in advising LMIM and its directors as to the proposed split of settlement proceeds as between the FMIF and the MPF; and
- (v) in the belief that, if there were any facts, matters or circumstances which he should consider or have regard to in relation to the Proceedings or the settlement thereof, including as to the proposed split of settlement proceeds between the FMIF and the MPF, they would be brought to his attention by any or all of the second defendant, the sixth defendant or Monaghan or Allens.

Bellpac loans

3. As to paragraph 5 of the statement of claim, the third defendant:
 - a) admits that the plaintiff has disclosed to the third defendant a document entitled "Loan Agreement", purporting to have been executed on the 10th of March 2003 on behalf of GPC Bellambi Pty Ltd ACN 101 713 017, PTAL and LMIM as RE;
 - b) does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 5 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
4. As to paragraph 6 of the statement of claim, the third defendant does not admit the allegations therein because:
 - a) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 6 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - b) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
5. As to paragraph 7 of the statement of claim, the third defendant does not admit the allegations therein because:
 - a) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 7 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - b) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
6. As to paragraph 8 of the statement of claim, the third defendant:
 - a) admits that the plaintiff has disclosed to the third defendant documents purporting to be as follows:
 - (i) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 5 December 2003, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;

- (ii) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 13 February 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
- (iii) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 14 May 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
- (iv) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 4 October 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
- (v) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 4 October 2004, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
- (vi) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 21 January 2005, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
- (vii) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 2 May 2005, and purporting to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, LMIM, and PTAL;
- (viii) a document entitled "Variation Deed", bearing the date 23 June 2006, and purporting to have been executed on behalf of by Bellpac, PTAL, and LMIM; and
- (ix) a document entitled "Deed of Variation of Loan Agreement and Consent by Guarantor", bearing the date 11 July 2008, and purported to have been executed on behalf of Bellpac, GPC No 8 (Bulli) Pty Ltd, Great Pacific Capital Limited, Balgow Pty Limited, Anpor Holdings Pty Ltd, Richland Investments (Australia) Pty Ltd, Alfred Chi Wai Wong, LMIM, and PTAL; and

b) does not admit the allegations therein because:

- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 8, as pleaded in paragraphs 2B and 2C above; and
- (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

7. As to paragraph 9 of the statement of claim, the third defendant:

- a) admits that the plaintiff has disclosed to the third defendant a document entitled "Loan Agreement" and purporting to have been executed on 23 June 2006 on behalf of Bellpac Pty Ltd ACN 101 713 017 ("**Bellpac**") and LMIM as Trustee for the MPF; and
- b) does not admit the allegations therein because:

- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 9 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
8. As to paragraph 10 of the amended statement of claim, the third defendant does not admit the allegations therein because:
- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 10 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
9. As to paragraph 11 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant documents:
 - (i) purporting to be a mortgage granted by Bellpac on 17 December 2004 to LMIM in respect of various properties bearing dealing no. AB211547W; and
 - (ii) purporting to be a certificate of entry of a charge on the property of Bellpac, together with terms of a fixed and floating charge, bearing the date 9 October 2006 and in favour of LMIM as trustee for the MPF; and
 - b) does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 11 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
10. As to paragraph 12 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant a document entitled "Priority Deed", bearing the date 23 June 2006 and purporting to have been entered by PTAL, LMIM as RE of the LM Mortgage Income Fund, GPC No. 11 Pty Ltd, GPC No 12 Pty Ltd, GPC No. 8 (Bulli) Pty Ltd, LMIM as trustee for the LM Mortgage Income Fund, Austcorp Project No. 20 Pty Ltd and Bellpac; and
 - ~~b) denies the allegations in subparagraph (a) because s. 8 of the said Deed of Priority provided as follows:~~
 - ~~(i) cl. 8 provides as follows:~~

~~**"Release of Securities**~~

~~*If an asset which is subject to a Security is sold pursuant to a bona fide sale for approximately fair market value and the full proceeds of sale are distributed in accordance with the Deed, each Mortgagee must provide a release of their respective Securities to the extent that they relate to the sold assets."*~~ and

- (ii) ~~PTAL is not specifically mentioned in cl.8;~~
 - c) ~~relies on the Deed of Priority for its full terms, true meaning and effect; and~~
otherwise does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 12 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
11. As to paragraph 13 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant documents purporting to be:
 - (i) a "Default Notice" from solicitors for PTAL to the directors of Bellpac dated 14 March 2006; and
 - (ii) a "Notice to Mortgagor" from solicitors for PTAL to the directors of Bellpac dated 28 April 2006;
 - b) does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 13 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
12. As to paragraph 14 of the statement of claim, the third defendant:
- a) admits that receivers and managers were appointed to Bellpac on 6 May 2009; and
 - b) otherwise does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 14 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
13. The third defendant admits paragraph 15 of the statement of claim, as recorded in the historical company extract for Bellpac.
14. The third defendant admits paragraph 16 of the statement of claim, as recorded in the historical company extract for Bellpac.

Bellpac sale of the Property to Gujarat

15. As to paragraph 17 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant a document entitled "Land and Asset Sale Agreement Bellpac No. 1 Colliery" bearing date 21

October 2004 and purporting to have been executed on behalf of Bellpac, GPC, Gujarat NRE Australia Pty Ltd, Bounty and Coalfields; and

- b) does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 17 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

16. As to paragraph 18 of the statement of claim, the third defendant:

- a) admits that the plaintiff has disclosed to the third defendant the following:
 - (i) a document entitled "Amendment Deed Bellpac No. 1 Colliery" bearing the date of 3 December 2004, to be entered by Bellpac, GPC, Gujarat NRE Australia Pty Ltd, Bounty and Coalfields, but as disclosed comprising only the first 12 pages of such document and not bearing signatures for or on behalf of any person or entity;
 - (ii) a document entitled "Remediation Licence Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, Gujarat NRE Australia Pty Ltd, Bounty and Coalfields;
 - (iii) a document entitled "Royalty Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, Gujarat NRE Australia Pty Ltd, Bounty and Coalfields;
 - (iv) a document entitled "Subdivision Deed Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, GPC Gujarat NRE Australia Pty Ltd, Bounty and Coalfields;
 - (v) a document entitled "Access Licence Bellpac No. 1 Colliery" bearing the date 3 December 2004, purporting to have been executed on behalf of Bellpac, Gujarat NRE Australia Pty Ltd, Bounty and Coalfields; and
 - (vi) a document dated 3 December 2004 purporting to be a letter from Bellpac to Bounty and Gujarat NRE Australia Pty Ltd; and
- b) does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 18 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

17. As to paragraph 19 of the statement of claim, the third defendant does not admit the allegations therein because:

- a) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 19 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
- b) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

18. As to paragraph 20 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant the following:
 - (i) a document entitled "Deed of Settlement" bearing the date 12 September 2007 and purporting to have been executed on behalf of India NRE Minerals Ltd, Southbulli Holdings Pty Ltd and Bellpac;
 - (ii) a document entitled "Amendment Deed to Deed of Settlement dated 12 September 2007" bearing the date 23 July 2008 and purporting to have been executed on behalf of Gujarat NRE Minerals Ltd, Southbulli Holdings Pty Ltd and Bellpac; and
 - (iii) a document entitled "Restated Settlement Deed (Replacing the Deed of Settlement dated 12 September 2007)" bearing the date 23 July 2008 and purporting to have been executed on behalf of Gujarat NRE Minerals Ltd, Southbulli Holdings Pty Ltd and Bellpac Pty Ltd; and
 - b) does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 20 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
19. As to paragraph 21 of the statement of claim, the third defendant:
- aa) admits that in 2009 a dispute arose between Bellpac, LMIM as trustee for the MPF and PTAL on the one hand, and Gujarat and Coalfields, which was recorded in the Proceedings commenced in 2009 involving those parties;
- and otherwise does not admit the allegations therein because:
- a) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 21 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - b) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
20. As to paragraph 22 of the statement of claim, the third defendant:
- a) admits that the Gujarat proceedings were commenced by summons filed in the Supreme Court of New South Wales on 13 May 2009;
 - b) denies that the Bellpac proceedings were commenced in or about November 2009 and believes that allegation to be untrue because the Bellpac proceedings were commenced by summons filed in the Supreme Court of New South Wales on 7 July 2009, followed by a statement of claim filed 27 July 2009;
 - bb) says further, in relation to subparagraph 22(b) of the statement of claim that:
 - (i) the Bellpac proceedings were commenced by LMIM in its capacity as trustee for the MPF and by Bellpac against Gujarat; and
 - (ii) pursuant to a list summons filed in the Supreme Court of New South Wales on 30 November 2009, the Bellpac proceedings were expanded

to include PTAL as a plaintiff (as custodian of LMIM as Responsible Entity for the FMIF) and Coalfields, Bounty and GPC as defendants;

- c) admits that the Coalfields cross-claim was commenced by way of a first cross-claim summons filed in the Supreme Court of New South Wales on or about 16 March 2010;
- d) says that:
 - (i) in so far as LMIM was a party to the Bellpac proceedings, it was suing in relation to the rights and assets of LMIM as trustee of the MPF in respect of subject matter of those proceedings as identified in the Amended List Summons dated 5 February 2010, News South Wales case number 298727/2009, paragraph 18; and Amended Commercial List Statement dated 5 February 2010, News South Wales case number 298727/2009, paragraphs 19 to 49; and
 - (ii) accordingly, LMIM, as trustee for the MPF, was a party to the Bellpac proceedings; and
- e) otherwise does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 11 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

Funding of the Proceedings

21. [Left Blank]

~~As to paragraph 23 of the statement of claim, the third defendant:~~

- ~~a) admits, as was the fact, that the funds in the FMIF were frozen from about June or July 2009 and were not, therefore, available to fund any proceedings;~~
- ~~b) admits that the third defendant was aware of the matters referred to in the preceding subparagraph from about the time said funds were frozen;~~
- ~~c) otherwise denies the allegations in so far as they concern the third defendant, and says that they are untrue because the third defendant did not form any opinion or view on the matter; and~~
- ~~d) otherwise does not admit that allegations therein as they concern the state of mind of persons other than the third defendant.~~

22. As to paragraph 24 of the statement of claim, the third defendant:

- ~~a) repeats and relies on the matters pleaded in the preceding paragraph hereof and admits that the third defendant was aware, says that from about July 2009 onwards;~~
 - ~~(i) the funds in the FMIF were frozen and were not, therefore, available to fund any proceedings; and~~

- (ii) that funds to pay for the Proceedings were being sourced from LMIM as trustee of the MPF and were, at times, drawn down against the MPF Bellpac Loan;
- b) denies that the LMIM as trustee of the MPF provided such funds as registered mortgagee of the Property with second priority under the Deed of Priority and believes that allegation to be untrue because:
 - (i) it was funding the proceedings to prosecute and defend the Bellpac and Gujarat Proceedings respectively; and
 - (ii) it is the third defendant's understanding that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings; and
 - (iii) the funding was not provided pursuant to the Deed of Priority; and
- c) otherwise does not admit the allegations therein because:
 - (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 24 of the statement of claim, as and for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

Mediation Heads of Agreement

23. As to paragraph 25 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant:
 - (i) an undated document purporting to be a hand-written document entitled "Heads of Agreement"; and
 - (ii) a typed document entitled "Heads of Agreement recording Agreement in Principle", purporting to have been executed on behalf of LMIM, PTAL and Gujarat NRE Minerals Ltd; and
 - b) does not admit the allegations therein because:
 - (i) the third defendant, although he was aware that there was to be a mediation, did not attend the mediation and was not directly or materially involved in the matters subject of the allegations in paragraph 25 of the statement of claim, as and for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
24. As to paragraph 26 of the statement of claim, the third defendant:
- a) admits that the document entitled "Heads of Agreement recording Agreement in Principle" says, *inter alia*, the matters pleaded in paragraph 26(a), (b), and (c) of the statement of claim; and
 - b) otherwise does not admit the allegations therein because:

- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 26 of the statement of claim, as and for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
25. As to paragraph 27 of the statement of claim, the third defendant:
- a) admits that negotiations concerning the settlement of the Proceedings were ongoing in or around late 2010 into 2011; and
 - b) otherwise does not admit the allegations in paragraph 27 of the statement of claim because:
 - (i) the third defendant was not directly or materially involved in any such negotiations;
 - (ii) of the matters pleaded in paragraphs 2B and 2C above; and
 - (iii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

Settlement of the LMIM Bellpac proceedings

26. As to paragraph 28 of the statement of claim, the third defendant:
- a) admits that the plaintiff has disclosed to the third defendant:
 - (i) documents entitled "Deed of Release", each bearing the date 21 June 2011 and purporting to have been executed in counterpart on behalf of LMIM, PTAL, Bellpac, Gujarat NRE Coking Coal Ltd and Southbulli;
 - (ii) documents entitled "Deed of Settlement and Release", each bearing the date 21 June 2011 and purporting to have been executed in counterpart on behalf of LMIM, PTAL, Bellpac, Gujarat NRE Coking Coal Ltd, Southbulli and Coalfields; and
 - (iii) a document purporting to be a Contract for the sale of land – 2005 edition, between PTAL and Gujarat NRE Coking Coal Ltd; and
 - aa) admits that those documents were executed by LMIM;
 - bb) denies that the Deed of Release was executed by LMIM solely in its capacity as RE of or for the FMIF and believes that such allegation is untrue because, on its proper interpretation, that Deed was entered into and executed by LMIM on behalf of both the FMIF and the MPF, for the following reasons:
 - (i) the execution page of each of the Deed provides that it was executed by LMIM;
 - (ii) the recitals to the Deed of Release state to the effect that:
 - (A) LM (a reference to LMIM) and PTAL (as those terms are defined in the Deed of Release):
 - (1) have loaned substantial amounts to Bellpac;

- (2) both hold registered mortgages over the Bellpac Land (or most of it); and
- (3) both hold registered fixed and floating charges over all of the assets of Bellpac;
- (B) Bellpac is in default of its obligations to LM and PTAL and that PTAL proposes to sell the land;
- (iii) by clauses 5 and 6 of the Deed of Release, releases were to be given from the date of the Deed, as between each of LMIM, PTAL and Bellpac on the one hand, and each of Gujarat and Southbulli on the other, including releases from all Claims (as defined) directly or indirectly arising out of or related to the Proceedings and the subject matter of the Proceedings;
- (iv) clause 2 of the Deed of Release provided that, simultaneously with the execution of that Deed, the parties thereto would enter into the Deed of Settlement and Release, which Deed was attached as Annexure A to the Deed of Release;
- (v) the Deed of Settlement and Release, *inter alia*:
 - (A) by clause 6 thereof, provided for the execution of consent orders as attached in Schedule A thereto, being for the disposal of the Proceedings; and
 - (B) by clauses 5 and 6 thereof, provided for releases as between PTAL, Bellpac and LM on the one hand, and Coalfields on the other, of all Claims (as defined) directly or indirectly arising out of or related to the Proceedings and the subject matter of the Proceedings;
- (vi) in the premises of subparagraphs (iii) to (v) above, the Deed of Release provided for the release of all claims by and against LMIM as trustee of the MPF (as a party to the Bellpac proceedings) and Gujarat and Southbulli respectively;
- (vii) at the time of entering the Deed of Release, each of the parties thereto knew:
 - (A) of the facts as pleaded in subparagraphs 20bb) and d) above;
 - (B) that LMIM as trustee of the MPF, was a party to the Bellpac proceedings; and
 - (C) that entry into the Deed of Release would effect a compromise and release of the rights and any obligations of LMIM as trustee of the MPF in relation to Gujarat and Southbulli, including of all claims made in the Bellpac proceedings; and
- (viii) further, in so far as clause 22.1 provided that LM entered into the Deed of Release in its capacity as the RE of the FMIF, that clause, on its proper interpretation:
 - (A) did not, and did not purport to, exhaustively state the capacity in which LM entered into the Deed and may, in that regard, be contrasted with the drafting of clause 21.1 of the Deed of Release; and

- (B) was to identify only that in so far as LMIM entered into the Deed of Release in its capacity as RE of the FMIF, it did so pursuant to the constitution of the FMIF and to acknowledge the limited scope of LM's obligations and powers thereunder;
- (ix) the Deed of Release was executed by PTAL, which was sufficient to bind LMIM as RE of the FMIF, and it was unnecessary for LMIM to also execute the Deed of Release in its capacity as RE for the FMIF; and
- (x) in the premises of subparagraphs (ii) to (ix) above, and on the proper interpretation of the Deed of Release, references to LM in the Deed of Release were to or included references to LMIM as trustee for the MPF;
- cc) alternatively, says that if the Deed of Release was executed by LMIM only in its capacity as RE for the FMIF (which is denied), the parties to the Deed of Release and the lawyers engaged by LMIM (being Allens and Monaghan Lawyers) assumed and conducted themselves on the basis that the Deed of Release would be binding on both LMIM as trustee for the MPF and LMIM as RE for the FMIF;
- dd) denies that the Deed of Settlement and Release was executed by LMIM solely in its capacity as RE of or for the FMIF and believes that such allegation is untrue because, on its proper interpretation, that Deed was entered into and executed by LMIM on behalf of both the FMIF and the MPF, for the following reasons:
- (i) the execution page of each of the Deed provides that it was executed by LMIM;
- (ii) the recitals to the Deed of Settlement and Release refer to:
- (A) the Bellpac proceedings;
- (B) the mediation of the Proceedings; and
- (C) the agreement of the parties to the Proceedings to settle their differences on the terms set out in the Deed of Settlement and Release;
- (iii) of the matters pleaded in subparagraph bb(v) above;
- (iv) at the time of entering the Deed of Settlement and Release, the parties thereto knew:
- (A) of the facts as pleaded or referred to in subparagraphs 20bb) and d) above;
- (B) that LMIM as trustee of the MPF, was a party to the Bellpac proceedings; and
- (C) that entry into the Deed of Settlement and Release would effect a compromise and release of the rights and any obligations of LMIM as trustee of the MPF in relation to Gujarat, Southbulli and Coalfields, including of all claims made in the Bellpac proceedings; and
- (v) the Deed of Release was executed by PTAL, which was sufficient to bind LMIM as RE of the FMIF, and it was unnecessary for LMIM to also execute the Deed of Release in its capacity as RE for the FMIF; and

- (vi) further, in so far as clause 19.1 provided that LMIM entered into the Deed of Release in its capacity as the RE of the FMIF, such clause, on its proper interpretation:
- (A) did not, and did not purport to, exhaustively state the capacity in which LMIM entered into the Deed and may, in that regard, be contrasted with the drafting of clause 21.1 of the Deed of Release;
- (B) was to identify only that in so far as LM entered into the Deed of Release in its capacity as RE of the FMIF, it did so pursuant to the constitution of the FMIF and to acknowledge the limited scope of LM's obligations and powers thereunder;
- (vii) in the premises of subparagraphs (ii) to (vi) above, the Deed of Settlement and Release provided for the release of all claims by and against LMIM as trustee of the MPF (as a party to the Bellpac Proceeding) and Gujarat, Southbulli and Coalfields respectively; and
- (viii) in the premises of subparagraphs (i) to (vii) above, and on the proper interpretation of the Deed of Settlement and Release, references to LM in the Deed of Settlement and Release were to, or included references to, LMIM as trustee for the MPF; and
- ee) alternatively, says that if the Deed of Settlement and Release was executed by LMIM only in its capacity as RE for the FMIF (which is denied), the parties to the Deed of Release and the lawyers engaged by LMIM (being Allens and Monaghan Lawyers) assumed and conducted themselves on the basis that the Deed of Release would be binding on both LMIM as trustee for the MPF and LMIM as RE for the FMIF;
- b) otherwise, does not admit the allegations therein because:
- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraph 28 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
- (ii) despite having made reasonable inquiries, including an inspection of the Deeds (the Deeds of Release which appear to have differences), the third defendant remains uncertain as to the truth or falsity of the allegations.
27. As to paragraph 29 of the statement of claim, the third defendant:
- a) admits that clause 7 of the documents referred to in paragraph 26(a)(i) hereof is to the effect as pleaded in paragraph 29 of the statement of claim; and
- b) otherwise does not admit the allegations therein because:
- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraphs 28 and 29 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
- (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.
28. As to paragraph 30 of the statement of claim, the third defendant:
- a) admits that clause 2 of the documents referred to in paragraph 26(a)(ii) hereof is to the effect as pleaded in paragraph 30 of the statement of claim; and
- b) otherwise does not admit the allegations therein because:

- (i) the third defendant was not directly or materially involved in the matters subject of the allegations in paragraphs 28 and 30 of the statement of claim, as pleaded in paragraphs 2B and 2C above; and
- (ii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations.

Advice

29. The third defendant ~~denies~~ admits the allegations in paragraph 30A of the statement of claim, save that the instructions were not confirmed until on or about 9 December 2010, and believes that they are untrue because the email of 6 December 2010, referred to in the particulars to paragraph 30A, does not provide to the effect as pleaded in the statement of claim.
30. As to paragraph 30B of the statement of claim, the third defendant:
- a) admits the allegations therein;
 - b) says that:
 - (i) the instructions to Allens;
 - (A) were provided as part of an ongoing solicitor and client relationship between LMIM and Allens in relation to matters concerning and incidental to the Proceedings and the settlement thereof; and
 - (B) raised the issue of a conflict as between LMIM as RE of the FMIF and as trustee of the MPF;
 - (ii) that was set out in the email from Monaghan to John Beckinsale of Allens dated 14 March 2011 and comprised of the words "... given that LM is in a position of conflict, being the trustee of both the FMIF and the MPF";
 - (iii) the instructions to Allens specified the position of the FMIF as first mortgagee and the MPF as second mortgagee in relation to the mortgages in security of the FMIF Bellpac Loan and the MPF Bellpac Loan;
 - (iv) that was set out in the attachments to the email from Monaghan to John Beckinsale of Allens dated 14 March 2011 and, more specifically, in the email from Monaghan to Aaron Lavell of 6 December 2010 and in the report of WMS dated 7 March 2011 at paragraph 2.0; and
 - (v) the instructions to Allens informed John Beckinsale that specific persons from Allens were acting for LMIM in relation to documenting any settlement of the Proceedings; and
 - (vi) in light of the above matters, sought advice confirming whether the proposed split of proceeds between the FMIF and MPF was "*legally acceptable*"; and
 - c) says further that the said email from Monaghan to Allens of 14 March 2011 (together with the attachments thereto) was forwarded by email from the second defendant to the third defendant of 14 March 2011, in which email the second defendant informed the third defendant to the effect that:
 - (i) the second defendant had requested Monaghan to seek further legal advice in respect of the proposed Bellpac proceeds split and, specifically,

as to "how we deal with first and second mortgages etc., and also conflicts", and

- (ii) Monaghan had spoken with John Beckinsale from Allens who was comfortable with the proposed proceeds split between the FMIF and the MPF.

31. As to paragraph 30C of the statement of claim, the third defendant:

- a) as to the allegations in subparagraph (a):
 - (i) admits that what the plaintiff refers to as "*the instructions*", namely an email from David Monaghan to Aaron Lavell dated 6 December 2010 and two emails from David Monaghan to John Beckinsale dated 14 and 17 March 2011, did not include copies of the Gujarat Contract, the Deed of Release or the Deed of Release and Settlement; and
 - (ii) says that it was not possible to have provided those documents as part of "*the instructions*" because the said documents did not exist as at or before 14 or 17 March 2011;
- ~~b) as to the allegations in subparagraph (b)(i):~~
 - ~~(i) admits that the emails referred to by the plaintiff as "*the instructions*" did not state the matters set out in subparagraph (b)(i) of the statement of claim; but~~
 - ~~(ii) otherwise denies the allegations therein and believes that they are untrue because says that:~~
 - ~~(A) settlement of the Proceedings did not occur until June 2011;~~
 - ~~(B) prior to such settlement being reached, whether any settlement was to occur and, if so, on what basis and terms, remained uncertain and subject to further negotiations by those conducting the negotiations on behalf of LMIM; and~~
 - ~~(C) in the premises, none of the matters pleaded in subparagraph (b)(i) of the statement of claim were facts as at or by 17 March 2011;~~
 - ~~(iii) in the premises, says further that as at March 2011, it was not possible to state the matters referenced in subparagraph (b)(i) in the instructions to WMS or Allens;~~
 - (iv) says that Allens:
 - (A) at all material times between about April 2009 to November 2009 and from on or about 1 December 2010 were the solicitors retained to act on behalf of LMIM and PTAL in the Proceedings, including for the settlement negotiations in respect of those proceedings; and
 - (B) were instructed as pleaded in paragraph 30b) hereof;
 - (BB) were, as at March 2011, on behalf of LMIM, in the process of drafting and negotiating each of the documents that ultimately became the Gujarat Contract, the Deed of Release and Deed of Settlement and Release;

- (C) were thereby aware of the structure of the proposed settlement and any ~~such structure~~ earlier proposed structure in the course of settlement negotiations; and
- (D) in the premises, says that, as at March 2011, there was no necessity, nor apparent reason, to state the matters referenced in subparagraph (a) (b)(i) in the instructions to Allens;
- (v) says that:
- (A) the third defendant was not directly or materially involved in the settlement negotiations concerning the Proceedings; and
- (B) the third defendant was not directly or materially involved in providing instructions to either WMS or Allens and instructions to those firms were given by Monaghan in consultation with Darcy and Tickner;
- c) ~~as to the allegations in subparagraph (b)(ii):~~
- ~~(i) admits that the emails referred to by the plaintiff as "the instructions" did not state the matters set out in subparagraph (b)(ii) of the statement of claim; but~~
- ~~(ii) repeats and relies on subparagraph 31.b) above;~~
- ~~(iii) otherwise denies the allegations therein and believes that they are untrue because: at the time the instructions were given, none of the matters pleaded in paragraph 30C(b) existed as facts;~~
- ~~(iv) says further or alternatively, that the allegation in paragraph 30C(b)(ii) is irrelevant because:~~
- ~~(A) the sale of the Property to Gujarat was not an exercise of power of sale by PTAL as first registered mortgagee, but was pursuant to the compromise reached in the settlement of the Proceedings, including in respect of the substantive rights and assets of LMIM as trustee of the MPF subject of that proceeding;~~
- ~~(B) further, by cl 8 of the Deed of Priority, LMIM as trustee of the MPF was required to release the MPF mortgage only if the Property was sold pursuant to a bona fide sale for approximately fair market value and the full proceeds of sale are distributed in accordance with the Deed of Priority;~~
- ~~(C) the sale of the Property as part of the settlement of the Proceedings was not a bona fide sale of the Property, but was part of the overall proposed settlement pursuant to which the bulk of the proceeds did not relate to the sale of the Property;~~
- ~~(D) the sale price of Property under the Gujarat Contract was not approximately the fair market value of the Property because:~~
- ~~D.1 the 2007 Settlement Deed provided (in clause 4.2) that Bellpac then had a valuation of the Property at \$42M to \$52M and (by clause 4.3) Gujarat's nominee, SBH, agreed to pay \$56M for the Property;~~
- ~~D.2 the 2008 Settlement Deed provided (in clause 2.3(b)) that the Property would be sold to SBH for \$35M;~~

~~D.3 in the Proceedings, the plaintiffs alleged that Bellpac had acquired the Property and associated rights in 2003 for \$21M;~~

~~D.4 under the Mediation Heads of Agreement, Gujarat or its nominee was to buy the Property for \$65.5M; and~~

~~D.5 under the Gujarat Contract, the sale price of the Property was \$10M.~~

Further particulars as to the allegations in subparagraph (D) above will be provided after expert reports have been obtained;

~~(E) the proceeds of the sale of the Property were not, and were not to be, distributed in accordance with the Deed of Priority, and in particular cl 3.2 thereof; and~~

~~(F) the distribution of the sale proceeds were, rather, to be shared between the FMIF and the MPF; and~~

~~(G) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to settle the proceedings; because:~~

~~G.1 LMIM as trustee of the MPF was a party to the proceedings;~~

~~G.2 LMIM as RE for the FMIF had no power or authority to enter into any compromise on behalf of LMIM as trustee of the MPF;~~

~~G.3 for the reasons pleaded in paragraph 26 above, LMIM as trustee of the MPF was to be a party to each of the Deed of Release and the Deed of Settlement and Release; and~~

~~G.4 further for the reasons pleaded in paragraph 26, LMIM as trustee of the MPF was required to consent to entering into those Deeds, including the grant of the releases therein, and to the execution of the consent orders attached to the Deed of Settlement and Release; and~~

~~G.5 by reason of the matters pleaded in subparagraphs G.1 to G.4 above, there could be no settlement of the proceedings without the consent and cooperation of LMIM as trustee of the MPF;~~

~~(iv) says further, therefore or in any event, LMIM as trustee of the MPF was entitled:~~

~~(A) to withhold its consent to the settlement of the Proceedings;~~

~~(B) to refuse to hand over or release its securities;~~

~~(C) as a party to the Bellpac Proceedings (as pleaded in paragraph 20.d) above), to refuse to settle those proceedings and the claims made against Gujarat in that proceeding; and~~

~~(D) to seek an injunction or other relief to prevent the sale of the Property or to sue the RE of the FMIF for damages or other relief, including;~~

~~D.1 for payment of a sum akin to a litigation funding fee;~~

~~D.2 for damages for misleading or deceptive conduct; and~~

~~D.3 for an order that it pay a sum akin to a litigation funding fee in exchange for the agreement to the proposed settlement by LMIM as trustee of the MPF, on the basis that LMIM as RE of the FMIF was estopped from denying that there was an arrangement to that effect between LMIM in its respective capacities;~~

~~(v) in the circumstances:~~

~~(A) the Proceedings would not have settled on the proposed terms or at all without the consent and cooperation of LMIM as trustee of the MPF;~~

~~(B) unless LMIM as trustee of the MPF remained prepared to fund the ongoing costs of the Proceedings, LMIM as RE of the FMIF would be at risk of being unable to prosecute and defend the Proceedings further and being liable to judgments against it in default of taking steps, and consequently pay the other parties' costs thereof and suffer the relief claimed by Coalfields in the Coalfields cross claim; and~~

~~(C) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents referred to in paragraph 30C(b)(i) of the statement of claim and in order for the settlement to proceed at all;~~

d) as to subparagraph (c), admits the allegations therein but says that:

(i) Allens:

(A) ~~were provided with~~ had a copy of the Deed of Priority by June 2007 and, in particular, by emails on 19 April 2007 [FMIF.100.006.6709; FMIF.100.006.6710], 6 June 2007 [FMIF.100.006.6814; FMIF.100.006.6815], 8 May 2008 [FMIF.040.003.001; FMIF.040.003.0036] and 11 June 2008 [FMIF.049.006.0197; FMIF.049.006.0201]; and

(B) were thereby aware of the existence and terms of the Deed of the Priority; and

(ii) in the circumstances, as at March 2011, there was no apparent reason or necessity to instruct Allens as to the terms of the Deed of Priority;

e) says further that the emails and attachments to those emails to WMS and to Allens set out to the effect that:

(i) the loan by LMIM as RE of the FMIF was secured by a registered first mortgage over the Property;

(ii) as at 28 November 2010, approximately \$49M was outstanding in respect of the FMIF Bellpac loan;

(iii) the loans by LMIM as trustee of the MPF were secured by a second registered mortgage over the Property; and

- (iv) as at 28 November 2011 approximately \$24M was outstanding in respect of the MPF Bellpac Loan; and
- f) as to subparagraph (d):
- (i) admits that the instructions provided to WMS and Allens did not state the matters pleaded in subparagraphs (d)(i) or (d)(ii) of the statement of claim;
- (ii) admits that the third defendant was aware, from about July 2009 onwards, that funds to pay for the Proceedings were being sourced from LMIM as trustee of the MPF and were, at times, drawn down against the MPF Bellpac Loan; and
- (iii) otherwise denies the allegations therein and believes that allegation to be untrue because:
- (A) the matters alleged in subparagraph (d)(i) therein were not facts;
- (B) LMIM as trustee of the MPF was not funding the Proceedings as mortgagee because it was funding the proceedings to allow it and the FMIF to prosecute and defend the Bellpac and Gujarat Proceedings respectively; and
- (C) the third defendant's understanding is that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings; and
- (iv) as to subparagraph (d)(iii):
- (A) admits that there was no binding express prior arrangement in the sense of a contract for LMIM as trustee of the MPF to be paid any amount if the amount that LMIM as RE of the FMIF recovered did not cover the whole of the amount owing by Bellpac to it; and
- (B) otherwise denies the allegations therein and believes that they are untrue because in so far as the third defendant believes and was aware:
- B.1 LMIM as trustee of the MPF funded the proceedings on the basis as pleaded in subparagraph 11.f(iii) above; and
- B.2 LMIM as RE of the FMIF, by its director's Mr Tickner and Ms Darcy, was aware of and allowed LMIM as trustee of the MPF to so fund LMIM as RE of the FMIF's participation in the proceedings; and
- (C) says further or alternatively, that even if there was no binding express prior arrangement in the sense pleaded by the plaintiff:
- C.1 it was necessary and in the interests of the members of the FMIF for LMIM as RE of the FMIF to come to reasonable terms with the MPF so as to ensure its cooperation and consent to the settlement of the Proceedings;

- C.2 LMIM as trustee of the MPF was a party to the Bellpac proceedings;
- C.3 the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to settle the Bellpac proceedings;
- C.4 LMIM as trustee of the MPF was entitled to withhold that consent unless an appropriate and fair agreement was reached with LMIM as RE of the FMIF to share the settlement proceeds;
- C.5 in circumstances where LMIM as trustee of the MPF had funded almost the entirety of the costs of the Proceedings, it would have been unreasonable and imprudent for LMIM as trustee of the MPF not to insist on a reasonable share of the settlement proceeds in exchange for its consent to settle the Bellpac proceedings; and
- C.6 the absence of a binding express prior arrangement was not a bar to, and was irrelevant to, LMIM as trustee of the MPF insisting on obtaining a reasonable share of the settlement proceeds once its consent was required to settle the Bellpac proceedings.

32. As to paragraph 30D of the statement of claim, the third defendant:
- a) admits that on or about 7 March 2011, WMS provided to LMIM a report setting out their opinion as to what would be a fair and reasonable split of the likely proceeds from the Proceedings;
 - b) says further that:
 - (i) this report was addressed to Monaghan at Monaghan Lawyers;
 - (ii) that WMS opined that a fair and reasonable split of the likely proceeds from the Proceedings would be 30% to 40% to the MPF and the balance to the FMIF; and
 - (iii) that the WMS Report was based on multiple sources of information including matters set out in the David Monaghan email dated 6 December 2010 and attachments to that email; and
 - c) repeats and relies on paragraph 29 above.
33. As to paragraph 30E of the statement of claim, the third defendant:
- a) admits the allegations therein; and
 - b) says further that the Allens Advice:
 - (i) opined that it was legally acceptable for LMIM to split the proceeds of the settlement on the basis of the opinion in the WMS Report;
 - (ii) did not advise (nor had Allens advised before providing the Allens Advice) that Allens should be provided with particular or further documents, such as the Settlement Documents, nor any other documents concerning the respective rights and obligations of LMIM as RE of the FMIF and as

trustee of the MPF respectively, as lenders to Bellpac and as between themselves;

- (iii) stated that Allens were not aware of any reason why agreeing to split the litigation proceeds between the FMIF and the MPF on the basis of the opinion in the WMS Report would raise any issues concerning the general law and statutory duties of the directors of LMIM; and
- (iv) was addressed to Monaghan of Monaghan Lawyers.

33A. As to paragraph 30F of the statement of claim, the third defendant:

- a) admits that the Allens Advice contained statements as quoted in subparagraphs 30F(a) to (e), (g) to (k), (m), (n) and (p);
- b) admits that the Allens Advice contained the statement as quoted in subparagraph 30F(f), but says the words quoted therein are stated in paragraph [16](g) and not [16](f) of the Allens Advice;
- c) admits that the Allens Advice contained the statement as quoted in subparagraph 30F(l), but says the words quoted therein are stated in paragraph [56] and not [55] of the Allens Advice;
- d) admits that the Allens Advice contained the statement as quoted in subparagraph 30F(o), save that the quote omits the word "direct" before the word "fiduciary" is first used in paragraph [63] of the Allens Advice; and
- e) otherwise does not admit the allegations as the statement of claim does not establish the relevance of the quoted passages of the Allens Advice.

33B. As to paragraph 30G of the statement of claim, the third defendant:

- a) denies the allegations therein as the passages quoted in the statement of claim are not relevant to causes of action alleged in this proceeding, which:
 - (i) do not allege any breach of Part 2D.1 of the Act; and
 - (ii) make no allegation that the third defendant afforded priority to duties under Part 2D.1 to any conflicting duty under ss 601FC(1) and 601FD(1) of the Act; and
- b) otherwise does not admit the allegations therein as:
 - (i) the paragraph is vague and does not identify any particular document; and
 - (ii) despite having made reasonable inquiries, the third defendant remains uncertain as the truth or falsity of the allegations.

33C. As to paragraph 30H of the statement of claim, the third defendant:

- a) as to subparagraph 30H(a):
 - (i) admits the allegations in subparagraph 30H(a);
 - (ii) admits further that, as disclosed on the face of the Allens Advice, in providing the advice Allens were apprised and conscious of the said conflict and, notwithstanding;

- (A) expressly opined that the proposed split of the proceeds of settlement of the proceedings was legally acceptable; and
- (B) did not state or warn that the proposed split of the proceeds would constitute, or result in, breach of s 601FD of the Act;
- (iii) repeats and relies on the matters pleaded in subparagraph 33b) above; and
- (iv) says that the advice was obtained as part of LMIM's consideration of the proper and most appropriate treatment of the proceeds of settlement of the proceedings having regard to the context in which those proceeds were produced and the respective interests of the FMIF and the MPF;
- b) as to subparagraph 30H(b):
- (i) will rely on the terms of the Allens Advice at the trial of this action; and
- (ii) otherwise does not admit the allegations therein as they are vague and embarrassing and do not make any allegation against the third defendant;
- c) as to subparagraph 30H(c):
- (i) admits that paragraph [25] of the Allens Advice stated:
- "The RE therefore needs to always act in the best interests of members of the FMIF when making any decision regarding the split of the litigation proceeds and the terms of the Gujarat settlement. We assume that the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the result of the litigation with Gujarat, being the terms of the proposed settlement, are in the best interests of FMIF members. In addition, we assume that the RE is satisfied that there is a need to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF (because the overall settlement cannot occur without the agreement of the MPF trustee - for example, it needs to release its security and pay Coalfields to withdraw its caveats)."*
- (ii) admits that paragraph [27] of the Allens Advice stated:
- "In this case, there are two areas of conflict for the RE as responsible entity of the FMIF. The first is between the RE as responsible entity of the FMIF and the RE as trustee of the MPF. We assume that any decision regarding the terms of the Gujarat settlement and the split of the litigation proceeds will be made on the basis of what is in the best interests of FMIF's members, and not for the purpose of benefitting the members of the MPF. If the proposed dealings are considered by the RE to be on arm's length terms for the purposes of Chapter 2E/Part 5C.7 (see paragraphs 39 to 50 below) then this will presumably be an important factor used by the RE in reaching this conclusion."*
- (iii) admits that paragraphs [25] and [27] of the Allens Advice did not state specifically how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with an obligation owed by the LMIM as RE of the FMIF to act in the best interests of the members of the FMIF;

- (iv) repeats subparagraph 33b) above and says further that the Allens Advice concluded and advised, at paragraph [16](f), that Allens was not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in regard to compliance with the duties of LMIM's directors under the Act, assuming relevantly that LMIM as RE of the FMIF:
- (A) had considered the feasible options for recovering the loan advanced by FMIF to Bellpac, and was satisfied that the terms of the proposed settlement and split of settlement proceeds were in the best interests of the FMIF's members;
- (B) was satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm's length;
- (v) says thereby that the Allens Advice expressed a legal conclusion as to how the conflict could be resolved in a legally acceptable way that did not give rise to any breach of duty;
- (vi) says further that judgment as to what is in the best interests of the members of the FMIF was not, in any event, a matter for legal opinion and was a matter for the commercial, corporate and ethical judgment of the directors of LMIM as RE of the FMIF; and
- (vii) says that the Allens Advice, at paragraphs [25] or [27] or elsewhere, did not state that:
- (A) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would, or would likely or possibly, be inconsistent with or otherwise in breach of an obligation owed by the LMIM as RE of the FMIF to act in the best interests of the members of the FMIF;
- (B) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would, or would likely or possibly, be inconsistent with or otherwise in breach of either of ss 601FC(1)(b) and 601 FD(1)(b) of the Act; and
- (C) the assumptions referred to in paragraphs [25] and [27] were invalid or incapable of being confirmed;
- d) as to subparagraph 30H(d):
- (i) admits that paragraph [56] of the Allens Advice stated:
- "The RE will need to be satisfied that the terms of the Gujarat settlement and the proposed split of litigation proceeds does not unfairly put the interests of one client (e.g. FMIF) ahead of the interests of its other client (e.g. MPF) or vice versa."*
- (ii) otherwise denies the allegations therein and believes that they are untrue because:
- (A) paragraph [56] of the Allens Advice was a passage under the heading, "Issues for the RE as an AFS Licensee", addressing issues as an AFS Licensee;

- (B) paragraph [56] of the Allens Advice did not, and did not purport to, address, advise upon or relate to the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act; and
- (iii) further or alternatively, says that whether or not paragraph [56] of the Allens Advice misconstrued s 601FC(1)(b) is not relevant to the causes of action pleaded against the third defendant in this proceeding;
- e) as to subparagraph 30H(e):
- (i) says the allegations therein are embarrassing as the plaintiff contends that the obligation referred to in subparagraph 30H(e) is not an obligation imposed by ss 601FC(1)(b) and 601FD(1)(b) of the Act;
- (ii) admits that paragraph [56] of the Allens Advice did not state specifically how paying 35% of the settlement proceeds to LMIM a trustee of the MPF would be consistent with an obligation on LMIM not to unfairly put the interests of the MPF ahead of the FMIF;
- (iii) says that the Allens Advice, at paragraph [56] or elsewhere, did not state or warn that paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would, or would likely or possibly, be inconsistent with or otherwise in contravention of:
- (A) an obligation owed by the LMIM as RE of the FMIF to act in the best interests of the members of the FMIF;
- (B) an obligation owed by the LMIM as RE of the FMIF to be satisfied that it was acting in the best interests of the members of the FMIF; and
- (C) either of ss 601FC(1)(b) or 601FD(1)(b) of the Act; and
- (iv) otherwise denies the allegations and believes that they are untrue because of the matters pleaded in subparagraphs 33C(c)(iv) to (vi) above;
- f) denies the allegations in subparagraph 30H(f) and believes that they are untrue because:
- (i) the Allens Advice was not premised as alleged;
- (ii) the Allens Advice nowhere discloses the existence of any such premise or assumption as alleged;
- (iii) Recital 9 of the Allens Advice:
- (A) is contrary to the allegations;
- (B) expressly acknowledges that there was no formal agreement between LMIM as RE of the FMIF and LMIM as trustee of the MPF to split the proceeds of the settlement of the proceedings; and
- (C) neither assumes, states nor implies that there was any existing agreement between the funds to split the proceeds; and
- (iv) the instructions provided to Allens on 14 March 2011, as referred to in the particulars to paragraph 30B of the statement of claim [FMIF.300.004.3197; FMIF.300.004.3198];

- (A) expressly informed Allens that the funds had not entered into an agreement concerning the proposed split of any proceeds from the proceedings; and
 - (B) provided no basis to infer or assume the existence of any existing agreement between the funds to split the proceeds of any settlement of the proceedings;
- g) denies the allegations in subparagraph 30H(g) and believes that they are untrue because:
- (i) the allegations do not accurately state the effect of the Allens Advice;
 - (ii) the matters set out in paragraphs [25], [35], [27], [37] and [53] of the Allens Advice, as excerpted in paragraph 30F of the statement of claim:
 - (A) were not conclusions;
 - (B) were mere assumptions and statements acknowledging the specific duties of LMIM as RE of the FMIF and as trustee of the MPF; and
 - (C) were not irreconcilable as alleged or at all; and
 - (iii) the Allens Advice, and in particular paragraphs [16](a) and (b), [25], [27], [35], [37], [53] and [56] of that advice, opined to the effect that it was legally acceptable to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the existence of a conflict, provided that after LMIM, having considered the feasible options for the recovery of the loans made by each of the funds, was satisfied that the split of proceeds was considered to be in the best interests of the members of each of the funds;
- h) as to subparagraph 30H(h):
- (i) admits that subparagraph [16](e) of the Allens Advice referred to the "FMIF compliance plan";
 - (ii) in respect of s 601FC(1) of the Act, denies that the Allens Advice, in so far as it did or did not address the duties in that section, is of any relevance to this proceeding, which does not assert any breach of s 601FC(1);
 - (iii) in respect of s 601FD(1), denies the allegations and believes that they are untrue because:
 - (A) acting in the best interests of the members of the MPF was not, necessarily or axiomatically, contrary to or irreconcilable with the duties imposed by ss 601FD(1)(b) or (c); and
 - (B) of the matters pleaded in subparagraphs 33C(c)(v) and 33C(f)(iii) above; and
 - (iv) otherwise does not admit the allegations therein because:
 - (A) the third defendant was not the author of the Allens Advice or of the statement of claim;

- (B) the third defendant does not know whether the references are, or are intended to be, to the same document;
- (C) the documents referred to do not appear to be the same document, each bearing or being referred to by different titles, with one document purportedly being that of LMIM and the other being that of the FMIF;
- (D) of the matters pleaded in paragraphs 2B and 2C above; and
- (E) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations;
- l) as to subparagraph 30H(i):
- (i) says that paragraph [57] of the Allens Advice stated that:
- "The RE will also need to ensure that it follows any procedures or policies it has established in accordance with section 912A(1)(aa) for managing conflicts of interest."*
- (ii) otherwise do not admit the allegations which are vague and embarrassing and which are not relevant to these proceedings, which:
- (A) do not allege any breach of Part 2D.1 of the Act;
- (B) make no allegation that the third defendant afforded priority to duties under Part 2D.1 to those under ss 601FC(1) and 601FD(1) of the Act; and
- (C) make no allegation that any or all of the defendants failed to adhere to the LMIM Conflicts Management Policy; and
- (iii) repeats and relies on the matters pleaded above in subparagraphs 33b), 33C(a)(ii), 33C(c)(iv), 33C(c)(v), 33C(e)(iii), 33C(g)(ii) and 33C(g)(iii) hereof;
- l) as to subparagraph 30H(i):
- (i) says that paragraph [63] of the Allens Advice stated that:
- "Generally, the directors of a trustee company do not themselves owe direct fiduciary obligations to the beneficiaries of the trust. However, section 601 FD(2) of the Corporations Act provides that the duties outlined in section 601 FD(1) override any conflicting duty an officer has under Part 2D.1 of the Corporations Act. Although this point has not yet been decided by case law, it is possible that section 601 FD(2) will mean that directors of a responsible entity will have a direct fiduciary relationship with members of a registered scheme. This would mean that the directors would owe the scheme members all of the proscriptive fiduciary duties that arise as between the RE itself and the scheme members."*
- (ii) admits that the Allens Advice did not elaborate upon the observations in paragraph [63], including to identify what the specific duties would or might be; and

- (iii) repeats and relies on the matters pleaded above in subparagraphs 33b), 33C(a)(ii), 33C(c)(iv), 33C(c)(v), 33C(e)(iii), 33C(g)(ii) and 33C(g)(iii) hereof;
- k) as to subparagraph 30H(k):
- (i) denies the allegations therein and believes that the allegations are untrue because:
- (A) the Allens Advice did conclude that the proposed split of the settlement proceeds was "legally acceptable" provided that LMIM was satisfied that it was in the interests of the members of each of the FMIF and the MPF; and
- (B) that conclusion was expressly stated and was not a matter of interpretation; and
- (ii) says further that the subparagraph is vague and embarrassing:
- (A) in light of the conclusion stated expressly in the Allens Advice; and
- (B) further, because the plaintiff nowhere identifies what it contends is or should have been the "proper construction" of the Allens Advice; and
- (C) because none of the matters pleaded in subparagraphs 30H(a) to (i) of the statement of claim sustain the allegation in subparagraph 30H(k);
- l) further or alternatively, says generally in response to all of the allegations in paragraph 30H, that the third defendant:
- (i) is not a qualified lawyer;
- (ii) has no legal training;
- (iii) as a director of LMIM, was entitled to rely on the Allens Advice;
- (iv) as a director of LMIM, was not required to obtain any further or other advice as to the effect of the Allens Advice;
- (v) did not, could not have, and was not required to, analyse or construe the Allens Advice in the manner now set out in the statement of claim; and
- (vi) in determining, together with the other directors of LMIM, to proceed with the split of proceeds of the settlement of the proceedings between LMIM as RE of the FMIF and LMIM as trustee of the MPF, took proper notice of the effect of the Allens Advice.

Deed Poll

34. As to paragraph 31 of the statement of claim, the third defendant:
- a) admits to the existence of an undated Deed Poll as disclosed by the plaintiff to the third defendant;
- b) admits that the third defendant as a director of LMIM executed the Deed Poll; and

- c) admits that the Deed Poll was signed by the third defendant by 21 June 2011; denies that the Deed Poll was executed on or about 21 June 2011 and believes that allegation to be untrue because the Deed Poll was executed by the fourth defendant on or around 14 June 2011.
- d) says that the Deed Poll was executed by the third defendant on or around 14 June 2011;
- e) admits that each of the first, second, fourth, fifth and sixth defendants executed the Deed Poll but does not admit when each of those defendants executed the Deed Poll. The third defendant believes that those other defendants also signed the Deed Poll on or about 14 June 2011 but, despite having made reasonable inquiries, the third defendant remains uncertain of exactly when each other defendant executed the Deed Poll; and
- f) denies that the third defendant or other directors executed counterparts of the Deed Poll as directors of LMIM in its capacity as RE of the FMIF or as trustee of the MPF and believes that those allegations are untrue because:
 - (i) the directors all signed the same Deed Poll, save for John O'Sullivan, who was overseas at the time;
 - (ii) the third defendant did not sign the Deed Poll as director of LMIM in its capacity either as RE of the FMIF or as trustee of the MPF;
 - (iii) the execution by any other of the director defendant does not disclose that they executed as director of LMIM in its capacity either as RE of the FMIF or as trustee of the MPF; and
 - (iv) the Deed Poll does not disclose, expressly or implicitly, any intention that the directors' execution is as director of LMIM in its capacity either as RE of the FMIF or as trustee of the MPF.

35. As to paragraph 31A of the statement of claim, the third defendant:

- a) admits that, prior to executing the Deed Poll, he knew the facts alleged in the paragraphs referred to which he has admitted above, save that he did not know the specific details of the proceedings as pleaded in paragraphs 19 and 20 above;
- b) does not admit whether the first, second, fourth, fifth and sixth defendants had such knowledge, as those are matters within the knowledge of those defendants; and
- c) otherwise respectively denies or does not admit that he knew or ought to have known the facts alleged because of the matters pleaded:
 - (i) in paragraphs 2B and 2C above herein; and
 - (ii) above herein in response to the allegations in the paragraphs 5 to 22, 24 to 30, and 30A to 30E, 30H and 31 of the statement of claim,
on which he relies, and because:
 - (iii) the Deed Poll was executed in the week prior to the date of execution of the Deed of Release, Deed of Settlement and Release and the Gujarat Contract; and
 - (iv) the allegations are contrary to law.

36. The third defendant admits paragraph 32 of the statement of claim and relies on the full terms of the Deed Poll.

36A. As to paragraph 32A of the statement of claim, the third defendant:

a) admits that the Deed Poll did not expressly refer to the Allens Advice but says that:

(i) there was no requirement for the Deed Poll to refer expressly or at all to the Allens Advice, the Conflicts Management Policy or sections 601FC or 601FD of the Act;

(ii) whether or not the Deed Poll referred to the Allens Advice, the Conflicts Management Policy or ss 601FC or 601FD of the Act, does not signify that the directors of LMIM failed to consider such matters in proceeding with the split of the settlement proceeds; and

(iii) whether or not the Deed Poll referred to the Allens Advice, the Conflicts Management Policy or sections 601FC and 601FD of the Act, is not relevant to the causes of action asserted in this proceeding or the validity of the transaction by which the settlement proceeds were split between the FMIF and the MPF; and

b) otherwise denies the allegations therein and believes that they are untrue because:

(i) the Deed Poll was expressly [para 3.1(n)] entered "in light of the independent expert advice" received by LMIM, including the Allens Advice, which was discussed and considered by the directors of LMIM and Monaghan prior to the third defendant executing the Deed Poll and determining to proceed with the split of the settlement proceeds;

(ii) the text of the Background summary of the Deed Poll was prepared with reference to, and adopted much of, the background summary set out in the Allens Advice;

(iii) the Deed Poll refers at paragraph 2.1(c), *inter alia*, to the Compliance Plans of the MPF and FMIF and any other procedures that were in place in respect of conflicts of interest, which plan and procedures includes the Conflicts Management Plan; and

(iv) the Deed Poll refers at paragraph 2.1(d) to the "general law and statutory duties that relate to directors under the Corporations Act", which duties include those under ss 601FC and 601FD of the Act subject of the Allens Advice.

37. As to paragraph 33 of the statement of claim, the third defendant:

a) denies the allegations therein and believes that they are untrue because, by reason of the matters pleaded in paragraph 22.b) hereof, LMIM as trustee of the MPF did not agree to fund the Proceedings as registered mortgagee of the Property with second priority under the Deed of Priority;

subject to the above denial, pleads further or alternatively as follows:

b) does not admit that LMIM as trustee of the MPF agreed to or commenced providing funds to LMIM as RE of the FMIF in or about July 2009 because:

- (i) the third defendant was not involved in the decision for LMIM as trustee of the MPF to provide funding to LMIM as RE of the FMIF in order to fund the Proceedings;
 - (ii) ~~that the~~ third defendant believes ~~that that~~ decision was made by the second and sixth defendants together with Monaghan, who were the persons within and for LMIM who had conduct and control of the Proceedings for LMIM; and
 - (iii) otherwise, despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations;
- c) as to subparagraph 33(a):
- (i) admits that he had not considered the matters referred to in subparagraph 33(a) as at the time that LMIM as trustee of the MPF agreed to or commenced providing funding to LMIM as RE of the FMIF;
 - (ii) repeats and relies on the matters pleaded in paragraphs 2B and 2C and subparagraphs 37-b)(i) and 37-b)(ii) hereof; and
 - (iii) otherwise denies the allegations therein and believes that they are untrue because:
 - (A) of the matters pleaded herein in response to paragraph 30C(d)(iii) of the statement of claim;
 - (B) ~~says that~~ the third defendant was aware from about July 2009 onwards that funds to pay for the Proceedings were being sourced from LMIM as trustee of the MPF; and
 - (C) ~~says that~~ it is, and always has been, the third defendant's understanding that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings; ~~and~~

~~otherwise does not admit the allegations therein as they concern the state of mind of persons other than the third defendant;~~
- d) as to subparagraph 33(b), denies the allegations therein and believes that they are untrue because:
- (i) ~~insofar as the allegations pertain to the third defendant, denies the allegations and believes that they are untrue because he~~ the third defendant did not hold the expectation pleaded in subparagraph 33(b), whether in or about July 2009 or at any time;
 - (ii) it is, and always has been, the third defendant's understanding that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings; and
 - (iii) in the circumstances, the third defendant's expectation was that, subject to obtaining and considering necessary and appropriate professional advices, the MPF would receive a share of the proceeds resulting from the Proceedings; and

~~otherwise does not admit the allegations therein as they concern the state of mind of persons other than the third defendant.~~

- e) says further or alternatively that it is immaterial whether or not the alleged expectation was held as at the time LMIM as trustee of the MPF commenced funding the Proceedings because it was necessary and in the interests of the members of the FMIF for LMIM as RE of the FMIF to come to reasonable terms with the MPF so as to ensure its cooperation and consent to the settlement of the Proceedings.

38. As to paragraph 34 of the statement of claim, the third defendant:

- a) does not admit the allegations therein in so far as they concern the knowledge and state of mind of persons other than the third defendant;
- aa) as to subparagraph 34(aa) the third defendant denies that he did not adequately consider the content of the Allens Advice and believes that the allegation is untrue because he did give adequate consideration to the content of the Allens Advice;
- b) in so far as subparagraph 34(a) makes allegations against the third defendant respondent:
- (i) denies that, upon executing the Deed Poll, the third defendant knew or ought to have known the facts alleged in subparagraphs 34(a)(i) and (ii) and believes those allegations to be untrue because:
- (A) he was not the officer within LMIM dealing with or responsible for the conduct of the Bellpac Proceedings or the settlement thereof;
- (B) the Deed of Priority was entered into by others on behalf of LMIM the day after the third defendant became a director of LMIM;
- (C) the Deed of Priority, or its terms, was not brought to the attention of the third defendant by any person in relation to the split of proceeds at any time prior to the third defendant executing the Deed Poll; and
- (D) of the matters pleaded in paragraphs 2B, 2C, 30, 38(ba) 34(e), 31f), 33.b) above and 38b)(ii) below; and
- (ii) otherwise denies the allegations therein and believes that they are untrue because:
- (A) of the matters pleaded in paragraph 31 hereof above and because cl 3.1 of the Deed of Priority was subject to the operation of cl 3.2 of that Deed; and
- (B) the third defendant entered into the Deed Poll in awareness and consideration of the fact that LMIM had sought and received independent professional advice, from both WMS and Allens;
- (C) the said advices were:
- C.1 given upon an understanding by, and instruction to, those advisers as to position of first and second mortgagee respectively as between LMIM as RE of the FMIF and LMIM as trustee of the MPF;

Particulars

The third defendant repeats and relies upon paragraph 30.b) above hereof. Instructions as to this matter were provided to WMS in the email from Monaghan to Aaron Lavell of 6 December 2010.

- C.2 given upon an awareness on part of Allens as to the existence of and terms of the Deed of Priority; and

Particulars

The third defendant repeats and relies upon paragraph 31d) above hereof.

- C.3 to the effect as pleaded in paragraph 33.b) and 33C(c)(v) (on part of Allens) and otherwise that the proceeds split was fair and reasonable; and

- (iii) says further or alternatively, any priority established by the Deed Poll was subject to any subsequent agreement between the funds;

ba) as to the allegations in paragraph 34(b), says that:

- (i) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to settle the Bellpac proceedings;
- (ii) LMIM as trustee of the MPF was a party to the Bellpac proceedings;
- (iii) LMIM as RE of the FMIF had no power or authority to settle the Bellpac proceedings on behalf of LMIM as trustee of the MPF; and
- (iv) alternatively, LMIM as RE of the FMIF and/or PTAL had authority to settle the Bellpac proceedings on behalf of LMIM as trustee of the MPF on condition that 35% of the proceeds of the settlement were paid to LMIM as trustee of the MPF;
- (v) LMIM as trustee of the MPF was intended to be, and was, a party to the Deed of Release and Deed of Settlement and Release, subject to the agreement between the FMIF and the MPF by which the total moneys payable by Gujarat at settlement were to be split 65/35 between the FMIF and the MPF;
- (vi) LMIM as trustee of the MPF was required to be, and was, a party to the Deed of Release and Deed of Settlement and Release so as to give effect to the releases granted therein, and to execute the consent orders attached to the Deed of Release;
- (iv) therefore, or in any event, LMIM as trustee of the MPF was entitled to refuse to terminate the Bellpac proceedings and to grant the releases of the claims made against Gujarat in those proceedings; and
- (v) in the circumstances:
 - (A) the Proceedings would not have settled on the proposed terms or at all without the consent and cooperation of LMIM as trustee of the MPF;
 - (B) unless LMIM as trustee of the MPF remained prepared to fund the ongoing costs of the Proceedings, LMIM as RE of the FMIF would be at risk of being unable to prosecute and defend the Proceedings further and being liable to judgments against it in default of taking

steps, and consequently pay the other parties' costs thereof and suffer the relief claimed by Coalfields in the Coalfields cross-claim; and

(C) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents referred to in paragraph 30C(b)(i) of the statement of claim and in order for the settlement to proceed at all;

c) further, in so far as subparagraph 34(b) makes allegations against the third defendant, denies those allegations and believes that they are untrue because:

(i) the allegations proceed upon the incorrect premises that:

(A) LMIM as trustee of the MPF was not a party to the Deed of Release; and

(B) there was no necessity for LMIM as RE of the FMIF to reach agreement with LMIM as trustee of the MPF about sharing the proceeds of the settlement (~~see paragraphs 26 and subparagraph 0 hereof~~);

Particulars

~~The third defendant repeats and relies upon the matters pleaded in paragraph 31.c) hereof.~~

(ii) LMIM as trustee for the MPF was a party to the Bellpac Proceedings and its consent to terminate that proceeding was necessary for the Bellpac Settlement (as defined in the Deed Poll) to proceed; and

(iii) the third defendant did not know of the fact alleged in subparagraph 34(b)(i), nor should he ought to have known that fact because of the matters pleaded in paragraphs 2B, 2C, 26, 30, 31, 33.b) and, 38b)(ii) and 38c) above; and

(iv) of the matters pleaded in this defence in response to subparagraph 30C(d)(iii) of the statement of claim;

d) in so far as subparagraph 34(c) makes allegations against the third respondent defendant:

(i) admits that the third defendant, upon executing the Deed Poll, had a general understanding that LMIM as RE of the FMIF was first mortgagee and LMIM as trustee of MPF was a subsequent mortgagee over the Property;

(ii) denies the allegations generally and believes that they are untrue because of the matters pleaded in paragraphs 2B, 2C, 26, 30, 38(ba) 31.c), 31f, 33.b) and 38.b) above;

(iii) denies that, upon executing the Deed Poll, he knew each of the facts alleged in subparagraphs 34(c)(ii), (iv) and, (v) and (vi) and believes that those allegations are untrue because the third defendant did not then know of those specific matters;

(iv) ~~denies that, upon executing the Deed Poll, he ought to have known of the fact alleged in subparagraph (c)(ii) and believes that those allegations are untrue because:~~

- ~~(A) the third defendant was not the officer within LMIM dealing with or responsible for the conduct of the Bellpac Proceedings or the settlement thereof;~~
- ~~(B) the Deed of Priority was entered into by others on behalf of LMIM the day after the third defendant became a director;~~
- ~~(C) the Deed of Priority, or its terms, was not brought to the attention of the third defendant by any person in relation to the split of proceeds at any time prior to third defendant executing the Deed Poll; and~~
- ~~(D) of the matters pleaded in paragraphs 2B, 2C, 30, 33.b) and 38(ii) above; and~~

denies the allegations in subparagraph 34(c)(iii) and believes that they are untrue because:

- (A) the matters alleged in the subparagraph 34(c)(iii)(A) were and are not a fact, as pleaded in paragraph 22.b) above;
- (B) the third defendant was not the officer within LMIM dealing with or responsible for the conduct of the Bellpac Proceedings or the settlement thereof;
- (C) the Deed of Priority was entered into by others on behalf of LMIM the day after the third defendant became a director;
- (D) the Deed of Priority, or its terms, was not brought to the attention of the third defendant by any person in relation to the split of proceeds at any time prior to third defendant executing the Deed Poll; and
- (E) of the matters pleaded in paragraphs 2B, 2C, 22.b), 26, 30, 38(ba), 34e, 31f, 33.b) and 38.b)(ii) above;

(v) denies that, upon executing the Deed Poll, he ought to have known of the specific facts alleged in subparagraphs 34(c)(iv) and (c)(v) and believes those allegations are untrue because:

- (A) the third defendant was not the officer within LMIM dealing with or responsible for the conduct of the Bellpac Proceedings or the settlement thereof; and
- (B) of the matters pleaded in paragraphs 2B, 2C, 22.b), 30, 38(ba), 34e, 31f, 33.b) and 38.b)(ii) above;

~~denies the allegations in subparagraph (c)(vi) and believes that they are untrue because:~~

- ~~(A) the matters alleged in the subparagraph (c)(vi) are and were not a fact; and further~~
- ~~(B) the third defendant's understanding is, and always has been, that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings;~~

- e) denies the allegations in subparagraph (d) and believes that they are untrue because:
- (i) LMIM sought and received legal advice from Allens as to whether LMIM as trustee of the MPF could lawfully be treated as an arm's-length litigation funder;
 - (ii) the said advice was obtained in circumstances as pleaded in paragraphs 30, ~~38(ba) 31e~~, 31-d), and 31-e) and 31f) above;
 - (iii) the said advice was to the effect pleaded in paragraph 33.b) and 33C(a), 33C(c)(v) and 33C(g) above;
 - (iv) prior to executing the Deed Poll, the third defendant did consider the matters referred to in subparagraph 34(d);
 - (v) as a director of LMIM in its capacity as RE of the FMIF, the third defendant was not required to consider whether the MPF could be treated as if it was an arm's-length litigation funder; and
 - (vi) the matters addressed by the WMS Report and the Allens Advice were appropriate matters for a director in the circumstances to have sought advice in relation to;
- f) says further in relation to subparagraphs 34(a), (b), (c) and (d) of the statement of claim, that, prior to and upon the execution by the third defendant of the Deed Poll, the third defendant:
- (i) reasonably believed and trusted that the second defendant and the sixth defendant, together with Monaghan, who were managing and who were directly involved in the Proceedings, the Settlement of the Proceedings and the preparation of the Deed Poll:
 - (A) gave proper regard and consideration to all relevant facts and circumstances; and
 - (B) provided all necessary and appropriate instructions to WMS and Allens to enable them to provide reliable and complete advice concerning the proposed proceeds split;
 - (ii) had no reason to believe that the independent advice obtained from Allens and WMS was not appropriate or not adequate advice, or was not based on a proper consideration of all relevant facts, circumstances and documents; and
 - (iii) had no reason to believe that the conclusions and decisions stated in the Deed Poll were not based upon a proper consideration of all the relevant facts and circumstances, including the advices obtained from Allens and WMS;
- g) as to subparagraph 34(e):
- (i) denies the allegations in subparagraph (e) and believes that they are untrue because:
 - (A) the Allens Advice was substantially to the effect alleged in the circumstances alleged in so far as the third defendant has admitted them; and

- (B) the circumstances alleged by the plaintiff in subparagraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), ~~(ii)~~ and (iii) are untrue by reason of the matters pleaded in this defence herein in response to those paragraphs;
- (ii) further, says that the paragraph is embarrassing and unclear as to the meaning of "other independent advice"; and
- (iii) repeats and relies upon the matters pleaded in subparagraphs 2C(d), 33.b) and 38f) above;
- h) alternatively, with respect to subparagraph 34(e) of the statement of claim, says that no such advice was necessary because:
- (i) there was no legal impediment to LMIM as trustee of the MPF being treated as if it were an arm's-length litigation funder;
- (ii) there was no need to seek advice on whether it was reasonable for LMIM as trustee of the MPF to be paid an amount over and above the amount paid in funding the Proceedings, in circumstances where that MPF's contribution to funding the Proceedings was provided on the basis that the MPF would receive a share of the proceeds resulting from the Proceedings and in the circumstances pleaded in paragraphs 26 and 0 above;
- (iii) there was no need to seek advice as to whether it was in the interests of the FMIF for LMIM as trustee of the MPF to be paid in accordance with the Proceeds Split, as it was clearly in the interests of the FMIF to do so in the circumstances pleaded in paragraphs 26 and 38(ba) above and where:
- (A) but for the funding advanced by the MPF, the FMIF was unable to fund the litigation and was likely to have recovered nothing;
- (B) the MPF's contribution to funding the Proceedings was to be recognised by providing the MPF with a share of the proceeds resulting from the Proceedings;
- (C) in the absence of LMIM as trustee of the MPF agreeing to the Bellpac Settlement, the termination of the Bellpac Proceedings and to the release of its mortgage over the Property, the Bellpac Settlement would not have proceeded and FMIF was likely to receive substantially less, or nothing, in respect of the sum owed to it by Bellpac under the FMIF Bellpac Loan Agreement without continuing the Proceedings; and
- (iv) in any event, the advice that LMIM did seek and receive, from both WMS and Allens, and on which the third defendant relied, was adequate for the purposes of the directors of LMIM considering whether to agree to and proceed with the Bellpac Settlement and Proceeds Split;
- (v) the matters in subparagraph 34(e)(ii) and (iii) were matters for the commercial, corporate and ethical judgment of the directors of LMIM and were not matters for legal opinion; and
- i) in so far as subparagraph 34(f) makes allegations against the third defendant respondent:
- (i) admits that he took into consideration the Allens Advice and the WMS Report;

- (ii) denies that he ought to have known that those advices did not constitute the advice identified in subparagraph 34(e) of the statement of claim and believes that allegation to be untrue because:
 - (A) of the matters pleaded in subparagraphs 2C(d), 33.b), 33C and 38f) to h) above; and
 - (B) it was appropriate for the third defendant to take into consideration the Allens Advice and the WMS Report;
- j) as to subparagraph 34(g):
 - (i) denies the allegations therein and believes that they are untrue because of the matters pleaded above in this paragraph; and
 - (ii) repeats and relies upon the matters pleaded in paragraphs 2B, 2C, 33.b), 33C and 38f) above;
- k) says further or alternatively, that:
 - (i) the third defendant, in determining to allow the Proceeds Split to proceed, and thereby the making of the Settlement payment, independently assessed and relied on:
 - (A) information provided to him by one or more of the second defendant, the sixth defendant and Monaghan to the effect that:
 - A.1. LMIM had sought and received specific legal advice from Allens indicating that the Proceeds Split was legally acceptable having regard to LMIM's position as both RE of the FMIF and trustee of the MPF;
 - A.2. LMIM had sought and received specific advice from WMS indicating that the proposed split of the settlement proceeds was fair and reasonable; and
 - A.3. the said advices had been obtained by and in consultation with Monaghan of Monaghan Lawyers;
 - (B) the fact that the said advices from Allens and WMS indicated that Proceeds Split was legally acceptable and was fair and reasonable as between the two funds; and
 - (C) the proper discharge of the functions and duties respectively of each of the second defendant, the sixth defendant, Monaghan, Monaghan Lawyers, Allens and WMS;
 - (ii) the third defendant's reliance on the above matters was made:
 - (A) in good faith; and
 - (B) after making his own independent assessment of the information, advices and matters referred to in subparagraph 38k)(i) above, having regard to his knowledge of LMIM and its operating structure, including the matters as pleaded in paragraphs 2B and 2C above; and
 - (iii) in the premises:

- (A) it was reasonable for the third defendant to rely on the said information and advices in determining to allow the Proceeds Split to proceed and the Settlement payment to be made;
- (B) further or alternatively, pursuant to s 189 of the Act, the third defendant's reliance upon the said information and advices is taken to be reasonable unless the contrary is proved; and
- (C) it was not necessary for the third defendant to have known or considered the specific matters as alleged in paragraphs 34 of the statement of claim.

Payment to MPF of monies payable to FMIF by Gujarat under Gujarat Contract and Deed of Release

39. As to paragraph 35 of the statement of claim, the third defendant:

- a) admits that the Bellpac Proceedings were settled on 21 June 2011 and that the MPF received a sum of or about \$15,546,147.85 from the proceeds of the settlement of the Proceedings;
- b) otherwise does not admit the allegations therein because:
 - (i) the third defendant did not have carriage or control of the Bellpac Proceedings or settlement thereof, which matters were conducted and controlled by the second defendant, the sixth defendant and Monaghan;
 - (ii) the third defendant was not directly or materially involved in the receipt of or disbursement of the moneys referred to in paragraph 35; and
 - (iii) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or falsity of the allegations; and
- c) says that payment to MPF of the sum of or about \$15,546,147.85 ("**Settlement payment**") was:
 - (i) in accordance with the third defendant's understanding that LMIM as trustee for the MPF contributed funding to LMIM as RE of the FMIF towards the costs of the Proceedings on the basis that it was always to receive more than mere reimbursement of and interest on its contributions to funding the Proceedings and, more particularly, would receive a share of the proceeds resulting from the Proceedings;
 - (ii) made in consideration of the advice from WMS that such an amount was fair and reasonable;
 - (iii) made in consideration of the fact that legal advice had been obtained from Allens indicating that it was legally acceptable for LMIM to split the proceeds of the settlement on such a basis; ~~and~~
 - (iv) consistent with the fact that the settlement of the Proceedings could only occur with the consent and cooperation of LMIM as trustee of the MPF;
 - (v) thereby, in the interests the members of both the FMIF and the MPF; and
 - (vi) a reasonable allocation of the proceeds of settlement of the Proceedings in the circumstances pleaded above herein.

40. As to paragraph 36 of the statement of claim, the third defendant repeats and relies on the matters pleaded in paragraphs 39 and 41 of this defence and, subject to those matters:

- a) does not admit the allegations therein as they:
 - (i) ~~are unclear as to what "decision" is referred to with reference to the Deed Poll; and~~
 - (ii) concern the state of mind of persons other than the third defendant; and
- b) in so far as the allegations are made against the third defendant:
 - (i) admits that LMIM as RE of the FMIF caused the proceeds from the settlement of the Proceedings to be shared with LMIM as trustee of the MPF in the sum of or about \$15,546,147.85; and
 - (ii) says that the Proceeds Split was done on the basis of and in consideration of the matters referred to in subparagraphs 33C(i)(viii), 38b(ii)(B), 38e(iv), 32.f, 32.k) and 39.c) above and the matters set out in the Deed Poll, and also in reliance, on part of the third defendant, on the skill and judgment of each of the second defendant, the sixth defendant and Monaghan who at all times had conduct and control of the Proceedings and settlement thereof including arrangements concerning the split of proceeds between the FMIF and the MPF.

41. As to paragraph 37 of the statement of claim, the third defendant:

- a) says that the paragraph is vague and embarrassing as to the meaning of the words "*... which ought to have been held*"; and
- b) otherwise denies the allegations in paragraph 37 of the statement of claim and believes that they are untrue because:
 - (i) the funding contributions made by LMIM as RE of the MPF were made on the basis that it would receive a share of the proceeds resulting from settlement of the Proceedings;
 - (ii) it was necessary to obtain consent and cooperation of LMIM as RE of the MPF as pleaded in paragraphs 26 and 38(ba) 31-e) above;
 - (iii) further or alternatively, of the matters pleaded in paragraphs 26, 38(ba) 31-e) and (iii) above; and
 - (iv) ~~LMIM as RE of the FMIF, being legally entitled to the moneys comprising the Settlement payment, was entitled to direct part of those moneys to LMIM as trustee of the MPF;~~

the Settlement payment was not scheme property of the FMIF but was part of the money comprising the proceeds from the settlement of the Proceedings that were:

- (A) received upon the settlement of the claims made by both LMIM as trustee of the MPF and by PTAL as custodian of LMIM as RE of the FMIF;
- (B) received by LMIM on behalf of both the FMIF and the MPF; and
- (C) to be shared between the FMIF and the MPF in a proportion that was fair and reasonable having regard to the circumstances and

after taking into account the independent professional advice as to the proceeds split;

(v) as at 21 June 2011, when the Deed of Release and the Deed of Settlement and Release were entered, the Deed Poll had already been entered recording the directors' agreement and conclusion, *inter alia*, that:

(A) there was a need for LMIM as trustee of the MPF to agree to the overall settlement of the Proceedings; and

(B) the proceeds of the settlement of the Proceedings were to be shared in the ration of 65% to the FMIF and 35% to the MPF; and

(vi) further or alternatively:

(A) in so far as PTAL did sell the Property to Gujarat as mortgagee exercising power of sale (which is denied), the Property was sold for \$10 million, the full value of which was paid to and received by LMIM as RE of the FMIF;

(B) the balance of funds paid upon the settlement of the Bellpac proceedings were not moneys paid in respect of any security held by either LMIM as RE of the FMIF or LMIM as trustee of the MPF, such that those funds were not subject, or to be applied according, to the Deed of Priority;

(C) in so far as either PTAL or LMIM as RE of the FMIF was legally entitled to receive payment of moneys from Gujarat under the Deed of Release, that was subject to the agreed split of the settlement proceeds as between the FMIF and the MPF, such that they were entitled to direct all or part of those moneys to LMIM as trustee of the MPF.

42. The third defendant denies the allegations in paragraph 37A of the statement of claim and believes that they are untrue because:

a) for the reasons pleaded in paragraphs 2B, 2C, 26, 38(ba) 34-e, 33C and 38 above, and having proper regard to his position and responsibilities within LMIM, the third defendant:

(i) did have proper regard and gave adequate consideration to those matters that were true and were relevant; and

(ii) did act with the necessary degree of reasonable care and diligence required of him;

aa) of the matters pleaded in paragraph 33C above;

b) a person in the third defendant's position, acting with the degree of reasonable care and diligence required of such a person:

(i) would, or could reasonably and appropriately, have made the conclusions referred to in subparagraphs (i) to (vi) of paragraph 37A-(aa) of the statement of claim;

(ia) would have concluded that the overall settlement in accordance with the terms of the Gujarat Contract and the Deed of Release could not occur without the agreement of the MPF trustee;

- (ii) would, or could reasonably and appropriately, have agreed to make, cause, permit or direct the Settlement payment to the MPF trustee;
 - (iii) would not have made the determinations referred to in subparagraphs (i) to (iii) of paragraph 37A-(a) of the statement of claim; and
 - (iv) would, or could reasonably and appropriately, have split the proceeds of the settlement as was done between the FMIF and the MPF;
- c) it was reasonable for the third defendant, having been informed as pleaded in paragraph 38k) above, to agree upon and fix the sum of the Proceeds Split once the outcome of the Proceedings was known because:
- (i) of the advice received from WMS and Allens;
 - (ii) the view of the second and sixth defendant, who had carriage and control of the Proceedings and the settlement thereof on behalf of LMIM, was that the Proceeds Split was appropriate in all respects;
 - (iii) none of the advices from WMS or Allens, nor Monaghan nor Monaghan Lawyers, said anything to the contrary;
 - (iv) agreement on the percentage or amount of the Proceeds Split in light of the settlement of the Proceedings was appropriate in order to properly protect the interests of both the FMIF and the MPF, particularly having regard to the following factors:
 - (A) the nature and extent of the litigation risks that had been taken on by the LMIM as trustee of the MPF in funding the Proceedings;
 - (B) the risk and potential quantum of adverse costs orders that might have been made against LMIM as the RE of the FMIF and as the trustee of the MPF respectively in the event that LMIM had not succeeded in the Proceedings;
 - (C) the legal costs in fact expended by LMIM as trustee of the MPF;
 - (D) the fact that LMIM as trustee of the MPF had given an undertaking as to costs in security for costs in the Proceedings; and
 - (E) the amount and structure of the proposed settlement; and
 - (v) of all of the circumstances and matters known to and considered by the third defendant at the time, as pleaded above herein;
- d) it was reasonable for the third defendant to conclude as he did that:
- (i) the overall settlement could not occur without the agreement of the MPF trustee, for the reasons pleaded in paragraphs 26 and 38(ba) ~~24-e~~ above;
 - (ii) LMIM as RE of the FMIF needed to reach an agreement with LMIM as trustee of the MPF about the sharing of the settlement proceeds as LMIM as trustee for the MPF contributed funding to LMIM as RE of the FMIF towards the costs of the Proceedings on the basis that it was always to receive more than mere reimbursement of and interest on its contributions to funding the Proceedings and, more particularly, would receive a share of the proceeds resulting from the Proceedings;
 - (iii) the Proceeds Split was fair to, and in the interests of, the FMIF's members, as without the funding from the MPF, PTAL, on behalf and as

custodian of the FMIF, would have been unable to pursue and defend the Bellpac proceedings, and by reason of the facts pleaded in paragraphs 26, 38(ba) 31-e) and 42b) above; and

- (iv) LMIM as trustee of the MPF was in an analogous position to a litigation funder, as it had agreed to fund the Proceedings, and understood that it would do so, on the basis that its ~~contribution~~ would receive more than mere reimbursement of and interest on its contributions to funding the Proceedings and, more particularly, would receive a share of the proceeds resulting from the Proceedings; and
 - e) it was reasonable for the third defendant to agree that LMIM as RE of the FMIF pay the Settlement payment to LMIM as trustee of the MPF, on the basis that:
 - (i) LMIM as trustee of the MPF was entitled to be paid those moneys because its contribution towards the funding of the Proceedings was made on the basis that its contribution would receive more than mere reimbursement of and interest on its contributions to funding the Proceedings and, more particularly, would receive a share of the proceeds resulting from the Proceedings and by reason of the matters pleaded in paragraphs in 26, 38(ba) 31-e) and 42b) above;
 - (ii) it was in the best interests of the FMIF's members, as it was likely that LMIM as trustee of the MPF:
 - (A) would not have allowed the settlement to occur, save in circumstances where it received a fair and reasonable split of the proceeds; and, in any event
 - (B) would have been entitled to sue LMIM as RE of the FMIF if the former did not receive a fair and reasonable split of the proceeds resulting from the settlement of the Proceedings; and
 - (iii) it would not cause detriment to LMIM as RE of the FMIF if the Settlement payment was paid, as the FMIF could not have funded the litigation and the contribution made by LMIM as trustee of the MPF was made on the basis that its contribution would receive more than mere reimbursement of and interest on its contributions to funding the Proceedings and, more particularly, would receive a share of the proceeds resulting from the Proceedings;
 - (iv) the amount of \$15,546,147.85, being 35% of the overall moneys received upon settlement of the Proceedings, was an amount considered fair and reasonable by WMS in the WMS Report; and
 - (v) the amount of \$15,546,147.85 was reasonable, as it fairly recognised the contribution made by the MPF to the Proceedings, and the recovery of the settlement proceeds of the Proceedings, which would not have been recovered without the MPF's contribution in funding the Proceedings.
43. The third defendant admits that LMIM as trustee of the MPF received the Settlement payment, but otherwise does not admit the allegations in paragraph 37B of the statement of claim because:
- a) the third defendant was not directly or materially involved in the transaction or transactions constituting the said Settlement payment; and
 - b) despite having made reasonable inquiries, the third defendant remains uncertain as to the truth or otherwise of the allegations.

Contraventions of s 180, 182 of the Corporations Act

44. ~~The third defendant denies the allegations in paragraph 38 of the statement of claim and believes that they are untrue because:~~

- a) ~~they are wrong at law; and, more particularly~~
- b) ~~duties owed by the first to sixth defendants, as directors of LMIM, whether at general law or imposed by ss 180(1) and 182(1) of the Act are:~~
 - (i) ~~duties owed to the company in its own right and not otherwise; and~~
 - (ii) ~~not referable or owed to LMIM as RE of the FMIF.~~

45. ~~As to paragraph 39 of the statement of claim, the third defendant:~~

- a) ~~denies the allegations in paragraph 39 of the statement of claim and believes that they are untrue because:~~
 - (i) ~~for the reasons pleaded in the preceding paragraph, the first to sixth defendants did not owe the duties alleged to LMIM as RE of the FMIF;~~
 - (ii) ~~if LMIM as RE of the FMIF did owe such duties (which is denied), by reason of the matters pleaded in paragraph 42 above, the third defendant:~~
 - (A) ~~exercised his powers and discharged his duties with the relevant degree of care and diligence;~~
 - (B) ~~did not act improperly, within the meaning of s 182(1) or at general law;~~
 - (C) ~~did not improperly use his position as director of LMIM to gain an advantage for the MPF as alleged or at all, within the meaning of s 182(1) or at general law; and~~
 - (D) ~~did not improperly use his position as director of LMIM to cause detriment to LMIM as alleged or at all, within the meaning of s 182(1) or at general law;~~
 - (iii) ~~LMIM suffered no harm as a result of the Proceeds Split or making of the Settlement payment to LMIM as trustee for the MPF;~~
 - (iv) ~~it was not reasonably foreseeable that LMIM would or could suffer any harm as a result of the Proceeds Split or the making of the Settlement payment to LMIM as trustee for the MPF because:~~
 - (A) ~~none of the moneys resulting from the settlement of the Proceedings was, or ever was to be, payable to LMIM in its own right;~~
 - (B) ~~further or alternatively:~~
 - B.1 ~~the Proceeds Split and the payments made thereunder to the MPF trustee were not, and are not said to have been, contrary to the Constitution of the FMIF or duties owed by LMIM as RE of the FMIF;~~
 - B.2 ~~the Proceeds Split and the payments made thereunder to the MPF trustee were not, and are not said to have been, made without a belief, on part of LMIM as RE of the FMIF, held in good faith that it was acting in accordance with the~~

Constitution of the FMIF or duties owed by LMIM as RE of the FMIF;

~~B.3 the Proceeds Split and the payments made thereunder was made by LMIM as RE of the FMIF in reliance in good faith on the services of the second and sixth defendants and the services and advice respectively of Monaghan Lawyers and Allens; and~~

~~B.4 in the premises, pursuant to cl 19.1(a) and (b) of the Constitution of the FMIF, LMIM as RE of the FMIF could not be liable for any loss or damage arising from or, in respect of, the Proceeds Split or any payment made thereunder; and~~

~~(v) it was not possible for the MPF to gain an advantage as the MPF is not a separate legal entity; and~~

~~b) objects in point of law as the allegations in paragraph 39 are embarrassing and do not found or disclose any cause of action against the third defendant.~~

~~46. As to paragraphs 39A and 39B of the statement of claim, the third defendant:~~

~~a) objects in point of law as the allegations in paragraphs 39A and 39B are embarrassing and do not found or disclose any cause of action against the third defendant;~~

~~b) denies the allegations therein and believes that they are untrue because:~~

~~(i) for the reasons pleaded in paragraphs 42, 44 and 45 above, there was no breach of duty;~~

~~(ii) the duties alleged at paragraph 38 of the statement of claim are not duties owed to LMIM as RE of the FMIF;~~

~~(iii) the assets of LMIM were not depleted by the amount of the Settlement payment;~~

~~(iv) the assets of LMIM as RE for the FMIF were not depleted, as LMIM received all of the proceeds from the settlement of the Proceedings; and~~

~~(v) any allocation of the proceeds from the settlement of the Proceedings between the two funds did not cause any loss to be suffered by LMIM; and~~

~~e) alternatively, says that any depletion in the assets of the FMIF did not exceed the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for its contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.~~

~~47. As to paragraph 40 of the statement of claim, the third defendant:~~

~~a) objects in point of law as the allegations in paragraphs 39 to 40 are embarrassing and do not found or disclose any cause of action against the third defendant; and~~

~~b) denies the allegations therein and believes that they are untrue because:~~

~~(i) for the reasons pleaded in paragraph 44 above, there were no duties owed as alleged;~~

- ~~(ii) — if there were duties owed as alleged, for the reasons pleaded in paragraphs 42 and 45 above, there was no breach of those duties; and~~
- ~~(iii) — for the reasons pleaded in paragraphs 45 and 46 above, there was no loss suffered by LMIM;~~
- ~~c) — alternatively, says that any liability on part of the first to sixth defendants, or any one or more of them, to pay compensation under s 1317H of the Act (which liability is denied) should not exceed the amount paid in excess of that which was necessary to reimburse LMIM as trustee of the MPF for its contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.~~

48. — [Left Blank]

LMIM's involvement in contraventions by directors

49. — ~~The third defendant denies the allegations in paragraph 41 of the statement of claim and believes that they are untrue because numerous matters referenced by the paragraph are untrue or not within the third defendant's knowledge.~~

Particulars

~~The third defendant repeats and relies on the matters pleaded herein in response to paragraphs 1(b), 1(c), 2, 5-23 and 17-37 herein and to paragraphs 2B and 2C above.~~

50. — ~~The third defendant denies the allegations in paragraph 42 of the statement of claim and believes that they are untrue because, for the reasons pleaded herein, there was no contravention of duty by the first to sixth defendants in their capacity as directors of LMIM.~~
51. — ~~The third defendant denies the allegations in paragraphs 42A and 42B of the statement of claim and believes that they are untrue because of the matters pleaded in paragraphs 42, 44, 45 and 46 above.~~
52. — ~~As to paragraph 43 of the statement of claim, the third defendant:~~
- ~~a) — objects in point of law as the allegations in paragraphs 39 to 40 are embarrassing and do not found or disclose any cause of action against the third defendant; and~~
 - ~~b) — denies the allegations therein and believes that they are untrue because:~~
 - ~~(i) — for the reasons pleaded in paragraph 44 above, there were no duties owed as alleged;~~
 - ~~(ii) — if there were duties owed as alleged, for the reasons pleaded in paragraphs 42 and 45 above, there was no breach of those duties; and~~
 - ~~(iii) — for the reasons pleaded in paragraphs 45 and 46 above, there was no loss suffered by LMIM~~
 - ~~c) — alternatively, says that any liability on part of LMIM as trustee of the MPF to pay compensation under s 1317H of the Act (which liability is denied) should not exceed the amount paid in excess of that which was necessary to reimburse LMIM as trustee of the MPF for its contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.~~

Contravention of s 601FD of the Corporations Act

53. The third defendant admits the allegations in paragraph 44 of the statement of claim and, as to sub-paragraph (b), says that the best interests of the members of the FMIF are determined by reference, among other things, to the purpose and terms of the Constitution (Replacement Constitution [FMIF.100.003.7639]) of the scheme, which terms included:
- a) clause 13.1 thereof, which provides that the RE has all the powers as though it were the absolute owner of the Scheme Property and acting in its personal capacity;
 - b) clause 29.1 thereof, which relevantly provides that nothing in the Constitution restricts the RE or its associates from:
 - (i) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);
 - (ii) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity); or
 - (iii) acting in the same or similar capacity in relation to any other trust or managed investment scheme; and
 - b) clause 29.2 thereof, which provides that all obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.
54. As to paragraph 45 of the statement of claim, The third defendant denies the allegations in that paragraph 45 of the statement of claim and believes that they are untrue because:
- a) by reason of the matters pleaded in paragraph 42 and 45.a) above, there was no breach of duty; and
 - b) on the basis of the case asserted by the plaintiff in paragraph 34(c)(vi) and 37A(a) of the statement of claim, there was no conflict between the interests of the members of the FMIF and LMIM within the meaning of section 601FD(1)(c); and
 - c) the payment of the settlement sum to the MPF was within the powers conferred on LMIM as RE of the FMIF by clauses 13.1 and 29 of the Replacement Constitution of the FMIF.
- 54A. The third defendant denies the allegations in paragraph 45AA of the statement of claim and believes that they are untrue because:
- a) having regard to the separate interests of the MPF and its members / beneficiaries, the first to sixth defendants did not, and would not, have agreed to the settlement of the proceedings or entry into the Deed of Release and the Deed of Settlement and Release for no payment or consideration:
 - (i) as to do so would have been contrary to the duties of LMIM as trustee of the MPF and the first to sixth defendants as officers thereof;
 - (ii) as it would have been uncommercial and unreasonable to do so, in circumstances:

- (A) where LMIM as trustee of the MPF had funded more than 90% of the costs of the Proceedings;
 - (B) where the said funding of the costs of the Proceedings by the MPF had been provided on the basis of an understanding of LMIM's directors that the MPF would receive a share of any proceeds from the litigation;
 - (C) where LMIM as trustee of the MPF's funding of the said Proceedings was what produced, or principally caused and resulted in, the settlement with Gujarat in respect of which Gujarat paid \$10 million to acquire the land and a further \$35.5 million (exclusive of GST) as a global sum to obtain the releases from the plaintiffs in the Bellpac proceedings;
 - (D) where LMIM as trustee of the MPF had given an undertaking as to costs in security for costs in the Bellpac proceedings;
 - (E) where, as part of such a settlement, LMIM as trustee for the MPF was required to forever release and forgo its valuable rights against Gujarat, as claimed in the Bellpac proceedings;
 - (F) where, the consent of LMIM as trustee for the MPF was required in order for LMIM as RE of the FMIF of PTAL to settle the Bellpac proceedings;
 - (G) otherwise in the circumstances as pleaded in paragraphs 31.f(iv) and 38(ba) above;
 - (H) LMIM had obtained the Allens Advice, advising that the proceeds split was legally acceptable subject to specified conditions; and
 - (I) LMIM had obtained the WMS Report, advising that: "In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions".
- (iii) in circumstances where, for the reasons referred to in subparagraph 54A, above, no independent trustee for the MPF would have done so; and
- b) it was clear to the directors of LMIM (and it was the fact) that Gujarat would not have settled the Proceedings, nor entered into and completed the Gujarat Contract, or any form of the Deed of Release or the Deed of Settlement and Release if LMIM as trustee of the MPF had not been a party to the Deed of Release and the Deed of Settlement and Release and had not agreed to discontinue the Gujarat proceedings;
 - c) of the matters pleaded in paragraph 45AA of the first defendant's defence to the statement of claim;
 - d) the true counterfactual was that, but for the agreement to split the settlement proceeds 65/35 between the FMIF and the MPE respectively:
 - (i) the Proceedings:
 - (A) would not have settled on or about 21 June 2011 or on the terms that it did; and

(B) would have continued in circumstances where the FMIF was unable to pay the costs of such proceedings;

(ii) there would have been no proceeds of settlement of the Bellpac proceedings to be paid to LMIM as RE of the FMIF;

(iii) LMIM as RE of the FMIF would not have received \$30 million from the settlement; and

(iv) the FMIF would have been substantially worse off relative to the position it was in as a result of the settlement subject to the proceeds split.

54B. The third defendant is not required to plead to the particulars to paragraph 45AA of the statement of claim, but:

a) specifically denies the allegation in paragraph (ii) of the particulars, as ss 601FC(1) or 601FD(1) did not oblige LMIM or its directors to take the steps pleaded in paragraphs 45A.(b) to (f) of the statement of claim;

b) says, as to paragraph (v) of the particulars, there was no commercial value to LMIM as trustee of the MPF granting any release to Gujarat, and otherwise consenting to the dismissal of its claim against Gujarat in the Bellpac proceedings in return for no payment or consideration; and

c) otherwise denies the allegations made in each of the particulars paragraphs.

54C. The third defendant denies the allegations in paragraph 45AB of the statement of claim by reason of the matters pleaded in paragraphs 54A and 54B above.

55. The third defendant admits that the first to sixth defendants caused the settlement payment to be made to LMIM as trustee of the MPF, but otherwise denies the allegations in paragraph 45A of the statement of claim and believes that they are untrue because:

a) by reason of the matters pleaded in paragraphs 41 and 42, 45.a), 46.b) and 46.b)(iv) above, there was no breach of duty;

b) by reason of the matters pleaded in subparagraphs 41b)(iv) and 41b)(vi) above, LMIM as RE of the FMIF received all that it was entitled to as first registered mortgagee of the Property and under the Deed of Priority; and

c) the total moneys paid in settlement of the Proceedings were not scheme property of the FMIF but were moneys:

(i) received by LMIM in its capacity both as RE of the FMIF and as trustee of the MPF; and

(ii) to be shared between the FMIF and the MPF in a proportion that was fair and reasonable having regard to the circumstances and after taking into account the independent professional advice as to the proceeds split.

56. As to paragraph 45B of the statement of claim, the third defendant:

a) denies the allegations therein and believes that they are untrue because, by reason of the matters pleaded in paragraphs 41, 42, 45.a), 46.b) and 46.b)(iv) 55 above, there was no breach of duty and no loss suffered by LMIM as RE of the FMIF; and

- b) alternatively, says that any liability on part of LMIM as trustee of the MPF to pay compensation under s 1317H of the Act (which liability is denied) should not exceed the amount paid in excess of that which was necessary to reimburse LMIM as trustee of the MPF for its contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

56A. Further or alternatively to the matters pleaded in paragraphs 54 to 56 above:

- a) the third defendant denies that LMIM as RE of the FMIF suffered any loss or damage as a consequence of the making of the settlement payment to the MPF, or of the first to sixth defendants agreeing to make, cause, permit or direct the settlement payment to be made to LMIM as trustee of the MPF because, by reason of the matters pleaded in paragraphs 20, 31.f(iv), 38(ba), 54A, 54B and 54C above, the settlement of the proceedings could not and would not have occurred without the consent and cooperation of LMIM as trustee of the MPF; and
- b) the statement of claim discloses no causative link between the alleged conduct of the third defendant in contravention of s 601FD(1) and the loss and damage claimed in this proceeding.

57. As to paragraph 46 of the statement of claim, the third defendant:

- a) denies the allegations therein and believes that they are untrue because, by reason of the matters pleaded in paragraphs 41, 42, 45.a), 46.b), 46.b)(iv) and 47.b) 55 above, and in paragraph 57A below, there was no breach of duty and no loss suffered by LMIM as RE of the FMIF; and
- b) further or alternatively, denies the allegations in that paragraph and believes that they are untrue because as paragraphs 44 to 45B of the statement of claim discloses no basis for award of damages at general law against any of the defendants; and
- c) alternatively, says that any liability on part of the first to sixth defendants, or any one or more of them, to pay compensation under s 1317H of the Act (which liability is denied) should not exceed the amount paid in excess of that which was necessary to reimburse LMIM as trustee of the MPF for its contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

LMIM's involvement in contraventions by officers

~~58. As to paragraph 47 of the statement of claim, the third defendant:~~

- ~~a) denies the allegations in paragraph 47 of the statement of claim and believes that they are untrue because numerous matters referenced by the paragraph are untrue or not within the third defendant's knowledge; and~~
- ~~b) repeats and relies on the matters pleaded herein in response to paragraphs 1(b), 1(c), 2, 5, 13, 23 and 17, 37, 37A and 37B of the statement of claim herein and to paragraphs 2B and 2C above of this defence.~~

~~58A. As to paragraph 47A of the statement of claim, the third defendant:~~

- ~~a) admits that LMIM as trustee of the MPF received the Settlement payment (as defined in the statement of claim - the sum of \$15,546,147.85) for the benefit of the members of the MPF;~~

~~b) by reason of the matters pleaded herein, says that LMIM as trustee of the MPF was justified and entitled in so receiving the Settlement payment; and~~

~~c) otherwise denies the allegations therein because:~~

~~(i) LMIM did not execute or otherwise the Deed Poll as trustee of the MPF;~~

~~(ii) the statement of claim pleads no facts for the conclusion of law that LMIM as trustee of the MPF entered into the Deed Poll; and~~

~~(iii) LMIM as trustee for the MPF was not a party to the Deed Poll.~~

~~58B. The third defendant denies the allegations in paragraph 47B of the statement of claim and believes that they are untrue because:~~

~~a) LMIM did not receive the Settlement payment (as defined in the statement of claim the sum of \$15,546,147.85), or any part thereof, in its capacity as RE of the FMIF;~~

~~b) LMIM as RE of the FMIF had no entitlement to any part of the Settlement payment;~~

~~c) LMIM did not execute or otherwise enter the Deed Poll as RE of the FMIF;~~

~~d) the statement of claim pleads no facts for the conclusion of law that LMIM as RE of the FMIF entered into the Deed Poll; and~~

~~e) LMIM as RE of the FMIF was not a party to the Deed Poll.~~

~~59. The third defendant denies the allegations in paragraph 48 of the statement of claim and believes that they are untrue because:~~

~~a) of the matters pleaded in paragraphs 50 and 51 above; and~~

~~b) otherwise for the reasons pleaded herein, there was no contravention of duty by the first to sixth defendants in their capacity as directors of LMIM and no loss suffered by LMIM as RE of the FMIF.~~

~~60. The third defendant denies the allegations in paragraphs 48A and 48B of the statement of claim and believes that they are untrue because of the matters pleaded in paragraphs 42 and 49 to 52, 44, 45 and 46 above.~~

~~61. As to paragraph 49 of the statement of claim, the third defendant:~~

~~a) denies the allegations therein and believes that they are untrue because of the matters pleaded above in this defence; and~~

~~(i) for the reasons pleaded in paragraph 44 above, there were no duties owed as alleged;~~

~~(ii) if there were duties owed as alleged, for the reasons pleaded in paragraphs 42 and 45 above, there was no breach of those duties; and~~

~~(iii) for the reasons pleaded in paragraphs 45 and 46 above, there was no loss suffered by LMIM; and~~

~~b) alternatively, says that any liability on part of LMIM as trustee of the MPF to pay compensation under s.1317H of the Act (which liability is denied) should not exceed the amount paid in excess of that which was necessary to reimburse~~

~~LMIM as trustee of the MPF for its contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.~~

~~Rights of LMIM as former trustee of the MPF and the Plaintiff's right of subrogation~~

~~62. The third defendant does not admit the allegations in paragraphs 50 to 54 of the statement of claim. The third defendant has made reasonable inquiries and remains uncertain as to the truth or otherwise of the allegations.~~

Defences under Parts 5.2C, 9.4B and 9.5 of the Act

63. Further or alternatively, as to the allegations that the third defendant contravened s. 6015FD(1) 180(1) of the Act, the third defendant says that:
- a) in executing the Deed Poll and thereby making, permitting or directing the Proceeds Split and the making of the Settlement payment to be paid to LMIM as trustee for the MPF, he made a business judgment;
 - b) the business judgment was made in good faith and for a proper purpose, in that he considered that it was commercially appropriate and proper to proceed with the Proceeds Split in order to honour the basis on which he understood that LMIM as trustee of the MPF contributed funds towards the cost of the Proceedings, in circumstances where the FMIF was unable to fund the costs of those proceedings;
 - c) he did not have a material personal interest in making, permitting or directing the Proceeds Split or the making of the Settlement payment to LMIM as trustee for the MPF;
 - d) he informed himself about the Proceeds Split and Settlement payment to the extent he reasonably considered appropriate, in the circumstances pleaded in paragraphs 2B and 2C and 38k) above;
 - e) prior to executing the Deed Poll or otherwise approving of the Proceeds Split or the making of the Settlement payment, the third defendant:
 - (i) as pleaded in paragraph 38k) above, obtained, considered and relied on the advice and information provided by one or more of the second defendant, the sixth defendant and Monaghan, each of whom managed and were directly involved in the Proceedings, the funding of the Proceedings, and the Settlement of the Proceeding; and
 - (ii) considered and relied upon the effect of the advices from Allens and WMS;
 - f) in light of and reliance upon the information received and considered by the third defendant, the third defendant rationally believed that the judgment he made was in the best interests of LMIM the FMIF and the members thereof; ~~including in its capacities as RE of the FMIF and trustee of the MPF;~~
 - g) in the premises pleaded in (a) to (f) above, pursuant to s.180(2) of the Act the third defendant's belief that the judgment was in the best interests of the FMIF and the members thereof LMIM is ought to be taken to be rational unless the belief is one that no reasonable person in his position would hold (which it is not); and
 - h) in the premises pleaded in (a) to (f) above, pursuant to s.180(2) of the Act the third defendant met, or is taken to have met, the requirements of s.180(1) of the

Act his duties to exercise his power and discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were in the third defendant's position [as that phrase is used within the meaning of s 601FD(1)(b)].

64. Further or alternatively, should the Court find, contrary to the matters pleaded above, that the third defendant contravened any of ss 180(1), 182(1) or 601FD(1)(b) or (c) of the Act as alleged in the Statement of Claim, then:
- a) the third defendant acted honestly in making, permitting or directing the Settlement payment to be paid to LMIM as trustee for the MPF; and
 - b) having regard to all of the circumstances of the case, the third defendant ought fairly to be excused for any contravention; and
 - c) in the premises pleaded in (a) and (b), the third defendant seeks an order pursuant to s-1317S(2) of the Act, or s-1318(1) of the Act, or both, relieving him wholly or partly from any liability to which he would otherwise be subject.
65. Further or alternatively, by reason of the matters pleaded in paragraph 38k) above and pursuant to s 189 of the Act, the third defendant's reliance on the information and advices referred to in paragraph 63.d) above is taken to be reasonable unless the contrary is proved.
66. Except as stated above, the third defendant denies each and every allegation in the statement of claim (including implied allegations, if any).

Date: 3 April 2019

Signed:



Description: James Conomos Lawyers Pty Ltd
Solicitors for the Third Defendant

This pleading was settled by Mr Freeburn of Queens Counsel and Mr P. D. Hay of Counsel.

NOTICE AS TO REPLY

You have fourteen days within which to file and serve a reply to this defence. If you do not do so, you may be prevented from adducing evidence in relation to allegations of fact made in this defence.