

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**


CERTIFICATE OF EXHIBIT

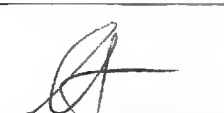
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VOLUME 2 OF 5

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Deponent

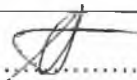

Solicitor *CLAUDIA SANE DENNISON*

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

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SC-13	Amended Reply to the Amended Defence of the Sixth Defendant	488-517


.....
Deponent


.....
Solicitor CLAUDIA JANE DENNIS ON

"SC-7"

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 AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND**

Amended pursuant to rule 378 of the Uniform Civil Procedure Rules 1999 (UCPR).
James Conomos Lawyers Pty Ltd, Dated 3 April 2019.



04 APR 2019

Filed in the Brisbane Registry on:

AMENDED DEFENCE OF THE FOURTH DEFENDANT TO THE FIFTH THIRD FURTHER AMENDED STATEMENT OF CLAIM DATED 2 APRIL 4 FEBRUARY 2019 ("STATEMENT OF CLAIM")



AMENDED DEFENCE OF THE FOURTH DEFENDANT TO THE FIFTH THIRD FURTHER AMENDED STATEMENT OF CLAIM
Filed on behalf of the Fourth Defendant
Rule 146

JAMES CONOMOS LAWYERS PTY LTD
Level 12 179 Turbot Street
BRISBANE QLD 4000
Telephone: 07 3004 8200
Facsimile: 07 3221 5005

The fourth defendant relies on the following facts in defence of the claim. For the purposes of this pleading, and save as indicated otherwise, the fourth defendant adopts the definitions as used in the statement of claim.

Parties and roles

1. The fourth defendant admits paragraphs 1, 4 and 4A of the statement of claim.
2. As to paragraph 2 of the statement of claim, the fourth defendant admits the allegations therein and says that:
 - a) ~~admits that she is and has been a director of LMIM since 30 September 2006;~~
 - b) ~~admits that the third 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 24 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, she 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 to 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 fourth 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 who, in that role, was responsible for and supervised approximately 25 staff members in the marketing team;
- 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 fourth defendant:

- a) in her capacity as a director, occupied the role of head of the Marketing Team within LMIM, which role occupied her daily activities within LMIM;
- b) in her role within LMIM, 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) in the premises, 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 she 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 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 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 she 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 her 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 fourth defendant:
 - a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 5 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
4. As to paragraph 6 of the statement of claim, the fourth defendant does not admit the allegations therein because:
 - a) the fourth 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 fourth defendant remains uncertain as to the truth or falsity of the allegations.
5. As to paragraph 7 of the statement of claim, the fourth defendant does not admit the allegations therein because:
 - a) the fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 7 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - b) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
6. As to paragraph 8 of the statement of claim, the fourth defendant:
 - a) admits that the plaintiff has disclosed to the fourth 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 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 purporting 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 8, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
7. As to paragraph 9 of the statement of claim, the fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 9 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 fourth defendant remains uncertain as to the truth or falsity of the allegations.
8. As to paragraph 10 of the amended statement of claim, the fourth defendant does not admit the allegations therein because:

- (i) the fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 10 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
9. As to paragraph 11 of the statement of claim, the fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 11 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
10. As to paragraph 12 of the statement of claim, the fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 save that cl 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."
 - ~~(ii) PTAL is not specifically mentioned in cl.8;~~
 - b) ~~relies on the Deed of Priority for its full terms, true meaning and effect; and~~
 - c) otherwise does not admit the allegations therein because:
 - (i) the fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 12 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and

- (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
11. As to paragraph 13 of the statement of claim, the fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 13 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
12. As to paragraph 14 of the statement of claim, the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 14 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 fourth defendant remains uncertain as to the truth or falsity of the allegations.
13. The fourth defendant admits paragraph 15 of the statement of claim, as recorded in the historical company extract for Bellpac.
14. The fourth 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 fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 17 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and

- (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.

16. As to paragraph 18 of the statement of claim, the fourth defendant:

- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 18 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.

17. As to paragraph 19 of the statement of claim, the fourth defendant does not admit the allegations therein because:

- a) the fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 19 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
- b) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.

18. As to paragraph 20 of the statement of claim, the fourth defendant:

- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 20 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
19. As to paragraph 21 of the statement of claim, the fourth defendant ~~does not admit the allegations therein because:~~
- 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 21 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - b) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.
20. As to paragraph 22 of the statement of claim, the fourth 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 48 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 11 of the statement of claim, for the reasons pleaded in paragraphs 2B and 2C above; and
 - (ii) despite having made reasonable inquiries, the fourth 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 fourth 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 fourth 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 fourth defendant, and says that they are untrue because the fourth 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 fourth defendant.~~

22. As to paragraph 24 of the statement of claim, the fourth defendant:

- a) ~~repeats and relies on the matters pleaded in the preceding paragraph hereof and admits that the fourth defendant was generally aware, says that~~ from about July 2009 onwards, ~~that:~~
 - (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 fourth 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 fourth 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 fourth 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 fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 fourth defendant, although she was aware that there had been 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 fourth defendant remains uncertain as to the truth or falsity of the allegations.
24. As to paragraph 26 of the statement of claim, the fourth 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 fourth 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 fourth defendant remains uncertain as to the truth or falsity of the allegations.
25. As to paragraph 27 of the statement of claim, the fourth 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 fourth 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 fourth 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 fourth defendant:
- a) admits that the plaintiff has disclosed to the fourth 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 Southbullii;
 - (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, Southbullii 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 Deeds 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 26bb)(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, Southburi 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 fourth defendant was not directly or materially involved in the matters subject of the allegations in paragraph 28 of the statement of claim, as and for the reasons 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 fourth defendant remains uncertain as to the truth or falsity of the allegations.

27. As to paragraph 29 of the statement of claim, the fourth 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 fourth 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 and for the reasons pleaded in paragraphs 2B and 2C above; and
- (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.

28. As to paragraph 30 of the statement of claim, the fourth 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 fourth 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 and for the reasons pleaded in paragraphs 2B and 2C above; and

- (ii) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations.

Advice

29. The fourth 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 fourth 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 fourth defendant of 14 March 2011, in which email the second defendant informed the fourth 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 fourth 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 onwards 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; and

(v) says that:

(A) the fourth defendant was not directly or materially involved in the settlement negotiations concerning the Proceedings; and

(B) the fourth 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;

~~e) 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 30C(b)(ii); 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 Bellco 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 2.2(b)) that the Property would be sold to SBH for \$35M;~~

~~D.3 in the Proceedings, the plaintiffs alleged that Bellco 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 \$40M;~~

~~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 of 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 these 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 Belpae Proceedings (as pleaded in paragraph 20d) above), to refuse to settle these 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 cumikin 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 necessity, nor apparent reason, 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) denies that the matters in subparagraph (d)(i) were "facts" as alleged and believes that allegation to be untrue because:
 - (A) 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
 - (B) the fourth 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
- (iii) does not admit the allegations in subparagraph (d)(ii) because:
 - (A) the fourth defendant was not directly or materially involved in the matters subject of the allegations in subparagraph (d)(iii) of the statement of claim, as and for the reasons pleaded in paragraphs 2B and 2C above; and
 - (B) despite having made reasonable inquiries, the fourth defendant remains uncertain as to the truth or falsity of the allegations; 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 fourth defendant believes and was aware:
 - B.1 LMIM as trustee of the MPF funded the proceedings on the basis as pleaded in subparagraph 31f)(ii)(B) 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 fourth 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 fourth 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 fourth 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](a) and not [16](f) of the Allens Advice;
- c) admits that the Allens Advice contained the statement as quoted in subparagraph 30F(i), 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 fourth 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 fourth 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 fourth defendant remains uncertain as the truth or falsity of the allegations.

33C. As to paragraph 30H of the statement of claim, the fourth 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 that 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 that allegations therein as they are vague and embarrassing and do not make any allegation against the fourth 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 on 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 was 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 ss 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 fourth 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(q) 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 axiomaticly, 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 fourth defendant was not the author of the Allens Advice or of the statement of claim;
 - (B) the fourth 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 fourth defendant remains uncertain as to the truth or falsity of the allegations;
- i) 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 fourth 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;
- j) 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 (j) 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 fourth 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 fourth defendant:
- a) admits to the existence of an undated Deed Poll as disclosed by the plaintiff to the fourth defendant;
- b) admits that the fourth defendant as a director of LMIM executed the Deed Poll;
- c) admits that the Deed Poll was signed by the fourth 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 fourth defendant on or around 14 June 2011;
- e) admits that each of the first, second, third, fifth and sixth defendants executed the Deed Poll, but does not admit when each of those defendants executed the Deed Poll. The fourth defendant believes that those other defendants also signed the Deed Poll on or about 14 June 2011, but despite having made

reasonable inquiries, the fourth defendant remains uncertain of exactly when each other defendant executed the Deed Poll; and

- f) denies that the fourth 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 fourth 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 defendants 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 fourth defendant:

- a) admits that, prior to executing the Deed Poll, she knew the facts alleged in the paragraphs referred to which she has admitted above, save that she 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, third, 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 she 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 she 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 fourth 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 fourth 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 ss 601FC or 601FD of the Act;

- (ii) whether or not the Deed Poll referred to those 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
 - (ii) whether or not the Deed Poll referred to the Allens Advice, the Conflicts Management Policy or ss 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 fourth 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 fourth defendant:

- a) denies the allegations therein and believes that they are untrue because, by reason of the matters pleaded in paragraph 22-b)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 fourth 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) the fourth 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 fourth ~~third~~ defendant remains uncertain as to the truth or falsity of the allegations;
- c) as to subparagraph 33(a):

- (i) admits that she 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 370 and 370 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 fourth defendant was generally 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 fourth 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 fourth 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 fourth defendant, denies the allegations and believes that they are untrue because she 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth defendant;

- aa) as to subparagraph 34(aa), the fourth defendant denies that she did not adequately consider the content of the Allens Advice and believes that the allegation is untrue because she did give adequate consideration to the content of the Allens Advice;
- b) in so far as subparagraph 34(a) makes allegations against the fourth defendant respondent:
- (i) denies that, upon executing the Deed Poll, the fourth 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) she 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 prior to the fourth defendant becoming a director;
- (C) the Deed of Priority, or its terms, was not brought to the attention of the fourth defendant by any person in relation to the split of proceeds at any time prior to the fourth defendant executing the Deed Poll; and
- (D) of the matters pleaded in paragraphs 2B, 2C, 30, 38(ba) 31-e, 31-f), 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 fourth 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 fourth defendant repeats and relies upon paragraph 30b) 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 fourth defendant repeats and relies upon paragraph 31-d) above hereof.

C.3 to the effect as pleaded in subparagraphs 33-b) and 33C(c)(v) (on part of Allens) and otherwise that the proceeds split was fair and reasonable;

(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 fourth 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 31e) hereof;

Particulars

~~The fourth 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 fourth defendant did not know of the fact alleged in subparagraph 34(b)(i), nor should she ought to have known that fact because of the matters pleaded in paragraphs 2B, 2C, 26, 30, 31, 33.b), 38(ba) 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 fourth ~~respondent~~ defendant:
- (i) admits that the fourth 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.e); 31.f)~~, 33.b) and 38b) above hereof;
- (iii) denies that, upon executing the Deed Poll, she 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 fourth defendant did not then know of those specific matters;
- (iv) ~~denies that, upon executing the Deed Poll, she ought to have known of the fact alleged in subparagraph 34(c)(ii) and believes that those allegations are untrue because:~~
- (A) ~~the fourth 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 prior to the fourth defendant becoming a director;~~
- (C) ~~the Deed of Priority, or its terms, was not brought to the attention of the fourth defendant by any person in relation to the split of proceeds at any time prior to fourth defendant executing the Deed Poll; and~~
- (D) ~~of the matters pleaded in paragraphs 2B, 2C, 30, 33b) and 38b)(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) it was not necessary for the fourth defendant, who was neither the officer at LMIM with conduct of the Proceedings nor the head of the property asset management team within LMIM, specifically to know (and she did not know) that the MPF was drawing down funds against the MPF Bellpac Loan;
- (C) the fourth defendant was not the officer within LMIM dealing with or responsible for the conduct of the Bellpac Proceedings or the settlement thereof;
- (D) the Deed of Priority was entered into by others on behalf of LMIM prior to the fourth defendant becoming a director;
- (E) the Deed of Priority, or its terms, was not brought to the attention of the fourth defendant by any person in relation to the split of proceeds at any time prior to the fourth defendant executing the Deed Poll; and
- (F) of the matters pleaded in paragraphs 2B, 2C, 22.b), 26, 30, 38(ba), 31.e), 31.f), 33b) and 38b)ii) above hereof;

(v) denies that, upon executing the Deed Poll, she 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 fourth 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), 31.e), 31.f), 33b) and 38b)(ii) above hereof;

~~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 fourth 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 34(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, 31a)(v), b)(iv), 38(ba), 31.e), 31.d), and 31.e) and 31.f), above;

- (iii) the said advice was to the effect pleaded in paragraphs 33b), 33C(a), 33C(c)(v) and 33C(g) above;
 - (iv) prior to executing the Deed Poll, the fourth 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 fourth 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 fourth defendant of the Deed Poll, the fourth 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 fourth 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 38.f) 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 31.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 paragraphs 26 and 38(ba) ~~34(e)~~ 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; and
 - (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 fourth 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 fourth defendant respondent:
- (i) admits that she took into consideration the Allens Advice and the WMS Report; and
 - (ii) denies that she 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 fourth 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 fourth 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 her 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 fourth defendant's reliance on the above matters was made:
 - (A) in good faith; and
 - (B) after making her own independent assessment of the information, advices and matters referred to in subparagraph 38k)(i) above;

having regard to her 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth 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.

40. As to paragraph 36 of the statement of claim, the fourth 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 in so far as they:
- (i) ~~are unclear as to what "decision" is referred to with reference to the Deed Poll; and~~

- (iii) concern the state of mind of persons other than the fourth defendant; and
 - b) in so far as the allegations are made against the fourth 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), 38.b)(ii)(B), 38.e)(iv), 38.f), 38k) and 39.c) above and the matters set out in the Deed Poll, and also in reliance, on part of the fourth 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 fourth 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 31.f)(ii) 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 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; and
 - (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 fourth 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 her position and responsibilities within LMIM, the fourth 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 her;
- aa) of the matters pleaded in paragraph 33C above:
- b) a person in the fourth 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 (v) 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 fourth 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 fourth defendant at the time, as pleaded above herein;
- d) it was reasonable for the fourth 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) 31-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 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 fourth 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 fourth 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 fourth 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 fourth defendant remains uncertain as to the truth or otherwise of the allegations.

Contraventions of s 180, 182 of the Corporations Act

44. ~~The fourth 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 fourth 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 fourth defendant:~~
 - ~~(A) exercised her powers and discharged her 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 her 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 her 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 fourth defendant.~~

~~46. As to paragraphs 39A and 39B of the statement of claim, the fourth 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 fourth 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 fourth 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 fourth 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;

e) — 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 fourth 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 fourth defendant's knowledge.

Particulars

The fourth 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth 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 fourth 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 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 29.1 of the Constitution of the FMIF (Replacement Constitution) (FMIF, 100.005.7639).
- 54A. The fourth 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 MPF 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 fourth 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 fourth 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 fourth 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 paragraph 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 41.b)(iv) and (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 fourth 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) and 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 64 to 56 above, the fourth defendant:

- a) 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) says that 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 fourth 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) and 55 above, 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 fourth 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 fourth defendant's knowledge; and~~
- ~~b) repeats and relies on the matters pleaded above herein in response to paragraphs 1(b), 1(e), 2, 5, 12, 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 fourth defendant:~~

- ~~a) admits that LMIM as trustee of the MPF received the Settlement payment (as defined in the statement of claim - the sum of \$16,546,147.86) 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 enter 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 fourth 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 \$16,546,147.85), 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 fourth 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 fourth defendant denies the allegations in paragraphs 43A and 43B of the statement of claim and believes that they are untrue because of the matters pleaded in paragraphs 42 and 40 to 52, 44, 45 and 46 above.~~

~~61. As to paragraph 40 of the statement of claim, the fourth 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 fourth defendant does not admit the allegations in paragraphs 50 to 64 of the statement of claim. The fourth 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 fourth defendant contravened s 601FD(1) 480(4) of the Act, the fourth defendant says that:
- a) in executing the Deed Poll and thereby by making, permitting or directing the Proceeds Split and the making of the Settlement payment 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 she considered that it was commercially appropriate and proper to proceed with the Proceeds Split in order to honour the basis on which she 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) she 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) she informed herself about the Proceeds Split and Settlement payment to the extent she reasonably considered appropriate, in the circumstances pleaded in paragraphs 2B and 2C and 9.k) above;
 - e) prior to executing the Deed Poll or otherwise approving of the Proceeds Split or the making of the Settlement payment, the fourth 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 fourth defendant, the fourth 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 the FMIF and the members thereof;~~
 - g) in the premises pleaded in (a) to (f) above, ~~pursuant to s.180(2) of the Act~~ the fourth 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 her 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 fourth defendant met, or is taken to have met, ~~the requirements of s.180(1) of the Act~~ her duties to exercise her power and discharge her duties with the degree of care and diligence that a reasonable person would exercise if they

were in the fourth defendant's position [as that phrase is used within the meaning of s 601FD(1)(b) of the Act].

64. Further or alternatively, should the Court find, contrary to the matters pleaded above, that the fourth 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 fourth 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 fourth defendant ought fairly to be excused for any contravention; and
 - c) in the premises pleaded in (a) and (b), the fourth defendant seeks an order pursuant to ~~s~~ s 1317S(2) of the Act, or ~~s~~ s 1318(1) of the Act, or both, relieving her wholly or partly from any liability to which she 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 fourth defendant's reliance on the information and advices referred to in paragraph 63d) above is taken to be reasonable unless the contrary is proved.
66. Except as stated above, the fourth 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 Fourth 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.

SUPREME COURT OF QUEENSLAND

04 APR 2019

REGISTRY: Brisbane
NUMBER: 12317/14

FILED
BRISBANE

Amended pursuant to Orders of Justice Jackson on 3 April 2019
H.W. Litigation 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

Defendants:

PETER CHARLES DRAKE & ORS

Filed in the Brisbane registry on 4 April 2019.

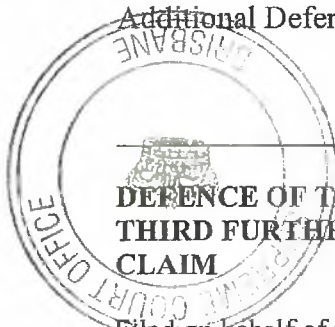
DEFENCE OF THE SIXTH DEFENDANT TO THE FIFTH FURTHER AMENDED STATEMENT OF CLAIM

The sixth defendant relies on the following facts in defence of the claim:

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04 APR 2019

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DEFENCE OF THE SIXTH DEFENDANT TO THE THIRD FURTHER AMENDED STATEMENT OF CLAIM

HW Litigation
Suite 30803, 9 Lawson Street
SOUTHPORT QLD 4215
Telephone: 07 5556 7100
Facsimile: 07 5556 7111

Filed on behalf of the sixth defendant
Form 17 - R. 146

Parties and roles

1. The sixth defendant admits the allegations in paragraph 1 of the Fifth Further Amended Statement of Claim ("Statement of Claim").
2. As to paragraph 2 of the Statement of Claim, the sixth defendant:
 - (a) admits ~~the allegations that he was a director of LMIM between 18 September 2008 and 13 July 2012;~~
 - (b) ~~says 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 has been a director of LMIM since 22 June 2006;~~
 - (iv) ~~the fourth defendant 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;~~
 - (c) ~~does not otherwise admit the allegations because he is uncertain as to the meaning of the expression "all material times";~~
 - (d) says further that David Monaghan ("Monaghan"):
 - (i) was admitted as a solicitor in 1990;
 - (ii) between 2004 and 2010, was employed by LM Administration Pty Ltd, initially as a risk manager and subsequently as commercial lending manager;
 - (iii) in his role as commercial lending manager, managed the commercial lending department in LMIM, which was responsible for a portfolio of loans, including (from in or about 2006):
 - (A) the FMIF Bellpac Loan (as defined in paragraph 6 of the Statement of Claim); and
 - (B) the MPF Bellpac Loan (as defined in paragraph 10 of the Statement of Claim);
 - (iv) from 1 March 2010 to 24 October 2012:
 - (A) was the principal of a law firm called Monaghan Lawyers; and
 - (B) acted as solicitor retained by LMIM in respect of the Proceedings (as defined in paragraph 22 of the Statement of Claim and clarified in paragraph 22 below) and matters associated with them, including settlement of the Proceedings and the matters the subject of these proceedings.
3. As to the allegations in paragraph 3 of the Statement of Claim, the sixth defendant:

- (a) admits the allegations;
- (b) ~~in relation to the allegations in subparagraphs (d)(ii) and (e), says that:~~
- (i) ~~the plaintiff's standing is thereby 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) ~~he has no standing to bring proceedings for alleged breaches of duties under Part 2D.1 of the Act.~~

4. The sixth defendant admits the allegations in paragraph 4 of the Statement of Claim.
- 4A. The sixth defendant admits the allegations in paragraph 4A of the Statement of Claim.

Bellpac loans

5. The sixth defendant admits the allegations in paragraph 5 of the Statement of Claim.
6. The sixth defendant admits the allegations in paragraph 6 of the Statement of Claim.
7. The sixth defendant admits the allegations in paragraph 7 of the Statement of Claim.
8. The sixth defendant admits the allegations in paragraph 8 of the Statement of Claim.
9. The sixth defendant admits the allegations in paragraph 9 of the Statement of Claim.
10. The sixth defendant admits the allegations in paragraph 10 of the Statement of Claim.
11. The sixth defendant admits the allegations in paragraph 11 of the Statement of Claim.
12. As to paragraph 12 of the Statement of Claim, the sixth defendant:
- (a) ~~says that cl. 8 of the Deed of Priority provided as follows: denies the allegations in subparagraph (e) because:~~
- (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."~~

- (ii) ~~PTAL is not specifically mentioned in cl. 8;~~
- (b) ~~otherwise~~ admits the allegations.
13. The sixth defendant admits the allegations in paragraph 13 of the Statement of Claim.
14. The sixth defendant admits the allegation in paragraph 14 of the Statement of Claim.
15. The sixth defendant admits the allegation in paragraph 15 of the Statement of Claim.
16. The sixth defendant admits the allegations in paragraph 16 of the Statement of Claim.

Bellpac sale of the Property to Gujarat

17. As to paragraph 17 of the Statement of Claim, the sixth defendant:
 - (a) does not admit that the parties entered into the LASA on or about 22 September 2004 because the LASA is dated 21 October 2004 and the sixth defendant has no personal knowledge of its execution;
 - (b) otherwise admits the allegations.
18. The sixth defendant admits the allegations in paragraph 18 of the Statement of Claim.
19. The sixth defendant admits the allegations in paragraph 19 of the Statement of Claim.
20. As to paragraph 20 of the Statement of Claim, the sixth defendant:
 - (a) admits the allegations;
 - (b) says that Southbulli Holdings Pty Ltd (SBH):
 - (i) was a subsidiary of Gujarat; and
 - (ii) was also a party to each of the Settlement Deeds.
21. The sixth defendant admits the allegations in paragraph 21 of the Statement of Claim.
22. As to paragraph 22 of the Statement of Claim, the sixth defendant:
 - (a) admits the allegations in subparagraphs (a) and (b);
 - (aaa) denies the allegations in subparagraph (b) and believes the allegations to be untrue because the Bellpac proceedings:
 - (i) were commenced by LMIM, as trustee of the MPF, and Bellpac, against Gujarat, by summons filed in the Supreme Court of New South Wales on 7 July 2009 with case number 3577 of 2009 [FMIF.040.004.0118];
 - (ii) were supported by an affidavit of Monaghan sworn on 1 July 2009, in which he deposed, among other things, that LMIM as plaintiff was the trustee of the MPF (Monaghan affidavit) [FMIF.300.002.2575];
 - (iii) were also supported by a statement of claim filed on 27 July 2009 [FMIF.028.001.0044];
 - (iv) were, on or around 27 November 2009, transferred to the Commercial List [FMIF.300.002.2704]
 - (v) 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 (including under the MPF Charge) in respect of the subject matter of those proceedings as identified in the Monaghan affidavit, an Amended List Summons dated 5 February 2010, New South Wales case number 298727/2009, paragraph 18, a Commercial List Statement filed on or about 27 November 2009 and an Amended Commercial List Statement dated 5 February 2010, New South Wales case number 298727/2009, paragraphs 19 to 49; and
 - (vi) in the premises pleaded in (i) to (v) above, LMIM as trustee of the MPF was a party to the Bellpac proceedings;

- (vii) PTAL did not become a party to the Bellpac proceeding until about 27 November 2009, when PTAL (on behalf of LMIM as RE of the FMIF) was joined as a plaintiff and Coalfields, Bounty and ~~GDC~~ GPC were joined as defendants;
- (aa) says further that PTAL did not make any claim in reliance on the PTAL charge until 8 February 2010, when PTAL and LMIM caused the Amended Commercial List Statement to be filed in the Court;
- (b) admits that Coalfields commenced legal proceedings against Bellpac and Gujarat, but otherwise does not admit the allegations in subparagraph (c) because it appears that the Coalfields cross-claim was made in the Bellpac proceedings, not the Gujarat proceedings.

Funding of the Proceedings

~~23. The sixth defendant admits the allegations in paragraph 23 of the Statement of Claim.~~

24. As to paragraph 24 of the Statement of Claim, the sixth defendant:

- (a) admits that, from in or about July 2009, LMIM as trustee of the MPF funded the defence of the Gujarat proceedings, the prosecution of the Bellpac proceedings and the defence of the Coalfields cross-claim;
- (aa) further as to sub-paragraph (a), relies on the matters pleaded in paragraph 22(b) of the amended defence of the second defendant to the third further amended statement of claim;
- (b) does not admit the amount of that funding because, despite reasonable enquiries, the sixth defendant remains uncertain as to the truth or otherwise of the allegations;
- (c) denies that LMIM as trustee of the MPF funded the Proceedings as second mortgagee because:
 - (i) in or about July 2009 to February 2010, the first to sixth defendants formed the view that LMIM as RE of the FMIF was not in a position to fund the Proceedings, including because of the conditions imposed on it by its financiers, which substantially controlled the uses to which it could put funds received by it;
 - (ii) LMIM as trustee of the MPF initially funded the Proceedings and, from the time when PTAL was joined as a party to the Bellpac proceedings, LMIM as trustee of the MPF continued to provide was providing funding to LMIM as RE of the FMIF to allow it to progress and defend (respectively) the Proceedings; and
 - (iii) because of the matters pleaded in paragraph 23 of the Statement of Claim and paragraphs 30C(k)(ii), 33(c), 34(c)(ii), 37(a), 37A(c)(vi), 37A(d)(i) and 55(b)(ii) herein; and
 - (iv) the funding was not provided pursuant to the Deed of Priority;
- (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 gave an undertaking as to damages in the Proceedings and 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.~~

Mediation Heads of Agreement

25. The sixth defendant admits the allegations in paragraph 25 of the Statement of Claim.
26. The sixth defendant admits the allegations in paragraph 26 of the Statement of Claim.
27. The sixth defendant admits the allegations in paragraph 27 of the Statement of Claim.

Settlement of the LMIM Bellpac proceedings

28. The sixth defendant admits the allegations in paragraph 28 of the Statement of Claim, and says further that, on the proper construction of the Deed of Release and Deed of Settlement and Release, LMIM as trustee of the MPF was also a party to those Deeds.
29. The sixth defendant admits the allegations in paragraph 29 of the Statement of Claim.
30. The sixth defendant admits the allegations in paragraph 30 of the Statement of Claim.

Advice

- 30A. The sixth defendant admits the allegations in paragraph 30A of the Statement of Claim and says further that:
- (a) on 6 December 2010, WMS sent a letter of engagement addressed to Monaghan of Monaghan Lawyers;
 - (b) the letter of engagement 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;
 - (c) 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;
 - (d) on 9 December 2010, he provided instructions to Monaghan via email to accept the WMS terms of engagement.
- 30B. The sixth defendant admits the allegations in paragraph 30B of the Statement of Claim and says further that 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 settlement thereof.
- 30C. As to paragraph 30C of the Statement of Claim, the sixth defendant:
- (a) admits subparagraph (a);
 - (b) says that the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement:
 - (i) were not executed until 21 June 2011; and therefore

- (ii) could not have been provided to WMS on 6 December 2010 or to Allens on 14 March 2011;
- ~~(c) admits that the instructions provided to WMS and Allens did not state the matters alleged in subparagraph (b);~~
- ~~(d) denies that those matters pleaded in subparagraph (b)(ii) were "facts" as alleged because of the matters pleaded in subparagraphs (c) and (g) below;~~
- (e) denies says further in respect of the allegations in subparagraph (b)(i) because, that as at the dates of the WMS instructions on 6 December 2010 and the Allens instructions on 14 March 2011:
- (i) the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement were not in existence;
- (ii) the structure of any final settlement had not been agreed and it was not agreed until at least June 2011;
- (f) says that the instructions to WMS and to Allens respectively attached copies of the Mediation Heads of Agreement;
- (fa) says that Allens:
- (i) at all material times between April 2009 and November 2009 and again from 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 the Proceedings;
- (ii) 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 the Deed of Settlement and Release;
- (iii) were, through their involvement pleaded in (i) and (ii) above, aware of the structure of the proposed settlement of the Proceedings and any earlier proposed structure, and it was not necessary to separately state the matters referred to in subparagraph (b)(i) in the instructions to Allens;
- ~~(g) denies the allegations in subparagraph (b)(ii) 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 settle the Proceedings because:~~
- ~~(ia) 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;~~
- ~~(ib) LMIM as trustee of the MPF was a party to the Proceedings;~~
- ~~(ic) LMIM as RE of the FMIF and/or PTAL had no authority to settle the Proceedings on behalf of LMIM as trustee of the MPF;~~
- ~~(id) 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;~~
- ~~(ie) 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 Settlement and Release;~~

~~(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 Bellpae 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 Bellpae 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;~~

~~(ai) 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);~~

~~(ii) therefore (or in any event), LMM as trustee of the MPF was entitled:~~

~~(A) to withhold its consent to the sale of the Property, in respect of which the sixth defendant repeats and relies on the matters pleaded in subparagraph (g)(i) 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;~~

~~(B) to refuse to hand over or release its securities;~~

~~(C) to refuse to terminate the Bellpae 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 FMF for damages or other relief, including;~~

~~D.1 for payment of a litigation funding fee;~~

~~D.2 for damages for misleading or deceptive conduct;~~

~~D.3 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;~~

~~(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 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);~~

(h) admits subparagraph (c) 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;

(i) says that the instructions to WMS and to Allens instructed each of them that the loan by LMIM as RE of the FMIF was secured by registered first mortgages and was approximately \$49M at November 2010, while the loans by LMIM as trustee of the MPF were secured by second registered mortgages and were approximately \$24M at November 2010;

(j) admits that the instructions provided to WMS and Allens did not state the matters in subparagraph (d)(i) and (ii);

(k) 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 allow it and PTAL 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;

Particulars

- (A) the sixth defendant had the understanding from about July 2009;
- (B) the nature of the contribution was a financial contribution sufficient to allow it ~~LMIM as RE of the FMIF~~ to progress and defend defend (respectively) the Proceedings;
- (C) there were no discussions or other communications that the sixth defendant can recall, as to the quantum of the MPF's share of any proceeds which resulted from the Proceedings, except:
1. email dated 21 October 2010 and sent at 12:52pm from Simon Tickner to David Monaghan [FMIF.100.003.0603];
 2. emails dated 12 November 2010 between David Monaghan and Lisa Darcy [FMIF.100.003.0107];
 3. emails dated 22 November 2010 between David Monaghan, Lisa Darcy, Simon Tickner, Andrew Petrik and Eghard van der Hoven [FMIF.100.002.9889; FMIF.100.002.9885];
 4. email dated 24 November 2010 and sent at 12:19pm from David Monaghan to multiple recipients including Simon Tickner [FMIF.100.003.4246];
 5. email dated 1 December 2010 from David Monaghan to Lisa Darcy and Simon Tickner [FMIF.100.003.4665];
 6. emails dated 2 December 2010 between Andrew Petrik to Simon Tickner and other recipients [FMIF.100.002.9314; FMIF.100.002.9294];
 7. emails dated 1-3 December 2010 between David Monaghan, Lisa Darcy and Simon Tickner [FMIF.100.003.4694];
 8. email dated 3 December 2010 and sent at 3:08pm from David Monaghan to Lisa Darcy and Simon Tickner [FMIF.100.002.9213];
 9. email (and attachments) dated 15 December 2010 from Aaron Lovell of WMS Solutions to David Monaghan and Simon Tickner [FMIF.200.013.8984, FMIF.200.013.8985, FMIF.200.013.8986];
 10. email dated 10 June 2011 from David Monaghan to Bronwyn Kingston (attaching a copy of the Deed Poll which was later sent to the sixth defendant) [FMIF.400.001.0011, FMIF.400.001.0012];

11. from about November 2010 to June 2011, the directors of LMIM had various discussions, the details of which the sixth defendant cannot recall, about how to divide the likely proceeds of settlement;

- (l) admits the allegation in subparagraph d(ii) that LMIM as trustee of the MPF drew down funding for the Proceedings against the MPF Bellpac Loan, but says further that it was entitled under the terms of the MPF Bellpac Loan to do so;
- (m) as to subparagraph (d)(iii):
- (i) admits that 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, in the sense that there was no concluded agreement or contract to that effect;
- (ii) otherwise denies that there was no binding express prior arrangement because:
- (A) LMIM as trustee of the MPF was funding the Proceedings for its own benefit and was not subordinated to the interests of LMIM as RE of the FMIF in any settlement which might occur;
- (B) 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, the particulars of which understanding are set out at paragraph 30C(k)(ii) above;
- (iii) says further that, even if there was no binding express prior arrangement in the sense pleaded by the plaintiff:
- (AA) LMIM as trustee of the MPF was a party to the Proceedings;
- (A) the consent of LMIM as trustee of the MPF was required in order for LMIM as RE of the FMIF or PTAI to settle the Proceedings;
- (B) LMIM as trustee of the MPF was entitled to withhold that consent unless an appropriate agreement was reached with LMIM as RE of the FMIF to share the settlement proceeds;
- (C) 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 Proceedings;
- (D) 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 Proceedings.

30D. The sixth defendant:

- (a) admits the allegations in paragraph 30D of the Statement of Claim;
- (b) says that:
 - (i) 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;
 - (ii) the WMS Report was addressed and provided by WMS to Monaghan Lawyers and Monaghan Lawyers provided a copy of it to LMIM.

30E. The sixth defendant:

- (a) admits the allegations in paragraph 30E of the Statement of Claim;
- (b) says 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 (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;
 - (iv) 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.

30F. As to paragraph 30F of the Statement of Claim, the sixth defendant:

- (a) admits that the Allens Advice contained statements as quoted in subparagraphs (a), (b), (d) and (e), (g) to (k), (m), (n) and (p);
- (b) admits that the Allens Advice at paragraph 16 contained the statement quoted at subparagraph (c) up to the word "matters", but denies that the words then appearing were, or accurately describe, the subsequent words in paragraph 16;
- (c) admits that the Allens Advice contained the statement quoted in subparagraph (f), but says that this should be a reference to paragraph 16(g) and not 16(f) of the Allens Advice;
- (d) admits that the Allens Advice contained the statement quoted in subparagraph (l), but says that this should be a reference to paragraph 56 and not 55 of the Allens Advice;
- (e) admits that the Allens Advice contained the statement quoted in subparagraph (o), but says that the quote omits the word "direct" before the word "fiduciary".

30G. As to paragraph 30G of the Statement of Claim, the sixth defendant:

- (a) ~~does not admit~~ admits the allegations ~~and believes the allegations cannot be admitted because the relevant Conflict Management Policy is not identified by date or other document reference, such that the sixth defendant, despite reasonable enquiries, remains uncertain as to the truth or otherwise of the allegations;~~
- (b) says further that the extracts from the Policy pleaded by the Plaintiff are not relevant to any issue in these proceedings because these proceedings do not concern any allegation by the plaintiff of a conflict between the duties owed under section 601FC or section 601FD of the *Corporations Act* and Part 2D.1 of the *Corporations Act*.

30H. As to paragraph 30H of the Statement of Claim, the sixth defendant:

- (a) admits the allegations in subparagraph (a) and says further that paragraph 15 of the Allens Advice adverts to the purpose of the advice being to advise LMIM whether it was legally acceptable for LMIM as RE of the FMIF to split the anticipated settlement proceeds with LMIM as trustee for the MPF, noting the position of conflict;
- (b) does not admit the allegations in subparagraph (b) and believes the allegations cannot be admitted because the allegation that the Allens Advice "set out a number of matters" is vague and embarrassing and insufficiently particularised to allow the sixth defendant to plead further;
- (c) as to subparagraph (c):
- (i) admits that paragraph 25 of the Allens Advice referred to the need for LMIM as RE of the FMIF to act in the best interests of the members of the FMIF;
- (ii) denies that paragraph 27 of the Allens Advice referred to the need for LMIM as RE of the FMIF to act in the best interests of the members of the FMIF and believes the allegation to be untrue because paragraph 27 of the Allens Advice assumed that to be the case and stated:

"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."

- (iii) 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 of LMIM as RE of the FMIF to act in the best interests of members of the FMIF;
- (iv) says that:
- (A) it was not part of the Allens Advice to opine on how paying 35% of the anticipated settlement proceeds would be consistent with the obligation of LMIM as RE of the FMIF to act in the best interests of members of the FMIF;
- (B) the *raison d'être* of the Allens Advice, as expressed in paragraphs 14 and 15 of the advice, was whether paying 35% of the

anticipated settlement proceeds to the MPF was legally acceptable, having regard to the identified conflict of interest;

(C) paragraph 16 of the Allens Advice concluded that it was legally acceptable for LMIM to split the litigation proceeds between the FMIF (65%) and the MPF (35%);

(D) the Allens advice did not state that paying 35% of the anticipated settlement proceeds to the MPF would be inconsistent with the interests of members of the FMIF or the MPF, nor with the duties owed by the officers of LMIM under s.601FD of the Act;

(d) as to subparagraph (d):

(i) admits that paragraph 56 of the Allens Advice 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;

(ii) denies that the above was a misconstruction of ss 601FC(1)(c) and 601FD(1)(c) of the Act and believes the allegation to be untrue because:

(A) paragraph 56 of the Allens Advice fell under the heading "Issues for the RE as an AFS Licensee", being issues for LMIM as a "financial services licensee" under s.921A of the Act;

(B) paragraph 56 of the Allens Advice did not, and did not purport to, address or advise upon the proper construction of ss 601FC(1)(c) and 601FD(1)(c) of the Act;

(C) there could be no misconstruction of ss 601FC(1)(c) and 601FD(1)(c) of the Act in paragraph 56 of the Allens Advice in circumstances where those sections were not addressed in any way in the paragraph;

(e) as to subparagraph (e):

(i) admits that by use of the term "vice versa", paragraph 56 of the Allens Advice 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;

(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 that obligation;

(iii) otherwise repeats and relies on subparagraph (c)(iv) above;

(f) denies the allegations in subparagraph (f) and believes the allegations to be untrue because:

(i) no such assumption appears at Recital (paragraph) 9;

(ii) paragraph 9 of the Allens Advice states that "[t]he 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) 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, the particulars of which are set out at paragraph 30C(k)(ii) above;
- (iv) whether there was an agreement or not was not relevant to the question of whether it was legally acceptable for LMIM to split the litigation proceeds in the circumstances pleaded in paragraph 30C(m)(iii) above;
- (g) denies the allegations in subparagraph (g) and believes the allegations to be untrue because:
 - (i) paragraph 25 of the Allens Advice is not irreconcilable with paragraph 35 thereof;
 - (ii) paragraph 27 of the Allens Advice is not irreconcilable with paragraph 37 thereof;
 - (iii) he says further that:
 - (A) the plaintiff has not pleaded how those paragraphs are irreconcilable with one another;
 - (B) paragraphs 25, 27, 35 and 37 concern the general law duties of LMIM as RE of the FMIF and as trustee of the MPF;
 - (C) the plaintiff makes no allegation that the sixth defendant has breached, or caused LMIM to breach, a general law duty and any irreconcilable conclusions in those paragraphs are irrelevant to these proceedings;
 - (D) in any event, the Allens Advice concluded in paragraph 16 that it was legally acceptable for LMIM to split the litigation proceeds between the FMIF (65%) and the MPF (35%);
- (h) as to subparagraph (h):
 - (i) denies that paragraph 16(e) of the Allens Advice referred to “LMIM’s Compliance Plan”, as it referred to “the FMIF compliance plan”, which the plaintiff has not identified;
 - (ii) ~~does not admit~~ denies that the Compliance Plan contained the terms pleaded at paragraph 30G of the Statement of Claim because that pleads terms of a document referred to as LMIM’s Conflicts Management Policy rather than to LMIM’s or FMIF’s compliance plan, which did not contain those words, alternatively for the reasons pleaded in paragraph 30G above;
 - (iii) says further that:
 - (A) paragraph 16(e) also referred to paragraphs 54 and 57 of the Allens Advice;

- (B) paragraph 54 of the Allens Advice identified the need for LMIM to review its compliance plan in the context of the duties of LMIM as RE of the FMIF under s.601FC(1) of the Act;
- (C) section 601FC(1) of the Act is not relevant to these proceedings;
- (D) paragraph 57 of the Allens Advice identified the need for LMIM to follow any policies established in accordance with s.912A(1)(aa) of the Act;
- ~~(E) section 912A(1)(aa) is not relevant to these proceedings;~~
- (F) the statement at paragraph 35 of the Allens Advice that LMIM must act in the best interests of the members of the MPF appears in the context of LMIM's general law duties and is not a discussion of a director's statutory duties under s.601FD(1) of the Act;
- (G) the plaintiff makes no allegation that the sixth defendant has breached, or caused LMIM to breach, a general law duty and therefore any irreconcilable conclusions in paragraphs 16(e) and 35 (if they exist, which is denied) are irrelevant to these proceedings;
- (H) in any event, acting in the best interests of the members of the MPF when making any decision regarding the split of the anticipated settlement proceeds was not necessarily (or automatically) inconsistent with, or contrary to, the duties imposed by s.601FD(1) of the Act;
- (i) as to subparagraph (i):
- (i) admits that paragraph 57 of the Allens Advice stated that LMIM would need to ensure that it followed any procedures or policies it has established in accordance with s.912A(1)(aa) of the Act for managing conflicts of interest;
- (ii) admits that paragraph 57 of the Allens Advice did not state how the proposed proceeds split could be reconciled with the matters pleaded at paragraph 30G of the Statement of Claim;
- (iii) says that:
- (AA) ~~section 912A(1)(aa) is not relevant to these proceedings;~~
- (A) the matters pleaded in paragraph 30G of the Statement of Claim concern, relevantly, resolution of conflicts between the duties imposed by s.601FD(1) and those imposed by Part 2D.1 of the Act;
- (B) no such conflict is alleged or in issue in these proceedings;
- (C) no allegation is made that any or all of the defendants failed to follow the LMIM Conflicts Management Policy;
- (j) denies the allegations in subparagraph (i) and believes the allegations to be untrue because:

- (i) paragraph 63 of the Allens Advice did not state that the effect of s.601FD(2) of the Act may have been to impose fiduciary duties on LMIM but stated that such duties may be imposed on the directors of a responsible entity, although generally directors of a trustee company do not owe fiduciary duties to the beneficiaries of the trust;
 - (ii) the duties were outlined in paragraphs 24 to 26 of the Allens Advice and included the words “the fundamental duty of all trustees is that of undivided loyalty to its beneficiaries (or to always act in the best interests of its beneficiaries)”;
- (k) as to subparagraph (k):
- (i) denies the allegation and believes it to be untrue because paragraph 16 of the Allens Advice did state that Allens considered that it was legally acceptable for LMIM to split the litigation proceeds between the FMIF and the MPF on the basis of the WMS Advice;
 - (ii) says further that:
 - (A) the plaintiff has failed to plead the “proper construction” that it relies on;
 - (B) to the extent that the plaintiff’s “proper construction” relies on the matters pleaded in paragraphs 30H(c)-(j) of the Statement of Claim, those constructions are incorrect for the reasons pleaded in subparagraphs (c) to (j) above;
- (l) further or alternatively, says that the sixth defendant:
- (i) is not a 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, and was not required to, analyse or construe the Allens Advice in the manner pleaded in paragraph 30H of the statement of claim; and
 - (vi) in determining, together with the other directors of LMIM, to proceed with the split of the proceeds of settlement of the Proceedings between LMIM as RE of the FMIF and LMIM as trustee of the MPF, had read the Allens Advice and took proper notice of its effect as he understood it;
 - (vii) knew that Monaghan had received and read the Allens Advice and Monaghan had never informed the sixth defendant that he disagreed with the Allens Advice or that the Allens Advice was in any way deficient, inadequate or wrong.

Deed Poll

31. The sixth defendant admits the allegations in paragraph 31 of the Statement of Claim.

31A. As to paragraph 31A of the Statement of Claim, the sixth 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;
- (b) does not admit whether the first to fifth defendants had such knowledge, as those are matters entirely within the knowledge of the first to fifth defendants;
- (c) 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, on which he relies.

32. The sixth defendant:

- (a) admits the allegations in paragraph 32 of the Statement of Claim;
- (b) says that the Deed Poll also provided (as were the facts) that:
 - (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 any proceeds recovered by the litigation;"*
 - (ii) *"The Directors gave careful consideration to: ...[among other things]*
 - (A) *"the circumstances that are described in the Background to this Deed;"*
 - (B) *"possible conflicts that may arise as a result of the Settlement Proposals flowing from LM preferring the interest of one of the Relevant Funds against the other;"*
 - (C) *"general law and statutory duties that relate to directors under the Corporations Act 2001;"*
 - (D) *"the impact of the Settlement Proposals on the Relevant Funds;"*
 - (E) *"any expert advice received by the Relevant Funds in relation to the Settlement Proposals";*
 - (iii) *"LM as RE of FMIF will comply with its general fiduciary duties as RE if it agrees to the Settlement Proposals;"*
 - (iv) *"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;"*
- (c) relies on the full terms of the Deed Poll.

32A. The sixth defendant denies the allegations in paragraph 32A of the Statement of Claim and believes the allegations to be untrue because:

- (a) the reference in the Deed Poll to "expert advice" was clearly a reference to the WMS Report and the Allens Advice;

- (b) the Deed Poll 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;
- (c) the reference in the Deed Poll to “statutory duties that relate to directors under the Corporations Act 2001” was a reference to s. 601FD of the Act.
33. The sixth defendant denies the allegations in paragraph 33 of the Statement of Claim because:
- (aa) he denies that LMIM as trustee of the MPF agreed to fund the Proceedings as second mortgagee with second priority under the Deed of Priority, because of the matters pleaded in paragraph 24(c) above and the paragraphs referred to therein;
- (a) the sixth defendant 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) 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) 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, the particulars of which are set out at paragraph 30C(k)(ii) above;
- (d) in July 2009, neither PTAL nor LMIM as RE of the FMIF was a party to any of the Proceedings;
- (e) he relies on the matters pleaded in paragraph 22 above.
34. As to paragraph 34 of the Statement of Claim, the sixth defendant:
- (aa) denies the allegations in subparagraph (aa) and believes the allegations to be untrue because:
- (i) he did adequately read and consider the content of the Allens Advice;
- (ii) the matters pleaded at paragraph 30H of the Statement of Claim were not something from which the court would infer that the sixth defendant failed to adequately read or consider the Allens Advice because the matters pleaded at paragraph 30H of the Statement of Claim are:
- (A) erroneous constructions of the content of the Allens Advice;
- (B) not readily apparent, being contended by the plaintiff for the first time in the Third Further Amended Statement of Claim, more than four years after the filing of the Claim;

- (C) not matters that the sixth defendant, as a person without legal training and reliant on Monaghan and Allens for legal advice, could have identified from a fair reading of the Allens Advice;
- (iii) he relies on the matters pleaded in paragraph 30H(l) above;
- (iv) the Deed Poll did refer to the matters pleaded in paragraph 32A of the Statement of Claim;
- (v) the signing of the Deed Poll by 14 June 2011 reflected the fact that the sixth defendant had received and considered the WMS Report and the Allens Advice some months prior, and had given careful consideration to those documents and all other relevant considerations prior to signing the Deed Poll;
- (a) denies the allegations in subparagraph (a) insofar as they are alleged against him because:

~~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 the MPF was entitled to withhold its consent, as to which he also relies on the facts pleaded in paragraphs 30C(g) 30C(m) above;~~

- (i) the allegation is made on the incorrect premise that PTAL sold the Property under the Gujarat Contract as a stand-alone sale, rather than (as it was in fact) as part of the overall settlement of the Proceedings, pursuant to which the bulk of the proceeds were not for, or referable to, the sale of the Property;
- (ii) the FMIF Bellpac Loan did not have priority over the MPF Bellpac Loan under the Deed of Priority, which dealt only with the priority of the securities held in respect of those loans;
- (iii) the sale of the Property would not have proceeded if it were not part of, and subject to, the overall settlement of the Proceedings, including the agreement of LMIM as trustee of the MPF to that settlement;
- (ba) denies the allegations in paragraph 34(b) because:
- (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 Proceedings;
- (ii) LMIM as trustee of the MPF was a party to the Proceedings;
- (iii) LMIM as RE of the FMIF and/or PTAL had no authority to settle the Proceedings on behalf of LMIM as trustee of the MPF;
- (iv) alternatively to (ic), LMIM as RE of the FMIF and/or PTAL had authority to settle the 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;

(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 Settlement and Release;

(vii) therefore (or in any event), LMIM as trustee of the MPF was entitled:

(A) to refuse to terminate the Bellpac Proceedings and the claims made against Gujarat in that proceeding;

(B) to sue the RE of the FMIF for damages or other relief, including:

B.1 for payment of a litigation funding fee;

B.2 for damages for misleading or deceptive conduct;

B.3 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 and/or between LMIM as trustee for the MPF and PTAL;

(viii) 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 or PTAL 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 funding the Proceedings if the settlement did not proceed and the MPF did not provide further funding for the proceeding, including because of the conditions imposed on it by its financiers, which substantially controlled the uses to which it could put funds received by it) 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 Deed of Settlement and Release and the Deed of Release (Settlement Documents) and in order for the settlement to proceed at all;

(b) further as to the allegations in subparagraph (b),

~~(i) denies that he knew the fact alleged in subparagraph (b)(i) because it was not a fact, for the reason pleaded in paragraph 28 above;~~

(ii) denies that he failed to have proper regard or give consideration to the fact alleged in the chapeau to subparagraph (b) and denies that that was a fact; and denies that he knew the facts alleged in subparagraph (b)(ii)

~~because those facts are untrue as 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:~~

- (iii) ~~denies that he knew or ought to have known the matters alleged in subparagraph 30C(d)(iii) of the statement of claim and in that regard relies on the facts pleaded in paragraphs 34(ba) and 30C(m) above;~~

~~(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 Bellpae Proceedings and its consent to terminate that proceeding was necessary for the Bellpae Settlement (as defined in the Deed Poll) to proceed;~~

~~(D) Allons as solicitors for LMIM as trustee for the MPF had possession of, and had a lien over, the certificates of title for the Property;~~

~~as to which he also relies on the facts pleaded in paragraphs 30C(g) 34(ba) and 30C(m) above;~~

- (c) denies the allegations in subparagraph (c) insofar as they are alleged against him because:

(i) the sixth defendant did have regard and gave adequate consideration to (and admits that he knew) the matters identified in (i), (ii), (iv) and (v);

(ii) the sixth defendant did have regard and gave adequate consideration to the matters identified in (iii) (to the extent that he 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, particulars of which are set out at paragraph 30C(k)(ii) above;

~~(iii) the sixth 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 30C(g) above;~~

- (d) denies the allegations in subparagraph (d) insofar as they are alleged against him because:

(i) the sixth 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 he arranged for the provision of specific advice on this point from Allens and he relied on that advice;

- (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, or to advance its own the interests of the MPF in LMIM's capacity as trustee and as a party to the Proceedings;
- (e) denies the allegations in subparagraph (e) insofar as they are alleged against him because:
- (i) the Allens Advice was, and further or alternatively he understood that it was, substantially to the effect alleged in the circumstances alleged insofar as he has admitted them;
 - (ii) on 7 April 2001, he received an email attaching the Allens advice and including an email dated 29 March 2011 from Monaghan to the second defendant, in which Monaghan said of the Allens advice that "the conclusion is that the transaction is OK" ("the Monaghan Advice");
 - (iii) Monaghan never informed the sixth defendant that Monaghan disagreed in any respects with the Allens Advice or that the Allens Advice was in any way deficient, inadequate or wrong;
 - (iv) he relies on the matters pleaded in paragraph 30H(l) above;
- (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;
 - (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 the circumstances pleaded in paragraphs ~~30C(g)~~ 34(ba) and 30C(m) 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 ~~30C(g)~~ 34(ba) and 30C(m) 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;

Particulars

FMIF was unable to fund the Proceedings because its cash flow was limited because:

1. from March 2009, FMIF had stopped taking subscriptions from new members;

2. FMIF was directing any surplus cash to the CBA to meet its obligations under the CBA finance facility and reduce the CBA debt;
 3. FMIF was being impacted by events surrounding the global financial crisis, including a general slowdown in repayment of loans;
 4. many FMIF loans were in default or arrears;
- (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 sixth defendant relied, was adequate for the purposes of the directors of LMIM considering whether to agree to the Bellpac Settlement and the Proceeds Split;
- (g) 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) denies that he ought to have known that it did not constitute the advice identified in subparagraph (e) thereof because:
 - (A) it was appropriate for the sixth 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 him, for the reasons pleaded in (aa) to (g) above;
- (i) does not admit the allegations insofar as they are alleged against the first to fifth 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 in this proceeding, and therefore he remains uncertain as to the truth or otherwise of the allegations;
- (j) says further or alternatively that:
- (i) the sixth 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 and Monaghan to the effect that:
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;
 2. LMIM had sought and received specific advice from WMS indicating that the proposed split of the settlement proceeds was fair and reasonable; and
 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 the Proceeds Split was legally acceptable and was fair and reasonable as between the two funds;
- (C) the Monaghan Advice;
- (D) a conversation with Monaghan on or around, but prior to, entry into the Deed Poll, wherein Monaghan said to the sixth defendant words to the effect of "there needs to be a fair split between the MPF and the FMIF because LMIM cannot settle the litigation without the consent of the MPF and failure to do so may result in the MPF suing the FMIF" ("the Monaghan Oral Advice"); and
- (E) the proper discharge of the functions and duties respectively of each of the second defendant, Monaghan, Monaghan Lawyers, Allens and WMS;
- (ii) the sixth 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 (i) above;
- (iii) the sixth defendant relies on the matters pleaded in paragraph 30H(I) above;
- (iv) in the premises:
- (A) it was reasonable for the sixth 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) it was not necessary for the sixth defendant to have known or considered the specific matters as alleged in paragraph 34 of the statement of claim.

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

35. As to paragraph 35 of the Statement of Claim, the sixth defendant says that:

- (a) he 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 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 (being the amount of the Gujarat settlement payment plus GST and conveyancing adjustments, less \$5.5M which was to be held as controlled monies and payable on the extended settlement date), including the cheque set out in paragraph (f)(i) below:
 - (f) LMIM as trustee of the MPF received a sum of money upon and after Completion:
 - (i) by its receipt of a bank cheque dated 17 June 2011 in the sum of \$13,606,093.32; and
 - (ii) by its receipt, on the extended settlement date, of a further bank cheque dated 8 September 2011 in the sum of \$1,944,600.47;
 both cheques amounting to a total sum of \$15,550,693.79
 (“**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.
36. The sixth 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 35 above;
 - (b) otherwise denies the allegations because of the matters pleaded in paragraph 35 above.
37. As to paragraph 37 of the Statement of Claim, the sixth 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, the particulars of which are set out at paragraph 30C(k)(ii) above;
- (b) of the matters pleaded in paragraphs ~~30C(g)~~ 34(ba) and 30C(m) above;
- (c) further or alternatively, of the matters pleaded in paragraphs ~~30C(g)~~ 34(ba) and 30C(m) above and 37A 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) as at 21 June 2011, when the Deed of Release and the Deed of Settlement and Release were entered into, the Deed Poll had already been entered into recording the directors' agreement and conclusion, *inter alia*, that:
 - (i) there was a need for LMIM as trustee of the MPF to agree to the overall settlement of the Proceedings; and
 - (ii) the proceeds of the settlement of the Proceedings were to be shared in the ratio of 65% to the FMIF and 35% to the MPF; and
- (h) further or alternatively:
 - (i) in so far as PTAL sold the Property to Gujarat as mortgagee exercising power of sale, the Property was sold for \$10 million, the full amount of which was paid to and received by LMIM as RE of the FMIF;
 - (ii) the balance of funds paid upon the settlement of the 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;
 - (iii) in so far as either PTAL or LMIM as RE of the FMIF was legally entitled to receive payment of moneys under the Deed of Release, they were entitled to direct ~~all~~ part of those moneys to LMIM as trustee of the MPF;
- (i) further or alternatively, the Gujarat 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:

- (i) received upon the settlement of the claims made by both PTAL as custodian for LMIM as RE of the FMIF and by LMIM as trustee of the MPF;
- (ii) received by LMIM on behalf of both the FMIF and the MPF;
- (iii) to be shared between the FMIF and the MPF in proportions that were, in the reasonable opinion of LMIM and its directors, fair and reasonable having regard to the circumstances and after taking into account independent professional advice as to the appropriate proportions.

37A. The sixth defendant denies the allegations in paragraph 37A of the Statement of Claim, ~~the sixth defendant~~ because:

- (a) for the reasons pleaded in paragraphs 30C(m) and 34 above:
 - (i) he did have proper regard and gave adequate consideration to those matters that were true and were relevant (being the matters admitted and pleaded in paragraph 34 above); and
 - (ii) he did act with the necessary degree of reasonable care and diligence;
- (b) it was reasonable for the sixth defendant, having discussed matters with the first to fifth defendants on or around the date that each signed the Deed Poll, and having received and considered the Allens Advice, the Monaghan Advice and the Monaghan Oral Advice 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, the Monaghan Advice and the Monaghan Oral Advice (on which the sixth defendant relied after carefully considering them);
 - (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;

Particulars

The nature and effect of the litigation risks were:

1. the fact that the Proceedings were complex and LMIM's prospects of success were uncertain;
2. the fact that the litigation exposed LMIM as trustee of the MPF to the risk of adverse costs orders if LMIM was unsuccessful in the Proceedings;
3. the risk of LMIM being unable to recover costs even if it were successful in the Proceedings;
4. the fact that LMIM as trustee of the MPF was at risk of spending considerable funds on the litigation on behalf of the

FMIF and may recover none of them, in addition to not recovering any of the MPF Bellpac Loan;

- (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;

Particulars

The quantum of any potential costs orders was entirely unknown but the sixth defendant was advised by David Monaghan in an email dated 29 July 2009 that costs were likely to be in excess of \$1,000,000 [FMIF.200.009.9231];

- (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 had given an undertaking as to costs in security for costs in the Proceedings;
- (F) the fact that none of the advices from WMS, Allens, Monaghan or Monaghan Lawyers said anything to the contrary;
- (G) the terms of clause 29 of the Constitution of the FMIF;
- (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 to fifth defendants, it was reasonable for the sixth 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 30C(g) 34(ba) and 30C(m) 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 paragraphs 30C(g) 34(ba) and 30C(m) 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 30C(g) 34(ba), 30C(m) and 37A(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 (for, inter alia, misleading or deceptive conduct or equitable estoppel, or for damages for purporting to settle the Proceedings without the consent of LMIM as trustee for the MPF) if the former did not receive a fair split of the Proceeds and by reason of the facts pleaded in paragraphs 30C(g) 34(ba) and 30C(m) 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 ~~30C(e)~~ 34(ba), 30C(m) and 37A(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, particulars of which are set out at paragraph 30C(k)(ii) above;
- (d) having given proper regard and adequate consideration to those matters and having discussed those matters with the first to fifth defendants, it was reasonable for the sixth 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 (particulars of which are set out at paragraph 30C(k)(ii) above) and by reason of the facts pleaded in paragraphs ~~30C(e)~~ 34(ba), 30C(m) and 37A(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 (for, inter alia, misleading or deceptive conduct or equitable estoppel) if the former did not receive a fair split of the Proceeds, as to which the sixth defendant repeats and relies on paragraphs ~~30C(e)(iii)(D)~~ 34(ba)(vii)(B) and 30C(m) above;
 - (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 ~~30C(e)~~ 34(ba), 30C(m) and 37A(b) above;
 - (iv) LMIM as trustee of the MPF would not otherwise have allowed the settlement to occur;
 - (v) 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
 - (vi) 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;
- (e) having given proper regard and adequate consideration to those matters, the sixth 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 ~~30C(e)~~ 34(ba), 30C(m) and 37A(b) to (d) above.

37B. The sixth defendant admits paragraph 37B of the Statement of Claim to the extent of the payment of the Litigation Funding Fee pleaded in paragraph 35 above.

Contraventions of s 180 and 182 of the Corporations Act

38. As to paragraph 38 of the Statement of Claim, the sixth 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.~~

39. The sixth defendant denies the allegations in paragraph 39 of the Statement of Claim because:

- (a) ~~for the reasons pleaded in paragraph 38 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 37A above, the sixth defendant exercised his powers and discharged his 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 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.~~

~~39A. The sixth defendant denies the allegations in paragraph 39A of the Statement of Claim:~~

~~(a) because, for the reasons pleaded in paragraphs 37A, 38 and 39 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.~~

~~39B. The sixth 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 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.~~

~~40. The sixth 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 and 39 above, there was no breach of those duties;~~

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

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- (b) further or alternatively, the statement of claim discloses no basis for the award of damages at general law against any of the defendants.

46A In the alternative to paragraph 46 above, if the sixth defendant is liable to pay to the plaintiff compensation under s 1317H of the Act (which is denied), then the amount of compensation should be no more than:

- (a) the difference between the amount of the Litigation Funding Fee and an amount that is an appropriate share of the proceeds of the settlement of the Proceedings, reflecting the facts pleaded in paragraphs 22, 24, 30C, 30D, 33, 34(a), 34(b), 34(f), 34(j), 35, 37 and 37A above, the risks and complexities of the Proceedings and the additional risks taken on by LMIM as trustee of the MPF in funding the Proceedings and giving an undertaking as to damages in the Bellpac Proceedings, such amount being more than just its contributions to funding costs of and associated with the Proceedings and interest thereon;
- (b) alternatively to (a), the difference between the amount of the Litigation Funding Fee less the amount of its total contributions to funding costs of and associated with the Proceedings and interest thereon.

LMIM's involvement in contraventions by officers

~~47. The sixth defendant does not admit the allegations in paragraph 47 of the Statement of Claim, because the paragraph does not contain any allegations against him;~~

~~47A. As to paragraph 47A of the Statement of Claim, the sixth defendant:~~

- ~~(a) denies that LMIM entered into the Deed Poll, as it was not a party to the Deed Poll either as trustee of the MPF or at all;~~
- ~~(b) admits that LMIM as trustee of the MPF received the Litigation Funding Fee for the benefit of the members of the MPF;~~
- ~~(c) says further that, by reason of the matters pleaded herein, LMIM as trustee of the MPF was justified and entitled in receiving the Litigation Funding Fee;~~
- ~~(d) refers to and relies on paragraph 35 above as to the alleged Settlement payment;~~

~~47B. As to paragraph 47B of the Statement of Claim, the sixth defendant:~~

- ~~(a) denies that LMIM (whether as RE of the FMIF or as trustee of the MPF) entered into the Deed Poll and believes the allegation to be untrue because LMIM was not a party to the Deed Poll;~~
- ~~(b) denies that LMIM as RE of the FMIF received the Settlement payment in its capacity as RE of the FMIF and believes the allegation to be untrue because LMIM as RE of the FMIF had no entitlement to any part of the Settlement payment;~~

~~48. The sixth defendant does not admit the allegations in paragraph 48 of the Statement of Claim, because the paragraph does not contain any allegations against him;~~

~~48A. The sixth defendant does not admit the allegations in paragraph 48A of the Statement of Claim, because the paragraph does not contain any allegations against him;~~

~~48B. The sixth defendant does not admit the allegations in paragraph 48B of the Statement of Claim, because the paragraph does not contain any allegations against him;~~

~~49. The sixth defendant does not admit the allegations in paragraph 49 of the Statement of Claim, because the paragraph does not contain any allegations against him.~~

Rights of LMIM as trustee of the MPF and the plaintiff's right of subrogation

~~50. The sixth defendant does not admit the allegations in paragraph 50 of the Statement of Claim. The sixth defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~

~~51. The sixth defendant does not admit the allegations in paragraph 51 of the Statement of Claim. The sixth defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~

~~52. The sixth defendant does not admit the allegations in paragraph 52 of the Statement of Claim. The sixth defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~

~~53. The sixth defendant admits the allegation in paragraph 53 of the Statement of Claim.~~

~~54. The sixth defendant does not admit the allegations in paragraph 54 of the Statement of Claim. The sixth defendant has made reasonable enquiries and remains uncertain as to the truth or otherwise of the allegations.~~

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

55. Further as to the allegations that the sixth defendant contravened s.601FD(1) s.180(1) of the Act, the sixth defendant says that he did not breach his duties under that subsection because:

- (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, he 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 (being the risks referred to in paragraph 37A(b)(ii)(A) above), and in providing an undertaking as to damages in the Bellpac Proceedings and in agreeing to fund the payment of \$1,300,000 to Confields under the terms of the Deed of Settlement and Release, all in circumstances where LMIM as RE of 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, particulars of which are set out at paragraph 30C(k)(ii) above;
 - (iii) the sixth defendant relies on the matters pleaded in paragraphs 30C(g), 30C(m) and 30H(l)(vi) and (vii) 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 Litigation Funding Fee to be paid to LMIM as trustee for the MPF, and in particular:

- (i) obtained and considered the Allens Advice, the Monaghan Advice and the Monaghan Oral 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 further advice provided to him by David Monaghan to the effect that it was not necessary to document the funding arrangement between the FMIF and the MPF, other than by referring to it in the Deed Poll;

Particulars

The advice was contained in the following emails:

1. email from David Monaghan to Grant Fischer and Simon Tickner sent 20 August 2010 at 9:29am [FMIF.200.009.8973];
 2. email from David Monaghan to Simon Tickner sent 31 August 2010 at 3:44pm [FMIF.100.003.2096];
 3. email from David Monaghan to multiple recipients including Simon Tickner sent 24 November 2010 at 12:19pm [FMIF.100.003.4246]; and
 4. email from David Monaghan to Lisa Darcy and Simon Tickner sent 1 December 2010 at 5:49pm [FMIF.100.003.4665];
 5. at least one discussion between the sixth defendant, the second defendant and David Monaghan preceding the latter email, in which the appropriate rate for litigation funding was discussed and Mr Monaghan was instructed to make enquiries about commercial rates;
- (e) in light of the information received and considered by the sixth defendant, the sixth defendant rationally believed that the judgment he made was in the best interests of ~~LMIM, including in its capacities as RE~~ of the FMIF and the members thereof trustee of the MPF;
- (ea) he also relies on the fact pleaded in paragraph 34(e)(iii) above;
- (f) in the premises pleaded in (a) to (ea), ~~pursuant to s.180(2) of the Act~~ the sixth defendant's belief that the judgment was in the best interests of LMIM is ~~taken to be~~ was rational and reasonable unless the belief is one that no reasonable person in his 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 sixth defendant met, or is taken to have met and reasonably and appropriately discharged, 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 sixth defendant's position (as that expression is used within the meaning of s.601FD(1)(b) the requirements of s.180(1) of the Act.
56. Further or alternatively, should the Court find, contrary to the matters pleaded above, that the sixth defendant contravened ~~any of ss180(1), 182(1) or s.601FD(1)~~ of the Act as alleged in the Statement of Claim, then:

- (a) the sixth defendant acted honestly in making, permitting or directing the Litigation Funding Fee to be paid to LMIM as trustee for the MPF; and
- (b) the sixth defendant acted in good faith;
- (c) the sixth defendant acted after he had made an independent assessment of the information and advice, which included:
 - (i) reading and considering the Allens Advice, the Monaghan Advice, the Monaghan Oral 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;

Particulars

The enquiries were contained in the following emails:

1. email from Simon Tickner to David Monaghan sent 30 August 2010 at 9:34am [FMIF.100.003.2096];
 2. email from Simon Tickner to David Monaghan sent 31 August 2010 at 3:49pm [FMIF.100.003.2096];
 3. email from Simon Tickner to David Monaghan sent 21 October 2010 at 12:52pm [FMIF.100.003.0603]; and
 4. email from Simon Tickner to Eghard van der Hoven and David Monaghan sent 22 November 2010 at 3:56pm [FMIF.100.002.9885].
- (ca) the sixth defendant did not receive any personal benefit from the division of the settlement proceeds between the FMIF and the MPF;
 - (cb) the sixth defendant was aware that the second defendant had raised the proposal to divide the proceeds as between the FMIF and the MPF (proposal) with the auditors of LMIM as RE of the FMIF and the auditors had not, to the sixth defendant's knowledge or at all, informed the second defendant or LMIM that in their opinion the proposal ought not occur or should be reconsidered;
 - (cc) no other person, including WMS, Allens, Monaghan and the members of the compliance committee of LMIM, had informed the sixth defendant nor, to his knowledge or at all, that the proposal ought not occur or should be reconsidered;
 - (d) having regard to all of the circumstances of the case pleaded above (but particularly those matters pleaded in paragraphs ~~30C(e)~~ 34(ba), 30C(m), 30H(l), 33, 34, 37A and 55), the sixth defendant ought fairly to be excused for any contravention;
 - (e) in the premises pleaded in (a) to (d) ~~and (b)~~, the sixth 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.

57. ~~In relying on the information and advice referred to in paragraph 55(d) above, the sixth defendant acted:~~

- (a) ~~in good faith; and~~
- (b) ~~after he had made an independent assessment of the information and advice, which included:~~
- (i) ~~reading and considering the Allens Advice, the Monaghan 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;~~

Particulars

The enquiries were contained in the following emails:

1. ~~email from Simon Tickner to David Monaghan sent 30 August 2010 at 9:34am [FMIF.100.003.2096];~~
2. ~~email from Simon Tickner to David Monaghan sent 31 August 2010 at 3:49pm [FMIF.100.003.2096];~~
3. ~~email from Simon Tickner to David Monaghan sent 21 October 2010 at 12:52pm [FMIF.100.003.0603]; and~~
4. ~~email from Simon Tickner to Eghard van der Heven and David Monaghan sent 22 November 2010 at 3:56pm [FMIF.100.002.9885].~~

58. ~~In the premises pleaded in paragraph 57 above, pursuant to s.189 of the Act the sixth defendant's reliance on the information and advice referred to in paragraph 55(d) is taken to be was reasonable unless the contrary is proved.~~

Signed: *HW Litigator*

Dated: 4 March 2019

Description: Solicitors for the sixth defendant

This pleading was settled by Mr K. A. Barlow QC and Mr G. Coveney 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.

"SC-9"

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

Amended pursuant to the orders of Justice Jackson made on 3 April 2019.
Signed: *Gadens* Dated: 4 April 2019

Gadens Lawyers

**AMENDED AMENDED REPLY TO THE ~~THIRD~~ FOURTH FURTHER AMENDED
DEFENCE OF THE FIRST DEFENDANT TO THE ~~THIRD~~ FIFTH FURTHER AMENDED
STATEMENT OF CLAIM**

The plaintiff hereby replies to the ~~Third~~ Fourth Further Amended Defence of the first defendant dated ~~29 June 2015~~ ~~23 March 2018~~ ~~6 March 2019~~ 3 April 2019 as follows (the Defence):

**Amended Amended Reply to the ~~Third~~ Fourth
Further Amended Defence of the First Defendant**
Filed on behalf of the Plaintiff

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

1. The plaintiff adopts the:
 - (a) admissions made in paragraphs 1, 3, 4, 4A, 6, 9, 14, 15, 16, 22, ~~23~~, 26(a), 29(a), 30(a) and 32 and 37B, of the Defence;
 - (b) the definitions used in the ~~Third Second Fifth~~ Further Amended Statement of Claim dated ~~17 June 2015 7 November 2016 (2FASOC) 1 February 2019~~ 2 April 2019 (35FASOC) and the Defence (unless the contrary intention is expressed).

2. As to paragraph 2 of the Defence, the plaintiff:
 - (a) adopts the admissions therein; ~~in paragraphs (a), (b), (c), (d), (e) and (f)~~;
 - (b) admits subparagraphs (a) and (b);
 - (c) does not admit subparagraph (c) on the basis that the reference to “other similar tertiary qualification” is vague and, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.
 - (d) ~~as to subparagraph (a), adopts the admission the first defendant became a director of LMIM on 31 January 1997 but says he ceased being a director on 9 January 2015;~~
 - (e) ~~as to subparagraph (e), in so far as the reference to 30 September 2007 is intended to be a reference to 30 September 2012, adopts the admission.~~
 - ~~(f) joins issue with subparagraph (g)~~

- 2A. As to paragraph 2A of the Defence, the plaintiff:
 - (a) admits subparagraphs (a) and (e);
 - (b) otherwise does not admit the matters alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.

- 2B. As to paragraph 2B of the Defence, the plaintiff does not admit the matters alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.

3. As to paragraph 5 of the Defence, the plaintiff:
 - (a) adopts the admission in subparagraph (a);
 - (b) says that “GPC Bellambi Pty Ltd” ACN 101 713 017 changed its name to “Bellpac Pty Ltd” on 11 August 2013;
 - (c) ~~further says that the first defendant executed the FMIF Bellpac Loan Agreement on behalf of LMIM as RE~~ admits the matters alleged at subparagraph (b);
 - (d) joins issue with subparagraph (c).

- ~~4. As to paragraph 6 of the Defence, the plaintiff:~~
 - (a) ~~adopts the admission in subparagraph (a)~~;
 - (b) ~~repeats and relies on paragraph 6 of the 2FASC and paragraph 3 of this Reply.~~

5. As to paragraph 7 of the Defence, the plaintiff:
- (a) as to subparagraph (a):
 - (i) adopts the admission therein;
 - (ii) admits that the land that comprised the Property was identified in full in the schedule to the FMIF Bellpac Loan Agreement and in annexure A to mortgage 9481438R;
 - (iii) says that the definition of "Property" at paragraph 7(a) of the 35FASOC includes the land referred to at subparagraph (c);
 - (iv) says the PTAL Mortgage is comprised of mortgage numbered 9481438R and Book 4382 No 489 each registered in the New South Wales Land and Property Information in favour of PTAL;
 - (b) adopts the admission at subparagraph (b);
 - (c) admits the matters alleged at subparagraph (c);
 - (d) admits the matters alleged at subparagraph (d);
 - (e) is not required to plead to subparagraph (e);
 - (f) says the PTAL Mortgage is comprised of mortgage numbered 9481438R and Book 4382 No 489 each registered in the New South Wales Land and Property Information in favour of PTAL;
 - (g) says the PTAL Charge is comprised of the fixed and floating charge formerly registered with ASIC as charge number 931141;
 - (h) says the PTAL Mortgage and PTAL Charge were each granted by Bellpac to PTAL;
 - (i) says a copy of the PTAL Mortgage and PTAL Charge were provided to the first defendant's solicitors on 12 May 2015.
6. As to paragraph 8 of the Defence, the plaintiff adopts the admissions therein and further:
- (a) ~~says~~ in relation to subparagraph (a) ~~that:~~
 - (i) ~~the document in subparagraph (a)(ii) of the Defence is in fact dated 13 February 2004 and is a separate document to that referred to at subparagraph (a)(i) of the Defence;~~
 - (ii) ~~the document referred to in subparagraph (a)(iv) was not executed on behalf of Balgow Pty Limited;~~
 - (iii) says that the "Variation Deed" referred to in subparagraph (a)(viii):
 - (A) ~~was also executed on behalf of Richland Investment (Australia) Pty Ltd, Balgow Pty Ltd, Great Pacific Capital Limited and GPC No 8 (Bulli) Pty Ltd; and~~
 - (B) contains a Facility Agreement at Annexure A which was separately executed on behalf of Bellpac, PTAL and LMIM as RE;

- (iv) otherwise admits that the FMIF Bellpac Loan Agreement was varied pursuant to the instruments referred to therein;
 - (b) says the first defendant executed each of the documents referred to in subparagraph (a) of the Defence on behalf of LMIM;
 - (c) joins issue with subparagraph (b).
7. As to paragraph 9 of the Defence, the plaintiff:
- (a) adopts the admission contained therein;
 - (b) admits that the first defendant executed the MPF Bellpac Loan Agreement on behalf of LMIM in its capacity as trustee of the MPF.
8. As to paragraph 10 of the Defence, the plaintiff:
- (a) adopts the admission in subparagraph (a);
 - (b) says admits that the first defendant executed the MPF Bellpac Loan Agreement on behalf of LMIM in its capacity as trustee for the MPF.
9. As to paragraph 11 of the Defence, the plaintiff:
- (a) admits the plaintiff produced to the first defendant the documents described in subparagraph (a);
 - (b) says the MPF Mortgage is comprised of the mortgage bearing dealing no. AB211547W referred to in subparagraph (a)(i);
 - (c) further says the MPF Charge is comprised of the fixed and floating charge referred to in subparagraph (a)(ii) formerly registered with ASIC as charge number 1327826;
 - (d) as to subparagraph (b):
 - (i) repeats and relies upon the matters pleaded at subparagraph 5(a)(iii) above;
 - (ii) admits subparagraph (i);
 - (iii) admits subparagraph (ii);
 - (e) admits subparagraph (c);
 - (f) ~~admits denies subparagraph (d) on the basis that the Charge is dated 23 June 2006 but says that the Certificate of Entry of Charge lodged with ASIC bears the date 9 October 2006 with a lodgement date of 18 July 2006;~~
 - (g) joins issue with subparagraph (e).
10. As to paragraph 12 of the Defence, the plaintiff:
- (a) admits it produced to the first defendant the document referred to in subparagraph (a) but says it is in fact entitled "Priority Deed";
 - ~~(b) as to subparagraph (b), admits that clause 8 contains the text alleged but says that the effect of the clause is accurately pleaded at paragraph 12(b) of the 2FASOC;~~

- (c) as to subparagraph (c), says admits that the first defendant and the second defendant executed the Priority Deed on behalf of LMIM in its capacity as RE for the FMIF and LMIM in its capacity as trustee for the MPF;
 - (d) joins issue with subparagraph (d).
11. As to paragraph 17 of the Defence, the plaintiff:
- (a) admits it produced to the first defendant the document in subparagraph (a) but says the document is dated 21 October 2004;
 - (b) says that this document is the LASA;
 - (c) joins issue with subparagraph (b).
12. As to paragraph 18 of the Defence, the plaintiff adopts the admissions therein and further:
- (a) admits the agreements which amended the LASA comprised of the documents referred to plaintiff produced to the first defendant the documents in subparagraph (a) but says that the copy of the document produced entitled "Access Licence Bellpae No. 1 Colliery" (referred to in subparagraph (a)(v)) has not been executed on behalf of Coalfields;
 - (b) says the letter referred to in subparagraph (a)(vi) was also addressed to Coalfields;
 - ~~(c) further says that these documents comprise the 2004 Agreements;~~
 - (d) joins issue with subparagraph (b).
13. As to paragraph 19 of the Defence, the plaintiff:
- (a) adopts the admission at subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) admits the matters alleged; and
 - (ii) says that the allegation is embarrassing as it fails to identify the "aspects of the dispute" (if any) which it alleges to be relevant to the dispute;
 - (c) joins issue with subparagraph (c).
14. As to paragraph 20 of the Defence, the plaintiff adopts the admissions therein and further:
- (a) admits the settlement deeds comprised of the documents referred to it produced to the first defendant the document referred to in subparagraph (a);
 - ~~(b) says that these documents are the Settlement Deeds;~~
 - (c) joins issue with subparagraph (b).
15. As to paragraph 21 of the Defence, the plaintiff:
- (a) as to subparagraph (a):
 - (i) admits the matters alleged;

- (ii) says that the interest of LMIM as trustee of the MPF in the dispute was as lender under the MPF Bellpac Loan Agreement, as registered mortgagee under the MPF Mortgage with second ranking priority pursuant to the Deed of Priority and as registered charge under the MPF Charge;
 - (iii) says that LMIM as RE of the FMIF also had an interest in how the dispute was resolved;
 - (b) adopts the admission at subparagraph (b);
 - (c) joins issue with subparagraph (c).
16. As to paragraph 22 of the Defence, the plaintiff:
- (a) adopts the admission at subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) as to subparagraph (i):
 - (A) admits that the Bellpac Proceeding was commenced by LMIM and Bellpac against Gujarat by summons filed in the Supreme Court of New South Wales on or around 7 July 2009;
 - (B) does not admit that the Bellpac Proceeding was originally commenced by LMIM in its capacity as trustee for the MPF because the description of the party in the Bellpac proceedings was "LMIM" and it does not identify in what capacity LMIM was a party to the Bellpac proceedings and having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) admits the matters alleged at subparagraph (ii);
 - (iii) admits the matters alleged at subparagraph (iii);
 - (iv) adopts the admission at subparagraph (iv);
 - (c) admits subparagraph (c);
 - (d) admits subparagraph (d);
 - (e) is not required to plead to subparagraph (e).
17. As to paragraph 22A of the Defence, the plaintiff:
- (a) as to subparagraph (a):
 - (i) does not admit that the claims being pursued by LMIM and PTAL in the Bellpac proceedings were being brought in LMIM's capacity as trustee for the MPF on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (ii) admits that the Bellpac proceedings were complex claims against third parties for a range of relief including the matters alleged;
 - (b) does not admit the matters alleged at subparagraph (b) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

- (c) as to subparagraph (c) does not admit the dates on which Allens were the solicitors retained to act to protect LMIM's various interests in the Proceedings, the capacity in which LMIM retained Allens or the scope of its retainer on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (d) as to subparagraph (d) does not admit the dates from which Verekers Lawyers was retained by LMIM to act to protect its various interests in the Proceedings, the capacity in which LMIM retained Verekers Lawyers or the scope of its retainer on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (e) does not admit the matters alleged at subparagraph (e), on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (f) does not admit the matters alleged at subparagraph (f) because the allegation is vague and, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (fa) admits subparagraph (fa);
- (fb) denies subparagraph (fb) on the basis that:

- (i) by email dated 3 June 2008 [FMIF.049.006.0182], prior to the commencement of the Proceedings, Allens stated to Mr Monaghan, inter alia:

"Notwithstanding the difficulties identified above in predicting the orders which might be made in the context of any challenge to the settlement deed, we do not consider that any orders will operate to invalidate the consolidated coal lease granted by the NSW Government in favour of Gujarat NRE Minerals Limited. That lease is not an agreement sought to be attacked by Bellpac Pty Ltd (through any liquidator) and is not even an agreement to which Bellpac is a party or in respect of which Bellpac can claim to have any relevant interest"

"Irrespective, we doubt that a Court would be prepared to require the performance of the Remediation Licence Deed by means of an order for specific performance or a mandatory injunction. That is because the Remediation Licence Deed is unlikely to be considered by a court as an agreement in the nature of that which equity will protect by requiring performance."

- (ii) the email of 3 June 2008 provided advice as to the position of LMIM in the event that the existing settlement deed was set aside, not LMIM's prospects of success in the Proceedings (which had not yet commenced);
- (iii) by letter of advice dated 21 November 2008 [FMIF.049.008.0058], being the letter referred to at subparagraph 22A(fa)(viii) of the Defence, Allens advised that the Remediation Licence Deed had likely terminated by the effluxion of time and said further:

"For those reasons, on its face, it appears that the Remediation Licence Deed has terminated by the effluxion of time. The deed is silent as to the extent of any accrued rights of the parties arising from a breach of the Remediation Licence Deed which occurred prior to its termination. However, in the ordinary course, we would not expect any such accrued rights to be lost upon the expiration of the agreement. If that is correct, based on the facts of which we are presently aware, Bellpac ought be entitled to require the performance by Gujarat of the obligations contained in the Remediation Licence Deed or to recover the monetary loss arising from any failure by Gujarat to perform those obligations." (emphasis added)

(fc) as to subparagraph (fc):

(i) repeats and relies upon the matters pleaded at subparagraph (fb) above;

(ii) says that LMIM issued a notice of default, issued a notice of exercise of power of sale and commenced the Bellpac Proceeding to enforce the PTAL Mortgage;

(iii) otherwise does not admit the allegations on the basis the allegation is vague and, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(g) as to subparagraph (g), admits that the first defendant was a recipient of the email communications listed therein save that:

(i) the email referred to at subparagraph (g)(i) to the first defendant is timestamped 9:10am and the reply sent by the first defendant was dated 10:12am;

~~(ii) the email referred to at subparagraph (g)(ii) appears to be a duplicate of that referred to at subparagraph (g)(i);~~

(iii) it does not know and does not admit the emails referred to at subparagraphs 27(b)(ii)(T) and (W), those emails not having been disclosed to the Plaintiff, on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(iv) it says that the email referred to at subparagraph 27(b)(ii)(EE) was sent by Mr Monaghan;

(h) as to subparagraph (h):

(i) admits that the emails particularised therein were to the effect alleged;

(ii) does not admit whether such an undertaking was provided by LMIM “on its own behalf” or “on behalf of the other plaintiffs” on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(i) does not admit the matters alleged at subparagraph (i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(j) says further in relation to subparagraph (i) that even if the first defendant had the beliefs alleged (which is not admitted) he was still required to exercise his powers as a director consistently with:

(i) his duty to act in the interests of members of the FMIF in accordance with section 601FD(1)(c) of the Corporations Act 2001 (“the Act”);

(ii) the duty of LMIM to act in the interests of members of the FMIF in accordance with section 601FC(1)(c) of the Act.

18. As to paragraph 24 of the Defence, the plaintiff:

(a) as to subparagraphs (a), (b) and (c):

(i) admits the matters alleged;

(ii) says the funding was provided in the manner pleaded at paragraph 24 of the 25FASOC;

- (b) as to subparagraph (d):
- (i) as to subparagraph (i), admits that PTAL did not become a party to the Bellpac proceedings until 30 November 2009;
 - (ii) denies subparagraph (ii) on the basis that the Proceedings could have alternatively been funded by LMIM as RE of the FMIF utilising funds which could have been received from LMIM as trustee of the MPF in the form of amounts payable by the latter to the former comprising:
 - (A) Loans assigned by LMIM as RE of the FMIF to LMIM as trustee of the MPF, being described as the "Albassit", "KPG 13th Beach" and "Lifestyle" loans ("the Assigned Loans") for a total of \$36.6m of which between \$31m and \$33,513,345 remained payable as at July 2009;

Particulars

- (1) The Assigned Loans were assigned on or about 28 August 2008 for approximately \$33,513,345.00.
 - (2) As to March 2010, the balance of those loans was approximately \$31m.
 - (3) As at 31 December 2010, the balance of those loans was approximately \$20.2m.
- (B) An assignment of debt/management fee receivable of \$5.1, which related to an assignment of debt from LM Administration Pty Ltd to LMIM as trustee of the MPF,
- such that, as at 30 June 2009, LMIM as trustee of the MPF owed to LMIM as RE of the FMIF approximately \$41.745m;
- (c) as to subparagraph (e):
- (i) admits that LMIM as trustee for the MPF funded the other costs referred to;
 - (ii) says that the said costs associated with the Proceedings were funded in the manner pleaded at paragraph 24 of the 35FASOC;
 - (iii) does not admit the total amounts of such costs on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (d) admits the matters alleged at subparagraph (f);
- (e) as to subparagraph (g):
- (i) says that the plaintiff does not plead at paragraph 24 of the 35FASOC that the funding was provided pursuant to the Deed of Priority;
 - (ii) otherwise joins issue with the matters alleged;
- (f) as to subparagraph (h):
- (i) as subparagraph (i):

- (A) admits that a purpose of LMIM as trustee of the MPF funding the Proceedings (as pleaded at paragraph 24 of the 35FASOC) was to enable LMIM to continue to prosecute the Proceedings for the benefit of both the FMIF and the MPF;
 - (B) says that as second mortgagee, LMIM as trustee of the MPF stood to benefit from the proceeds of the Proceedings only if the said proceeds were sufficient to fully discharge the amounts secured by the PTAL Mortgage and the PTAL Charge which had first priority under the Deed of Priority;
 - (C) otherwise denies the matters alleged on the basis that the true state of affairs was as pleaded at paragraphs 24 and 33(b) of the 35FASOC;
 - (ii) as to subparagraph (ii), ~~does not admit~~ denies as untrue that there was any such understanding as alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (g) as to ~~does not admit~~ subparagraph (i):
 - (i) says that, as at the date of the Settlement payment, the amount of funding provided was approximately \$1,950,421.69;
 - (ii) admits the invoices particularised at subparagraph (ii);
 - (iii) does not admit that the invoices particularised at subparagraphs (ii)(C), (E), (K), (L) or (N) related in whole or part to the Proceedings on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iv) otherwise does not admit the allegations on the basis that the allegation at subparagraph (iii) is vague and having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (h) as to subparagraph (j):
 - (i) repeats and relies upon its responses above to paragraphs 22A(h) and 27(viii) of the Defence;
 - (ii) admits that LMIM as trustee of the MPF agreed to provide an undertaking as to damages in the Bellpac proceedings;
 - (iii) does not admit whether such an undertaking was provided by LMIM “on behalf of the plaintiffs” on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iv) does not admit that LMIM as trustee of the MPF agreed to fund the \$1.3m payment to Coalfields on settlement on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (i) joins issue with subparagraph (k).
19. As to paragraph 25 of the Defence, the plaintiff:
- (a) admits it produced to the first defendant the document referred to in subparagraph (a) but says this document is undated;

- (b) as to subparagraph (b), says admits it also produced to the first defendant a copy of a handwritten typed document entitled "Heads of Agreement" dated 9 November 2010; and
 - (c) says it has also produced to the first defendant a copy of a typed document entitled "Gujarat / Williams proceedings";
 - (d) further says that these three documents comprise the Mediation Heads of Agreement
 - (e) does not admit subparagraph (c) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (f) joins issue with subparagraph (d).
20. As to paragraph 26 of the Defence, the plaintiff:
- (a) adopts the admission at subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) admits the matters alleged;
 - (ii) says that the terms on which the parties ultimately settled were as pleaded at paragraph 28 of the 35FASOC;
 - (c) joins issue with subparagraph (c).
21. As to paragraph 27 of the Defence, the plaintiff:
- (a) adopts the admission at subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) as to subparagraph (i):
 - (A) admits that the terms documented by the Deed of Release, the Deed of Settlement and Release and the Gujarat Contract were different to the settlement proposal set out in the Mediation Heads of Agreement;
 - (B) says that the reference to "substantially different" is vague;
 - (ii) as to subparagraph (ii):
 - (A) ~~does not know and does not admit the emails referred to at subparagraphs 27(b)(ii)(T) and (W), those emails not having been disclosed to the Plaintiff, on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
 - (B) ~~says that the email referred to at subparagraph 27(b)(ii)(EE) was sent by Mr Monaghan;~~
 - (C) otherwise admits that the first defendant was the recipient of the email communications listed therein;
 - (iii) does not admit subparagraph (iii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iv) admits subparagraph (iv);

- (v) does not admit subparagraph (v) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (vi) denies subparagraph (vi) on the basis that LMIM as RE of the FMIF could have caused a payment to Coalfields to be made by calling upon LMIM as trustee of the MPF to pay further amounts due pursuant to the transactions referred to at paragraph 18(b)(ii) above;
- (vii) admits subparagraph (vii);
- (viii) does not admit subparagraph (viii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.

22. As to paragraph 28 of the Defence, the plaintiff:

- (a) as to subparagraph (a), admits it produced to the first defendant the Deed of Release, the Deed of Settlement and Release and the Gujarat Contract;
- (b) as to subparagraph (b):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii), admit that the recitals to the Deed of Release contained references to the matters alleged;
 - (iii) denies subparagraph (iii) on the basis that, by the references to PTAL, which acted as custodian for the FMIF and on the basis that clause 22 of the instrument identified that LMIM entered into it in its capacity as RE of the FMIF, the references in the Deed of Release to LMIM could only have been references to LMIM as RE of the FMIF;
 - (iv) as to subparagraph (iv):
 - (A) denies the matters alleged for the reasons pleaded at paragraph 34(b)(ii) of the 25FASOC that the agreement of LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF to perform its obligations under the Deed of Release;
 - (B) says that LMIM as RE of the FMIF was entitled as first mortgagee to take the steps referred to therein;
 - (C) says that LMIM pursuant to section 601FC(1)(c) of the Act and LMIM's directors (including the first defendant) pursuant to section 601FD(1)(c) of the Act were required to give priority to the interests of the FMIF over the interests of MPF to the extent of any conflict between them;
 - (v) as to subparagraph (v):
 - (A) admits that the Deed of Release was executed by PTAL;
 - (B) says that execution of the Deed of Release by PTAL was sufficient to bind LMIM as RE of the FMIF in relation to the property of the FMIF which was subject to the Deed of Release;
 - (C) denies as untrue that it was unnecessary for LMIM to also execute the Deed of Release in its capacity as RE of the FMIF on the basis that the counterparties to the Deed of Release had an interest in obtaining certainty

that LMIM as RE of the FMIF was fully bound by the terms of the Deed of Release;

- (vi) denies subparagraph (vi) for the reasons pleaded at subparagraphs (i) to (v) above;
- (c) ~~does not admits subparagraph (c) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
- (d) as to subparagraph (d):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii), admit that the recitals to the Deed of Settlement and Release contained references to the matters alleged;
 - (iii) denies subparagraph (iii) on the basis that, on its proper construction, by the reference in the Deed of Settlement and Release to PTAL being a signatory of the instrument, which acted as custodian of the FMIF and on the basis that clause 19 of the instrument identified that LMIM entered into it in its capacity as RE of the FMIF, the references in the Deed of Settlement and Release to LMIM could only have been a reference to LMIM as RE of the FMIF;
 - (iv) as to subparagraph (iv):
 - (A) denies the matters alleged on the basis that the agreement of LMIM as trustee of the MPF was not required in order for LMIM as RE for the FMIF to perform its obligations under the Deed of Settlement and Release;
 - (B) says that LMIM as RE of the FMIF was entitled as first mortgagee to take the steps referred to therein;
 - (C) says that LMIM pursuant to section 601FC(1)(c) of the Act and LMIM's directors (including the first defendant) pursuant to section 601FD(1)(c) of the Act were required to give priority to the interests of the FMIF over the interests of MPF to the extent of any conflict between them;
 - (v) as to subparagraph (v):
 - (A) admits that the Deed of Settlement and Release was executed by PTAL;
 - (B) says that execution of the Deed of Release by PTAL was sufficient to bind LMIM as RE of the FMIF in relation to the property of the FMIF which was subject to the Deed of Settlement and Release;
 - (C) denies as untrue that it was unnecessary for LMIM to also execute the Deed of Settlement and Release in its capacity as RE of the FMIF on the basis that the counterparties to the Deed of Release had an interest in obtaining certainty that LMIM as RE of the FMIF was fully bound by the terms of the Deed of Release;
 - (vi) denies subparagraph (vi) for the reasons pleaded at subparagraphs (i) to (v) above;
- (e) ~~does not admits subparagraph (e) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
- (f) as to subparagraph (f):

- (i) admits subparagraph (i);
 - (ii) admits subparagraph (ii);
 - (iii) adopts the admission at subparagraph (iii);
 - (g) as to subparagraph (g):
 - (i) admits subparagraph (i);
 - (ii) does not admit subparagraph (ii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (h) joins issue with subparagraph (h).
23. As to paragraph 29 of the Defence, the plaintiff:
- (a) adopts the admission at subparagraph (a);
 - (b) admits subparagraph (b);
 - (c) admits subparagraph (c);
 - (d) ~~on the basis that the reference to "6.1" is intended to be a reference to "61",~~ admits subparagraph (d);
 - (e) joins issue with subparagraph (e).
24. As to paragraph 30A of the Defence, the plaintiff:
- (a) admits subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) admits that the email of 6 December 2010, among other things, requested that WMS advise what further information WMS required in addition to the information contained in the email to provide an advice and requested that WMS provide Monaghan with an estimate of WMS's fees to provide the advice;
 - (ii) says that the email also provided comprehensive information about the proposed split of the proceeds of settlement of the Proceedings;
 - (iii) says that the effect of the email was as pleaded at paragraph 30A of the ~~35~~FASOC;
 - (c) as to paragraph (c):
 - (i) admits that Mr Monaghan communicated with one or more representatives of WMS:
 - (A) by telephone on 3 December 2010;
 - (B) in person on 7 December 2010;
 - (C) by email on 9 December 2010;
 - (D) by telephone on 14 December 2010;

(E) by email on 21 December 2010;

(F) in person and by email on 4 March 2011;

(ii) does not admit the content of the telephone calls or personal attendances on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(d) admits subparagraph (d);

(e) admits subparagraph (e).

25. As to paragraph 30B of the Defence, the plaintiff:

(a) admits subparagraph (a);

(b) admits subparagraph (b);

(c) does not admit subparagraph (c) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations.

26. As to paragraph 30C of the Defence, the plaintiff:

(a) as to subparagraph (a):

(i) adopts the admission contained therein;

(ii) does not admit whether the Gujarat Contract, the Deed of Release and the Deed of Settlement and Release were in their final form in existence as at the date of the instructions on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(b) as to subparagraph (b):

(i) adopts the admission contained therein;

(ii) admits that, at the date of the emails dated 6 December 2010, 14 March 2011 and 17 March 2011, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised and were the subject of continuing discussions and negotiations between the parties to the Proceedings which were conducted until in or about mid-June 2011;

(c) as to subparagraph (c):

(i) as to subparagraph (i), admits that at the date of the emails dated 6 December 2010, 14 March 2011 and 17 March 2011, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised and were the subject of continuing discussions and negotiations between the parties to the Proceedings which were conducted until in or about mid-June 2011;

(ii) admits as to subparagraph (ii):

(A) says that the matters alleged are not responsive to the matters pleaded at paragraph 30C(b)(ii)

(B) says that pursuant to sections 601FC(1)(e) and 601FC(3) of the Act, where and to the extent to which there was any conflict between the interests of

~~members of the FMIF and LMIM (whether on its own behalf or as trustee of the MPF), LMIM was required to act in a way which gave priority to the interests of members of the FMIF;~~

~~(C) repeats and relies upon the plea at paragraph 30C(b)(ii) of the 2FASOC that, by the structure which was in fact adopted to settle the Proceedings, LMIM as RE of the FMIF could effect the settlement of the Proceedings without the consent of LMIM as trustee of the MPF;~~

~~(D) as to subparagraph (A), does not admit whether the fair market value of the Property was not approximately the sale price for the Property under the Gujarat Contract on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~

~~(E) does not admit the matters alleged at subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~

(iia) as to subparagraph (iia):

(A) admits that only \$10m of the proceeds of the settlement of the Proceedings were allocated to the contract for sale of the Property;

(B) admits that the sale was part of an overall settlement of the Proceeding;

(C) otherwise does not admit the allegations on the basis they are vague and, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(iii) admits ~~denies~~ subparagraph (iii) as untrue and repeats and relies on its response above to paragraph 22(b) of the Defence;

(iv) denies subparagraph (iv) as untrue and repeats and relies upon its response above to paragraph 28 of the Defence;

(v) denies that LMIM as trustee for the MPF was the only entity that could pay the amount of \$25,000 as it is untrue because LMIM as RE for the FMIF could have funded the payment for the reasons detailed in subparagraph 18(b)(ii) above, and otherwise does not admit subparagraph (v) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(vi) as to subparagraph (vi), denies that LMIM as trustee of the MPF was entitled to or would have taken the steps alleged therein because:

(A) LMIM as trustee of the MPF would not have withheld such consent:

(1) for the reasons pleaded at subparagraph (ii) above;

(2) because none of the matters alleged in the Defence created a requirement for consent by LMIM as trustee for the MPF in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents pleaded at subparagraph 30C(b)(i);

(B) neither the directors nor LMIM would have caused LMIM as trustee of the MPF to take those steps, because doing so would have constituted a breach of sections 601FC(1)(c) and 601FC(3) of the Act;

(vii) as to subparagraph (vii):

(A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (ii) to (vi) hereof, LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings on the terms pleaded at paragraph 30C(b)(i) of the 35FASOC in a way which gave priority to the interests of LMIM as trustee of the MPF over the interests of members of the FMIF;

(B) denies subparagraph (B) on the basis that, in the premises pleaded at subparagraphs (ii) to (vi) hereof, LMIM would not have caused or permitted LMIM as RE of the FMIF to be exposed to the risks alleged;

(C) denies subparagraph (C) on the basis that, in the premises pleaded at subparagraphs (ii) to (vi), there was no requirement for consent by LMIM as trustee for the MPF in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents referred to at paragraph 30C(b)(i) of the 35FASOC;

(d) as to subparagraph (d), adopts the admission contained therein and further:

(i) does not admit subparagraph (i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(ii) as to subparagraph (ii):

(A) does not admit subparagraphs (A) and (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(B) denies subparagraph (C) on the basis that, by failing to instruct Allens to consider or have regard to the terms of the Deed of Priority, there was a risk that Allens' advice would not address the critical issue of the rights of LMIM as RE of the FMIF to retain the entirety of the proceeds of the settlement of the Proceedings;

(iii) denies subparagraph (iii) on the basis that:

(A) it repeats and relies upon its response above to paragraph 22A of the Defence; and

(B) it was important in seeking advice as to how to address the conflict between the interests of LMIM as RE of the FMIF and LMIM as trustee of the MPF that LMIM sought advice as to the correct issues and in the manner in which the requests for advice from WMS and Allens were framed, LMIM sought advice which:

(1) was unduly narrow, by failing to instruct Allens to consider the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act and by the deficiencies pleaded at paragraph 30C of the 35FASOC; and

(2) purported to justify a decision which LMIM and its directors made, in relation to the split of the proceeds of settlement of the Proceedings, without regard to the requirements of sections 601FC(1)(c) and 601FD(1)(c) of the Act.

(e) admits subparagraph (e);

(f) as to subparagraph (f):

(i) denies subparagraph (i) as untrue because LMIM as trustee of the MPF funded the Proceedings as second mortgagee;

(ii) as to subparagraph (ii), does not admit that there was any such understanding on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation denies the allegation therein as it is untrue as there was no such understanding as alleged;

(g) joins issue with subparagraph (g);

(h) as to subparagraph (h):

(i) as to subparagraph (i):

(A) admits that no formal agreement had been entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF;

(B) denies that the reason for the lack of a formal agreement was the uncertainty of the outcome of the Proceedings as it is untrue because the reason why there was no formal agreement was because the monies were in fact advanced by LMIM as trustee of the MPF as second mortgagee;

(ii) denies subparagraph (ii) as untrue on the basis there was no such understanding as alleged;

(iii) denies subparagraph (iii) on the basis that:

(A) no date of any such "understanding" is pleaded;

(B) it is not pleaded by the first defendant that the alleged "understanding" was discussed with any other person;

(C) no form of agreement is alleged;

(D) no consideration for any such agreement is alleged; and

(E) there was no such understanding as alleged;

(iv) denies subparagraph (iv) on the basis that the true state of affairs is as pleaded in the 35FASOC,

27. As to paragraph 30D of the Defence, the plaintiff:

(a) as to subparagraph (a):

(i) adopts the admission contained therein;

(ii) admits subparagraph (i)

(iii) as to subparagraph (ii), denies that the WMS contained the opinion alleged because it did not;

(iv) says that the WMS Report stated that "...the litigation funding for a matter such as this would range between 30% to 40%. For the purposes of our allocation we have adopted the midpoint being 35% for MPF. Accordingly, the remaining 65% of the litigation proceeds should be applied to FMIF";

- (v) repeats and relies upon the matters pleaded at paragraph 30C of the 35FASOC;
- (vi) says that the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
- (vii) as to subparagraph (iii):
 - (A) says that the WMS Report on page 2 under the heading "Source of Information" listed the matters on which the report was "primarily based" as being "information supplied";
 - (B) otherwise does not admit whether the WMS Report was based on any other sources of information (which are not identified in the Defence) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (b) admits subparagraph (b).

28. As to paragraph 30E of the Defence, the plaintiff:

- (a) as to subparagraph (a):
 - (i) adopts the admission contained therein; and
 - (ii) repeats and relies upon its response above to paragraph 30B of the Defence;
- (b) as to subparagraph (b):
 - (i) admits that the Allens Advice contained the statements alleged at subparagraphs (i) and (iii), did not advise the matters referred to at subparagraph (ii) and was addressed as alleged at subparagraph (iv);
 - (ii) but says that the statement alleged at subparagraphs (i) and (iii) was subject to the matters set out in the Allens Advice, summarised at paragraph 16 of that advice;
 - (iii) repeats and relies upon the matters pleaded at paragraph 30C of the 35FASOC;
 - (iv) says that the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC.

28A. As to paragraph 30F of the Defence, the plaintiff:

- (a) adopts the admission at subparagraphs (a), (b), (c), (d), (e), (h), (i), (k), (m), (o) and (p);
- (b) as to subparagraph (f), admits that the words pleaded appear at paragraph [16](g) of the Allens Advice;
- (c) as to subparagraph (g):
 - (i) denies the words alleged appear at paragraph [15] of the Allens Advice on the basis those words appear at paragraph [25];
 - (ii) otherwise adopts the admission therein;
- (d) as to subparagraph (j):
 - (i) admits paragraph [37] of the Allens Advice contains the further text alleged;

(ii) otherwise adopts the admission therein;

(e) as to subparagraph (l), admits that the words referred to in the 35FASOC appear at paragraph [56] of the Allens Advice;

(f) as to subparagraph (n):

(i) admits that paragraph [62](a) of the Allens Advice does not recite the precise terms of section 601FD(1)(c) of the Corporations Act 2001;

(ii) admits that it contains a summary of the effect of section 601FD(1)(c).

28B. As to paragraph 30G of the Defence, the plaintiff:

(a) admits subparagraph (a);

(b) denies subparagraph (b) on the basis that one of the breaches pleaded against the first to sixth defendants in the 35FASOC is the contravention of section 601FD(1)(c) at paragraph 45 thereof.

28C. As to paragraph 30H of the Defence, the plaintiff:

(a) as to subparagraph (a):

(i) admits the matters alleged;

(ii) says that the paragraph is otherwise a deemed admission of paragraph 30H(a) of the 35FASOC;

(b) adopts the admission at subparagraph (b);

(c) as to subparagraph (c):

(i) adopts the admission of subparagraph (i);

(ii) as to subparagraph (ii):

(A) admits that paragraph [25] of the Allens Advice contained the following text:

“[...] 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).”

(B) denies that the settlement with Bellpac could not occur without the agreement of MPF as trustee because:

(1) pursuant to sections 601FC(1)(c) and 601FD(1)(c) of the Corporations Act 2001, LMIM was empowered to, and was required to, prioritise the interests of members of the FMIF over the interests of LMIM as trustee of the MPF, such that LMIM as trustee of the MPF would not have prevented the settlement from occurring;

(2) further, by reason of the Deed of Priority, LMIM as RE of the FMIF was entitled to settle the Proceedings on the terms which it did and retain the proceeds of that settlement, except to the extent the proceeds exceeded the debt owing to LMIM as RE of the FMIF;

(3) the plaintiff repeats and relies upon its response above to paragraph 30C(c)(vii) of the Defence;

(iii) as to subparagraph (iii):

(A) admits (and says) that paragraph [27] of the Allens Advice contained the following text:

“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. [...]”

(B) says that the effect of that text is, as pleaded in the 35FASOC, that LMIM as RE of the FMIF was required to act in the best interests of FMIF’s members;

(iv) adopts the admission at subparagraph (iv);

(v) as to subparagraph (v):

(A) admits that the Allens Advice made the statement referred to therein;

(B) says that the statement was qualified, to the extent it was subject to the matters then identified at subparagraphs [16](a) to (g) inclusive, of which subparagraphs (a), (d), (e), (f) and (g) were not established for the reasons pleaded in the 35FASOC;

(d) as to subparagraph (d):

(i) adopts the admission at subparagraph (i);

(ii) as to subparagraph (ii):

(A) admits that paragraph [56] fell under the heading “Issues for the RE as an AFS Licensee”;

(B) denies as untrue, to the extent it is alleged, that such placement negatives the plea in the 35FASOC that paragraph [56] misconstrued or was inconsistent with the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act;

(iii) as to subparagraph (iii):

(A) admits that the Allens Advice elsewhere addressed the effect of sections 601FC(1)(c) and 601FD(1)(c);

(B) denies as untrue, to the extent it is alleged, that such treatment elsewhere negatives the plea in the 35FASOC that the Allens Advice misconstrued the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act and contained inconsistent statements in relation to the effect of those subsections;

(iv) is not required to plead to subparagraph (iv).

(e) as to subparagraph (e):

(i) adopts the admission at subparagraph (i);

- (ii) admits subparagraph (ii);
- (iii) as to subparagraph (iii), says that the statement was qualified, to the extent it was subject to the matters then identified at subparagraphs [16](a) to (g) inclusive, of which subparagraphs (a), (d), (e), (f) and (g) were not established for the reasons pleaded in the 35FASOC;
- (f) as to subparagraph (f):

 - (i) adopts the admission at subparagraph (i);
 - (ii) admits subparagraph (ii);
 - (iii) as to subparagraph (iii) denies the allegation therein as it is untrue as there was no such understanding as alleged;
 - (iv) is not required to plead to subparagraph (iv);
 - (v) as to subparagraph (v), repeats and relies upon the matters pleaded above in response to the Defence;

- (g) denies subparagraph (g) on the basis that the true position is as pleaded at paragraph 30H(g) of the 35FASOC;
- (h) as to subparagraph (h):

 - (i) as to subparagraph (i):

 - (A) adopts the admission therein;
 - (B) does not plead to the reference to paragraph "30(f)(e)" as there is no such subparagraph in the Defence and paragraph 30F(e) of the Defence is an admission;

 - (ii) adopts the admission at subparagraph (ii);
 - (iii) is not required to plead to subparagraph (iii) and says that the Defence does not plead what the "full terms, meaning and effect" of the Allens Advice comprises;
 - (iv) as to subparagraph (iv) says that the statement was qualified, to the extent it was subject to the matters then identified at subparagraphs [16](a) to (g) inclusive, of which subparagraphs (a), (d), (e), (f) and (g) were not established for the reasons pleaded in the 35FASOC;

- (i) as to subparagraph (i):

 - (i) adopts the admission at subparagraph (i);
 - (ii) adopts the admission at subparagraph (ii);
 - (iii) is not required to plead to subparagraph (iii) and says that the Defence does not plead what the "full terms, meaning and effect" of the Allens Advice comprises;
 - (iv) as to subparagraph (iv) says that the statement was qualified, to the extent it was subject to the matters then identified at subparagraphs [16](a) to (g) inclusive, of which subparagraphs (a), (d), (e), (f) and (g) were not established for the reasons pleaded in the 35FASOC;

- (j) as to subparagraph (i):
 - (i) adopts the admission at subparagraph (i);
 - (ii) adopts the admission at subparagraph (ii);
 - (iii) is not required to plead to subparagraph (iii) and says that the Defence does not plead what the "full terms, meaning and effect" of the Allens Advice comprises;
 - (iv) as to subparagraph (iv) says that the statement was qualified, to the extent it was subject to the matters then identified at subparagraphs [16](a) to (g) inclusive, of which subparagraphs (a), (d), (e), (f) and (g) were not established for the reasons pleaded in the 35FASOC;
- (k) is not required to plead to subparagraph (k);
- (l) denies subparagraph (l) as untrue, for the reasons pleaded in the 35FASOC;
- (m) denies subparagraph (m) as untrue, for the reasons pleaded at subparagraphs 30H(c) to (j) of the 35FASOC.

29. As to paragraph 31 of the Defence, the plaintiff:

- (a) admits it produced to the first defendant the document referred to in subparagraph (a);
- (b) adopts the admission in subparagraph (b);
- (c) admits subparagraph (c);
- (d) does not admit subparagraph (d) on the basis that, having made reasonable enquiries, remains uncertain as to the truth or falsity of the allegations;
- (e) admits subparagraph (e);
- (f) joins issue with subparagraph (f).

30. As to paragraph 31A of the Defence, the plaintiff:

- (aa) as to subparagraph (aa), repeats and relies upon its responses above to paragraph 30H of the Defence;
- (ab) as to subparagraph (ab), says that the plaintiff also alleges that the first defendant knew that there was no existing agreement between LMIM as RE of the FMIF and LMIM as trustee of the MPF;

Particulars

The plaintiff relies upon the matters alleged at paragraph 30C(h)(i) of the Defence.

- (a) adopts the admission at subparagraph (a);
- (b) does not admit subparagraph (b), on the basis that, having made reasonable enquiries, he it remains uncertain as to the truth or falsity of the allegations;
- (c) joins issue with subparagraph (c);
- (d) is not required to plead to subparagraph (d);

(e) joins issue with subparagraph (e).

31. As to paragraph 32 of the Defence, the plaintiff:

- (a) adopts the admission contained therein;
- (b) admits that the Deed poll contained the text referred to at subparagraphs (aa) to (d), ~~(a)~~ and ~~(e)~~;
- (c) ~~does not admit~~ denies as untrue that there was any understanding of the kind referred to in the passage recited at subparagraph (a) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (d) denies there was a need to reach agreement of the kind referred to in the passage recited at subparagraph (b) on the basis that LMIM was required, by section 601FC(1)(c) of the Act, to give priority to the interests of members of the FMIF in the event of conflict between the members interests and LMIM's own interests;
- (e) denies that the "overall settlement" could not occur without the agreement of LMIM as trustee of the MPF as referred to in the passage recited at subparagraph (b) on the basis that, in order to give effect to LMIM's duties pursuant to section 601FC(1)(c) of the Act, LMIM was not permitted to cause itself as trustee of the MPF to prevent the "overall settlement" from occurring, as doing so would have constituted giving priority to its own interests or to the interests of the MPF rather than giving priority to the interests of members of the FMIF.

31A. As to paragraph 32A of the Defence, the plaintiff:

- (a) as to subparagraph (a), denies as untrue that the passage quoted therein constitutes a reference to the terms pleaded at paragraph 30G of the 35FASOC;
- (b) adopts the admission at subparagraph (b).

32. As to paragraph 33 of the Defence, the plaintiff:

- (a) as to subparagraph (a), repeats and relies upon its response above to paragraph 24 of the Defence;
- (b) ~~does not admit~~ the matters alleged at as to subparagraph (b):
 - (i) does not admit subparagraph (i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) as to subparagraph (ii):
 - (A) admits that no formal agreement was entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF;
 - (B) otherwise denies the allegations for the reasons pleaded at paragraph 26(h) above;
- (c) denies subparagraph (c) for the reasons pleaded at subparagraphs (a) and (b) above.

33. As to paragraph 34 of the Defence, the plaintiff:

- (aa) as to subparagraph (aa):

(i) as to subparagraph (i), repeats and relies upon its responses above to paragraph 30H of the Defence;

(ii) denies subparagraph (ii) for the reasons pleaded at paragraph 34(aa) of the 35FASOC;

(a) as to subparagraph (a):

(i) adopts the admission contained therein;

(ii) repeats and relies upon its response above to paragraph 28(f) of the Defence;

(b) admits subparagraph (b);

(c) as to subparagraph (c):

(i) as to subparagraph (i), repeats and relies upon its responses above to subparagraphs 34(a) and 30C(c) of the Defence;

(ii) as to subparagraph (ii):

(A) admits that only \$10m of the proceeds of the settlement of the Proceedings were allocated to the contract for sale of the Property;

(B) admits that the sale was part of an overall settlement of the Proceeding;

(C) otherwise does not admit the allegations on the basis they are vague and, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

~~denies subparagraph (ii) as untrue and repeats and relies upon the matters pleaded at subparagraph 34(a)(i) of the 2FASOC and paragraph 26(c) above;~~

(iii) as to subparagraph (iii):

(A) says that the matters alleged therein proceed on the false premise that the plaintiff's only ability to sell the Property was in reliance on clause 12 of the Deed of Priority;

(B) repeats and relies upon the matters pleaded at subparagraph (ii) above;

(C) says that, in any event, by clause 3.2 of the Deed of Priority (referred to at paragraph 12(d) of the 35FASOC), "all money" received by inter alia Bellpac, LMIM as RE of the FMIF or LMIM as trustee of the MPF in respect of the PTAL Mortgage or the PTAL Charge must be applied in the priority order in clause 3.1;

(D) admits that LMIM as RE of the FMIF received upon and after completion the amounts referred to at subparagraph (B);

(E) otherwise does not admit the matters alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(iv) ~~does not admit~~ as to subparagraph (iv), admits that the FMIF Settlement Payment substantially exceeded the total sale price for the Property pursuant to the Gujarat Contract on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

- (d) as to subparagraph (d):
 - (i) adopts the admission contained in subparagraph (i);
 - (ii) as to subparagraph (ii), repeats and relies upon its response above to paragraph 28(b) of the Defence;
 - (iii) as to subparagraph (iii), says that paragraph 30C(g) of the Defence is a non-admission and says that the plaintiff is not required to plead thereto;
 - (iv) as to subparagraph (iii), repeats and relies upon its response above to paragraph 30C of the Defence;

- (e) as to subparagraph (e):
 - (i) does not admit subparagraph (i), on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) does not admit as to subparagraph (ii) (including whether there was any such understanding):
 - (A) denies there was any such understanding as alleged for the reasons pleaded at subparagraph 26(h) above;
 - (B) otherwise does not admit the allegations on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) denies as to subparagraph (iii) on the basis that LMIM pursuant to section 601FC(1)(c) of the Act and LMIM's directors (including the first defendant) pursuant to section 601FD(1)(c) of the Act were required to give priority to the interests of the FMIF over the interests of MPF to the extent of any conflict between them, repeats and relies upon its responses above to paragraph 34(c) of the Defence;

- (f) as to subparagraph (f):
 - (i) as to subparagraph (i):
 - (A) says that the first defendant (along with the other directors of LMIM and LMIM) proceeded on the incorrect basis that the funding provided by LMIM as trustee of the MPF as second mortgagee could be treated as if it were arm's-length litigation funding;

Particulars

Recital M of the Deed Poll.

- (B) denies that Chapter 2E and accounting standard AASB 124 set out the relevant considerations to which LMIM was to have regard on the basis that pursuant to section 601FC(1)(c) of the Act and LMIM's directors (including the first defendant) pursuant to section 601FD(1)(c) of the Act were required to give priority to the interests of the FMIF over the interests of MPF to the extent of any conflict between them;

- (ii) denies subparagraph (ii) for the reasons pleaded at subparagraph (i) above;

- (iii) as to subparagraph (iii):

- (A) denies as untrue that LMIM as trustee of the MPF's role was similar to that of litigation funder and says that LMIM as trustee of the MPF provided funding in relation to the Proceedings in the manner pleaded at paragraph 24 of the 35FASOC;
- (B) denies that it was appropriate to consider litigation funder scenarios, which were not in fact analogous, for the reasons pleaded at paragraph (i) above;
- (iv) as to subparagraph (iv):
 - (A) admits that LMIM sought and obtained independent accounting advice and independent legal advice;
 - (B) says that the advice from WMS and Allens was deficient in that the instructions provided to WMS and to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (C) repeats and relies upon the matters pleaded at subparagraph (i) above;
- (v) denies subparagraph (v) for the reasons pleaded at subparagraph (i) above;
- (vi) does not admit subparagraph (vi) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (vii) as to subparagraph (vii):
 - (A) does not admit the matters alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (B) says that it is no answer to the failure of LMIM to comply with section 601FC(1)(c) of the Act and the failure of LMIM's directors to comply with section 601FD(1)(c) of the Act to rely upon any alleged reliance on other directors;
 - (C) says further that even if the first defendant had the beliefs alleged (which is not admitted) he was still required to exercise his powers as a director consistently with:
 - (1) his duty to act in the interests of members of the FMIF in accordance with section 601FD(1)(c) of the Act;
 - (2) the duty of LMIM to act in the interests of members of the FMIF in accordance with section 601FC(1)(c) of the Act;
- (viii) as to subparagraph (viii):
 - (A) admits that LMIM as trustee of the MPF being a registered mortgagee with second priority does not of itself exclude its ability to act separately as analogous to a litigation funder;
 - (B) denies as untrue that LMIM as trustee of the MPF in fact operated as, or analogous to, a litigation funder because the true state of affairs was as pleaded at paragraph 24 of the 35FASOC;
- (g) as to subparagraph (g):
 - (i) as to subparagraph (i):

- (A) admits that LMIM obtained advice from Allens;
 - (B) denies as untrue that the Allens Advice properly addressed the matters referred to at paragraph 34(e) of the 35FASOC;
 - (ii) as to subparagraph (ii):
 - (A) admits that LMIM obtained the WMS Report;
 - (B) denies as untrue that the WMS Report properly addressed the matters referred to at paragraph 34(e) of the 35FASOC;
 - (iii) as to subparagraph (iii), denies as untrue that the Allens Advice or the WMS Report considered the matters pleaded at subparagraphs 34(e)(i) to (iii) in the proper context of the circumstances outlined at subparagraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
 - (iv) denies subparagraph (iv) for the reasons pleaded at subparagraph 34 of the 35FASOC and subparagraph (f)(i) above;
 - (h) as to subparagraph (h):
 - (i) denies subparagraph (i) for the reasons pleaded above in response to subparagraph 34(f) of the Defence;
 - (ii) as to subparagraph (ii), ~~does not admit that there was any such understanding on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations~~ denies the allegations therein as there was no such understanding as alleged for the reasons pleaded at subparagraph 26(h) above;
 - (iii) as to subparagraph (iii), denies as untrue that it was clearly in the interests of the FMIF to agree to the proceeds split:
 - (A) for the reasons pleaded above in response to paragraphs 34(f) and 30C(c) of the Defence; and
 - (B) because LMIM as RE of the FMIF pursuant to section 601FC(1)(c) of the Act and LMIM's directors (including the first defendant) pursuant to section 601FD(1)(c) of the Act were required to give priority to the interests of the FMIF over the interests of MPF to the extent of any conflict between them;
 - (i) as to subparagraph (i):
 - (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii), repeats and relies upon its responses above to subparagraphs 34(g) and 34(h) of the Defence;
 - (j) as to subparagraph (j), repeats and relies upon its responses above to subparagraphs 34(a) to 34(i) of the Defence;
 - (k) joins issue with subparagraph (k).
34. As to paragraph 35 of the Defence, the plaintiff:
- (a) admits subparagraph (a);

- (b) admits subparagraph (b);
- (c) admits subparagraph (c);
- (d) admits subparagraph (d);
- (e) admits subparagraph (e);
- (f) admits subparagraph (f);
- (g) as to subparagraph (g):
 - (i) as to subparagraph (i):
 - (A) says that the total consideration payable to PTAL as custodian of the FMIF was the full amount of the Gujarat Settlement Payment defined at subparagraph 35(c) of the Defence;
 - (B) admits that the amount defined as the "Agreed Contribution", being the amount pleaded at paragraph 35 of the 35FASOC, was paid to LMIM as trustee of the MPF from the Gujarat Settlement Payment;
 - (ii) as to subparagraph (ii):
 - (A) admits that the payment made to LMIM as trustee of the MPF was consistent with the matters recorded in the Deed Poll;
 - (B) denies that the Deed Poll accurately recorded the true state of affairs because there was not in fact any need for LMIM as RE of the FMIF to reach agreement with LMIM as trustee of the MPF about sharing the proceeds of settlement of the Proceedings and LMIM as RE of the FMIF was obliged pursuant to section 601FC(1)(c) of the Act to give priority to the interests of members of the FMIF;
 - (C) does not admit that the directors in fact reached the conclusions recited in the Deed Poll on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) denies subparagraph (iii) for the reasons pleaded above in response to paragraphs 22, 22A, 24, 27, 28, 30C, 33, 34, 35, 37 and 37A of the Defence, but in particular because pursuant to section 601FC(1)(c) of the Act and LMIM's directors (including the first defendant) pursuant to section 601FD(1)(c) of the Act were required to give priority to the interests of the FMIF over the interests of MPF to the extent of any conflict between them.

35. As to paragraph 36 of the Defence, the plaintiff:

- (a) adopts the admission at subparagraph (a);
- (b) as to subparagraph (b), repeats and relies upon the matters pleaded above in response to paragraph 35 of the Defence.

36. As to paragraph 37 of the Defence, the plaintiff:

- (a) as to subparagraph (a), ~~does not admit that there was any such understanding on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations~~ denies there was any such understanding as alleged for the reasons pleaded at subparagraph 26(h) above;

- (b) as to subparagraph (b):
- (i) admits that the Deed Poll had been signed by all directors of LMIM before the Gujarat Contract, the Deed of Release and the Deed of Settlement and Release were executed;
 - (ii) says that the reference to “and the agreement of the directors in relation to how the proceeds would be split had been finalised” is vague;
 - (iii) does not admit that there was any such “agreement” as alleged as having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (c) as to subparagraph (c):
- (i) repeats and relies upon its responses above to paragraphs 28 and 30C(c) of the 35FASOC;
 - (ii) denies that LMIM as trustee of the MPF could have prevented settlement to have occurred in the circumstances alleged because doing so would have constituted a breach of sections 601FC(1)(c) and 601FC(3) of the Act;
- (d) as to subparagraph (d):
- (i) admits that LMIM as RE of the FMIF had the ability to issue directions in relation to the payment of the Gujarat Settlement Payment at Completion;
 - (ii) says that pursuant to sections 601FC(1)(c) and 601FC(3) of the Act, where and to the extent to which there was any conflict between the interests of members of the FMIF and LMIM (whether on its own behalf or as trustee of the MPF), LMIM was required to act in a way which gave priority to the interests of members of the FMIF;
- (e) as to subparagraph (da):
- (i) admits that clause 13.1 of the Constitution of the FMIF granted to LMIM as RE of the FMIF, among other things, all the powers in respect the Scheme and the Scheme Property that it is possible under the Act to confer on a RE and a trustee as though it were the absolute owner of the Scheme Property;
 - (ii) admits that clause 29 of the Constitution of the FMIF was in the terms pleaded in paragraph 44 of the Defence save that those terms were subject to the opening words at clause 29.1 “Subject to the Law”;

Particulars

- (A) The Law was defined in clause 1.1 of the FMIF Constitution [FMIF.100.005.7639] as “the Corporations Act 2001 and the Corporations Regulations”;
 - (iii) denies that ~~that provision~~ clauses 13 and 29 of the Constitution empowered LMIM as RE of the FMIF to make the Settlement payment to the seventh defendant because doing so constituted a breach of section 601FD(1)(c), or alternatively section 601FD(1)(b), of the Act, as pleaded in the 35FASOC;
- (f) as to subparagraph (e), repeats and relies upon its responses above to paragraphs 37(a) to (d) and 30C(c) and 35 of the Defence.

37. As to paragraph 37A of the Defence, the plaintiff:
- (a) denies subparagraph (a) for the reasons pleaded at paragraph 37A of the 35FASOC and in its responses above to paragraph 34 of the Defence;
 - (b) as to subparagraph (b):
 - (i) denies that it was reasonable for him to make the conclusion alleged because pursuant to sections 601FC(1)(c) and 601FC(3) of the Act, where and to the extent to which there was any conflict between the interests of members of the FMIF and LMIM (whether on its own behalf or as trustee of the MPF), LMIM was required to act in a way which gave priority to the interests of members of the FMIF;
 - (ii) says that the first defendant was not required to, and was not permitted to, take steps to protect the interests of both the MPF and the FMIF as LMIM and its directors were required by sections 601FC(1)(c) and 601FD(1)(c) of the Act respectively to give priority to the interests of the members of the FMIF;
 - (iii) as to subparagraph (i), the WMS Report and the Allens Advice were deficient in that the instructions provided to WMS and to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (iv) as to the matters alleged to have been relevant facts at subparagraph (ii):
 - (A) admits subparagraph (A);
 - (B) denies subparagraph (B) as untrue and repeats and relies upon the matters pleaded at paragraph 26(c) above;
 - (C) denies the matters alleged at subparagraph (C) to (G) were relevant for the reasons pleaded at subparagraph (i) above;
 - (c) as to subparagraph (c):
 - (i) does not admit that the first defendant in fact reached any of the conclusions alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) denies that it was reasonable for the first defendant to reach any such conclusions for the reasons pleaded at subparagraph (b) above and repeats and relies upon the matters pleaded at paragraph 34(g)(ii) above;
 - (iii) repeats and relies upon the matters pleaded at paragraphs 18(b) (that alternative funding was available), 26(c) (that LMIM as trustee of the MPF would not have refused to consent) and 33(f)(iii) (that LMIM as trustee of the MPF was not analogous to a litigation funder);
 - (d) as to subparagraph (d):
 - (i) as to subparagraph (i):
 - (A) admits clause 29.1 of the FMIF Constitution [FMIF.100.005.7639] is in the terms pleaded;
 - (B) but says that clause 29.1 was subject to the opening words "Subject to the Law";

Particulars

(C) The Law was defined in clause 1.1 of the FMIF Constitution [FMIF.100.005.7639] as “the Corporations Act 2001 and the Corporations Regulations”.

(ii) denies subparagraph (ii) because:

(A) it does not accurately state the duties owed under section 601FD(1)(b) and 601FD(1)(c);

(B) s601FD(1)(c) obliged the directors of LMIM to prioritise the interests of members of the FMIF to the extent there is a conflict between the members interests and the interests of the responsible entity and that s601FD(1)(b) obliged the directors to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer’s position;

(iii) denies subparagraph (iii) for the reasons that the first defendant contravened section 601FD(1)(c) and 601FD(1)(b) as pleaded in paragraph 45 of the 5FASOC.

~~38. As to paragraph 38 of the Defence, the plaintiff:~~

~~(a) adopts the admission at subparagraph (a);~~

~~(b) as to subparagraph (b):~~

~~(i) denies subparagraph (i) on the basis that those duties were owed both to LMIM and to LMIM as RE of the FMIF;~~

~~(ii) denies subparagraph (ii) on the basis that officers of a responsible entity owe the statutory duties prescribed at sections 180(1) and 182(1) as well as the duties prescribed at section 601FD of the Act.~~

~~39. As to paragraph 39 of the Defence, the plaintiff:~~

~~(a) as to subparagraph (a), repeats and relies upon its responses above to paragraph 38 of the Defence;~~

~~(b) denies subparagraph (b) for the reasons pleaded at paragraph 39 of the 2FASOC and in response to paragraph 37A of the Defence;~~

~~(c) as to subparagraph (c), repeats and relies upon the matters pleaded at paragraphs 39 to 45 of the 2FASOC;~~

~~(d) as to subparagraph (d), says that the reference at paragraph 39(b) to the 2FASOC to “an advantage to MPF” is in its context a reference to an advantage being gained by LMIM as trustee for the MPF.~~

40. As to paragraphs 40 44 to 54 of the Defence, the plaintiff:

(a) repeats and relies upon the matters pleaded at paragraphs 39 44 to 49/46 of the 35FASOC;

(b) as to paragraph 44, the plaintiff repeats and relies on paragraph :

(i) adopts the admission therein;

- (ii) admits that clause 29 of the FMIF Constitution [FMIF.100.005.7639] is in the terms pleaded save that those terms were subject to the opening words at clause 29.1 "Subject to the Law":

Particulars

- (A) The Law was defined in clause 1.1 of the FMIF Constitution [FMIF.100.005.7639] as "the Corporations Act 2001 and the Corporations Regulations".
 - (iii) says that s601FD(1)(c) of the Corporations Act 2001 obliged the directors of LMIM to prioritise the interests of members of the FMIF to the extent there is a conflict between the members interests and the interests of the responsible entity and that s601FD(1)(b) obliged the directors to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position:
 - (iv) says that clause 29.2 of the Constitution of the FMIF did not exclude the obligation at s601FD(1)(c) and 601FD(1)(b) of the Corporations Act 2001.
- (c) otherwise joins issue with the allegations therein.

41A. As to paragraph 45AA, the plaintiff:

- (a) as to subparagraph (a), repeats and relies upon its responses to paragraphs 30C(c), 34 and 37A above:
- (b) as to subparagraph (b):
 - (i) admit subparagraphs (i) to (x):
 - (ii) as to subparagraph (xi):
 - (A) does not admit that LMIM would have been in breach of LMIM's duties as trustee of the MPF if it took the steps referred to in paragraph 45AA(b) to (f) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations:
 - (B) says, if taking those steps would have been a breach of LMIM's duties as trustee of the MPF:
 - (1) LMIM was required, pursuant to sections 601FC(1)(c) and 601FC(3) of the Act, to act in a way which gave priority to the interests of members of the FMIF;
 - (2) being in breach of its obligations to the MPF did not excuse or justify LMIM's non-compliance with the above provisions on behalf of the FMIF;
- (iii) as to subparagraph (xii):
 - (A) does not admit that LMIM would have been in breach of LMIM's duties as trustee of the MPF if it took the steps referred to in paragraph 45AA(b) to (f) as it is unaware of the truth or falsity of the allegation despite having made reasonable inquiries;

- (B) otherwise denies the allegations there as they are untrue as sections 601FC(1)(c) and 601FC(3) of the Act obliged LMIM to take the steps referred to in paragraphs 45AA(b) to (f) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (iv) as to subparagraph (xiii) denies that is a proper inference because of the matters pleaded in paragraphs 12, 24, 28, 30C(d)(iii), 34(b) and 45AA of the 5FASOC and the matters pleaded in this Reply;
- (c) denies subparagraph (c) on the basis that;
- (i) the plaintiff's allegations of causation and loss are not premised on ignoring the interests of the MPF;
- (ii) the plaintiff's allegations of causation and loss are premised on how LMIM was required to act in accordance with section 601FC(1)(b) and (c) of the Act;
- (iii) the directors of LMIM were required to act in accordance with section 601FD(1)(b) and (c) of the Act;
- 41 AB. As to paragraph 45AB, the plaintiff repeats and relies on its responses to paragraph 45AA of the Defence above.
41. As to paragraph 55 of the Defence, the plaintiff:
- (a) as to subparagraph (a), admits that the decision of the first defendant to execute the Deed Poll was a "business judgment" within the meaning of section 180(3) of the Act;
- (b) as to subparagraph (b):
- (i) ~~denies as untrue the allegation that the business judgment to enter into the Deed Poll was made in good faith and for a proper purpose and repeats and relies upon the matters pleaded at paragraphs 30A to 34 of the 2FASOC;~~
- (ii) as to the matters alleged at subparagraph (i), denies as untrue that the matters alleged therein justified the making of the payment to LMIM as trustee for the MPF;
- (iii) ~~as to the matters alleged at subparagraph (ii), does not admit that there was any such understanding on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations denies that there was any such understanding as alleged for the reasons pleaded at subparagraph 26(h) above;~~
- (iv) as to subparagraph (iii), repeats and relies upon its responses above to paragraphs 22, 22A, 24, 27, 28, 30C, 33, 34, 35, 37 and 37A of the Defence;
- (c) does not admit the matters alleged at subparagraph (c) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation
- (d) as to subparagraph (d):
- (i) repeats and relies upon the matters pleaded at paragraph 37; and

- (ii) denies that the first defendant properly informed himself about the Proceeds Split and the Settlement payment for the reasons pleaded at paragraphs 30A to 34 of the 35FASOC;
- (e) does not admit subparagraph (e) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- ~~(f) as to subparagraph (f), denies that the first defendant rationally believed the judgment he made was in the best interests of LMIM including in its capacity as RE of the FMIF because the judgment was plainly to the detriment of the FMIF and the plaintiff repeats and relies upon the matters pleaded at paragraph 37A of the 2FASOC;~~
- ~~(g) as to subparagraph (g), repeats and relies upon the matters pleaded at subparagraph (f) above;~~
- ~~(h) denies the allegations in subparagraph (h) for the reasons pleaded at subparagraphs (a) to (g) above;~~

~~42. As to paragraph 56 of the Defence, the plaintiff:~~

- ~~(a) as to subparagraph (a), does not admit that the first defendant acted honestly in making, permitting or directing the amount paid to LMIM as trustee for the MPF to be paid by LMIM in its capacity as RE of the FMIF, on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation, and~~
- ~~(b) as to subparagraphs (b) and (c), denies the allegations therein because, having regard to all the circumstances of this case (in particular those pleaded at paragraph 37A of the 2FASOC and the first defendant's knowledge and experience in the operation of LMIM and the absence of any agreement between LMIM as RE of the FMIF and LMIM as trustee of the MPF in relation to the MPF recovering a share of the proceedings of the Proceedings prior to the entry into of the Deed Poll), there is no basis on which it can be said that the first defendant ought fairly be excused for any contravention of the Act.~~

~~43. As to paragraph 57 of the Defence, the plaintiff does not admit the matters alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.~~

44. Save as aforesaid, the plaintiff joins issue with the matters pleaded in the Defence.

45. As to paragraph 55 of the Defence the plaintiff:

- (a) notes the notice given of the first defendant's intention, in the event that the privileges pleaded in the Defence are waived in whole or in part, to rely upon ss 1317S or 1318(1) of the Corporations Act 2001 (Cth);
- (b) says further that, in so far as subparagraphs (a) and (b) purport to plead allegations of fact, it does not admit the allegations therein as, despite reasonable enquiry, it remains uncertain as to the truth or falsity of the allegations and cannot plead further until proper particulars are provided.

This amended pleading was settled by Ms MJ Luchich of Counsel Mr D O'Brien of Queen's Counsel and Mr M Jones of counsel.

Signed: *Adm*

Description: Solicitors for the Plaintiff

Dated: ~~14 July 2015~~ ~~12 April 2018~~ ~~12 March 2019~~ 4 April 2019