

"SC-10"

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

The Plaintiff relies on the following facts in reply to the ~~Amended~~ ~~Amended~~ Defence of the Second Defendant, filed in the Supreme Court of Queensland, Brisbane Registry on 24 April 2017 ~~27 April 2018~~ ~~26 February 2019~~ 3 April 2019 (Defence) as follows:

1. The plaintiff adopts the:

Amended Reply to the amended defence of the Second Defendant
Filed on behalf of the Plaintiff

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

Gadens Lawyers



4 APR 2019

- (a) admissions made in paragraphs 1(a) to (c), ~~2(a)~~, 4, 6, 7, 9, 10, 14, 16, 17 (a), 19, 20, ~~24~~, 24, 25, ~~25B~~, 29(a), 30(a), ~~31~~, ~~32(a)~~, 33, 40, and 51 and 64 of the Defence; and
- (b) definitions used in the ~~Third~~ ~~Second~~ ~~Fifth~~ Further Amended Statement of Claim dated ~~7 November 2016~~ ~~1 February 2019~~ 2 April 2019 (~~2FASOC~~ ~~35FASOC~~) and the Defence (unless the contrary intention is expressed).

1A. The plaintiff admits paragraph 1(e) of the Defence.

1AB. As to paragraph 1(f) of the Defence, the plaintiff:

- (a) as to subparagraph (i), admits that clause 13.1 and 29.1 of the FMIF Constitution [FMIF.100.005.7639] is in the terms pleaded;
- (b) as to subparagraph (ii), admits clause 29 of the FMIF Constitution had the effect pleaded save that clause 29 was subject to the opening words at clause 29.1 "Subject to the Law";

Particulars

- (i) 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".
- (c) 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.

1B. As to paragraph 2 of the Defence, the plaintiff:

- (a) adopts the admissions at subparagraph (a);
- (b) is not required to plead to subparagraph (b);
- (c) as to subparagraph (c):
 - (i) admits subparagraphs (i) and (iv);
 - (ii) 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;
- (d) admits subparagraph (d)(i) but does not admit (d)(ii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (e) admits subparagraph (e);
- (f) admits subparagraph (f);
- (g) admits subparagraph (g);
- (h) does not admit subparagraph (h) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(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.

2. As to paragraph 3 of the Defence, the plaintiff:
 - (a) adopts the admissions in subparagraphs (a) and (b);
 - (b) as to subparagraph (c):
 - (i) repeats and relies upon the matters pleaded at paragraph 3 of the 35FASOC;
 - (ii) says further that the first to sixth defendants were acting in their capacity as directors of the seventh defendant in its capacity as RE of the FMIF in relation to the matters pleaded at paragraph 36 of the 35FASOC;
 - (iii) for the reasons pleaded in sub-paragraphs (i) and (ii) above denies that the plaintiff does not have standing as alleged; and
 - (c) denies the allegation therein as they are untrue because his powers are not limited in the manner alleged.
3. As to paragraph 5 of the Defence, the plaintiff:
 - (a) adopts the admission therein; and
 - (b) admits subparagraphs (a) and (b).
4. As to paragraph 8 of the Defence, the Plaintiff:
 - (a) adopts the admission therein; and
 - (b) does not admit that the deeds referred to therein exhaustively list all variations to the FMIF Bellpac Loan Agreement on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations.
5. As to paragraph 11 of the Defence, the plaintiff:
 - (a) adopts the admission in subparagraph (a);
 - (b) admits that the MPF Charge provides that it was to secure, amongst other things, a loan agreement intended to be executed and dated on the same date between Bellpac and LMIM as trustee for the MPF but says further that:
 - (i) clause 3 of the MPF Charge provides that the Secured Property (as defined in the MPF Charge) is charged as security for payment of the "Money Secured" (as defined in the MPF Charge);
 - (ii) "Money Secured" is defined to include all money owing to the Mortgagee (being, LMIM as Trustee for the MPF) by the Mortgagor (being, Bellpac);
 - (iii) in premises of subparagraph (i) and (ii) above, the MPF Charge secured the payment of the MPF Bellpac Loan;
 - (c) adopts the deemed admission that as security for the MPF Bellpac Loan, Bellpac granted to LMIM as trustee of the MPF the MPF Mortgage; and

- (d) admits the MPF Mortgage pre-dates the MPF Bellpac Loan Agreement.
6. As to paragraph 12 of the Defence, the plaintiff:
- (a) adopts the admissions in subparagraph (a);
 - (b) admits that PTAL was also a party to the Deed;
 - ~~(c) as to subparagraph (b), admits that PTAL is not specifically mentioned in clause 8 but says:
 - ~~(i) the term "Mortgagee" in clause 8 of the Deed of Priority was defined in clause 1.1 to mean the First Mortgagee, the Second Mortgagee, the Third Mortgagee or Austcorp;~~
 - ~~(ii) the term "First Mortgagee" was defined in clause 1.1 to include "the Custodian" and the "Responsible Entity"; and~~
 - ~~(iii) "the Custodian" was defined to mean PTAL.~~~~
 - (d) is not required to plead to subparagraph (c).
7. As to paragraph 13 of the Defence, the plaintiff:
- (a) adopts the admissions in subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) repeats and relies upon the matters pleaded at paragraph 13 of the ~~35~~FASOC;
 - (ii) does not admit the matters alleged therein on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.
8. As to paragraph 15 of the Defence, the plaintiff:
- (a) admits the LASA is dated 21 October 2004;
 - (b) adopts the admission at subparagraph (b); and
 - (c) says that GPC was also a party to the LASA.
9. As to paragraph 18 of the Defence, the plaintiff:
- (a) adopts the admission at subparagraph (a); and
 - (b) admits the allegations at subparagraph (a) and (b).
10. The plaintiff admits the matters alleged at subparagraphs 20(b)(i) and (ii) of the Defence.
- ~~10A. As to paragraph 20(bb) of the Defence, the Plaintiff denies the matters alleged ~~as untrue~~ because the Amended Commercial List Statement:~~
- ~~(a) did not specify whether LM sued in its capacity as RE of the FMIF or as trustee for the MPF;~~

~~(b) at paragraph 4, referred to money loaned by LMIM as RE of the FMIF to Bellpac;~~

~~(c) at paragraph 20B, referred to demands issued by PIAL, which was custodian for the FMIF;~~

10A. The Plaintiff admits the matters alleged at subparagraph 20(bb) of the Defence,

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

(a) adopts the admissions at subparagraphs (a) and (d);

(aa) as to subparagraph (b):

(i) as to subparagraph (i), repeats and relies upon the matters pleaded in paragraph 24 of the 5FASOC that LMIM as trustee of the MPF funded the Proceedings as second mortgagee in an amount of "not more than" approximately \$1,950,421.69;

(ii) admits subparagraph (ii);

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

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

(c) as to subparagraph (e):

(i) admits that LMIM as trustee of the MPF agreed to provide an undertaking to pay any costs awarded against Bellpac in favour of Gujarat in the Bellpac proceedings; as to damages in the Bellpac proceedings;

~~does not admit that LMIM as trustee of the MPF agreed to fund the \$1.3m payment to Coalfields in order to facilitate settlement of the Proceedings on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.~~

(ii) denies that LMIM as trustee of the MPF funded the \$1.3m payment to Coalfields as part of the settlement of the Proceedings because the sum of \$1.3m was paid as part of the Bellpac settlement proceeds;

(iii) as to subparagraph (iv):

(A) admits that LMIM as trustee of the MPF funded the costs of settling the Proceedings; but

(B) says that part of Monaghan Lawyers invoice 644 dated 4 October 2011 related to a different claim;

(C) says that Verekers invoice 11518 dated 13 September 2011 related to a different claim and proceeding.

(iv) admits subparagraph (v);

- (d) denies subparagraph (f) on the basis that:
 - (i) from 3 March 2009, LMIM as RE of the FMIF determined that it would not accept any applications for investment in the FMIF from any person who was not an existing member in the FMIF; but
 - (ii) the FMIF was not otherwise frozen, such that any other funds which the FMIF was able to recover, or which it held, could have been available to fund the Proceedings or settlement thereof;
 - (iii) those funds included the funds referred to at subparagraph 15(c)(v) below;
12. As to paragraph 23 of the Defence, the plaintiff:
- (a) adopts the admissions made therein;
 - (b) adopts the deemed admission that the Mediation Heads of Agreement was executed in November 2010 in the course of a mediation between the parties to the Proceedings; and
 - (c) admits that the 'Heads of Agreement' bears the date 9 November 2010.

12A. As to paragraph 25 of the Defence, the plaintiff:

- (a) adopts the admissions therein;
- ~~(b) denies that, on the proper construction of the Deed of Release, LMIM as trustee of the MPF was also a party on the basis that by the references to PTAL, which acted as custodian for the FMIF, and 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;~~
- ~~(c) denies that, on the proper construction of the Deed of Settlement and Release, LMIM as trustee of the MPF was also a party on the basis that, by the reference 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 Release and Settlement to LMIM could only have been a reference to LMIM as RE of the FMIF.~~

12B. The plaintiff admits paragraph 25A of the Defence.

13. As to paragraph 26 of the Defence, the plaintiff:
- (aa) is not required to separately plead to subparagraph (aa);
 - (a) admits subparagraph (a); and
 - (b) denies subparagraph (b) on the basis that the email of 6 December 2010 was a lengthy letter of instruction which, on its proper construction sought advice as pleaded at paragraph 30A of the FASOC.

Particulars

The plaintiff relies in particular on the second-last paragraph of the letter which states, after providing a lengthy background to the issue:

“Can you please consider the above and let me know what further information you require. It is probably best that we have a meeting to discuss the matter generally, and I can provide you with any detail you require that I have not covered above.”

(c) admits subparagraph (c).

14. As to paragraph 27 of the Defence, the plaintiff:

(a) adopts the admissions contained therein;

(b) admits subparagraphs (a), and (b), (c) and (d), and

~~(c) is not required to plead to subparagraph (c) which alleges a conclusion of law.~~

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

(a) as to subparagraph (a):

(i) adopts the admission contained therein; and

(ii) does not admit that the final forms of the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement were not in existence at the dates of the WMS instructions on 6 December 2010 and the Allens instructions on 14 March 2011, 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) admits the admission contained therein;~~

~~(ii) as to the denial made therein:~~

~~(A) repeats and relies upon the matters pleaded at paragraph 30C of the 2 FASOC; and~~

~~(B) admits that, at the date of the instructions, whether or not a settlement would take place and the ultimate structure of any settlement between LMM and Gujarat has not been finalised and was the subject of continuing discussions between the parties to the Mediation Heads of Agreement;~~

~~(c) as to subparagraph (c):~~

~~(i) says that the matters alleged at subparagraphs (i), (ii) and (iii) are not responsive to the matters pleaded at paragraph 30C(b)(ii) of the 2 FASOC;~~

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

~~(iii) further as to subparagraph (i):~~

- ~~(A) repeats and relies upon its response above to paragraph 20(bh) of the Defence;~~
- ~~(B) repeats and relies upon the plea at paragraph 30C(b)(ii) of the 3EASOC that, by the structure which was in fact adopted to settle the Proceedings, LMIM as RE of the FMF could effect the settlement of the Proceedings without the consent of LMIM as trustee of the MPF;~~
- ~~(C) denies an untrue that the matters alleged therein created a requirement for consent by LMIM as trustee for the MPF in order for LMIM as RE of the FMF or PTAI to perform their obligations under the documents pleaded at subparagraph 30C(b)(i);~~
- ~~(D) otherwise does not admit the allegations therein (in particular whether any sale was not at market value) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~

~~(ia) as to subparagraph (ia):~~

- ~~(A) admits that Allens hold the original certificates of title for the Property;~~
- ~~(B) otherwise does not admit the matters alleged at subparagraph (ia) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;~~

~~(ib) as to subparagraph (ib):~~

- ~~(A) admits that LMIM as trustee of the MPF was paying the legal fees of Allens, Monaghan Lawyers and Vereckers Lawyers;~~
- ~~(B) says that LMIM as trustee of the MPF was doing so in the manner pleaded at paragraph 24 of the 3EASOC;~~
- ~~(C) otherwise denies the allegations for the reasons pleaded at subparagraph 15(e)(v) below;~~

~~(ic) denies subparagraph (ic) for the reasons pleaded at subparagraph 15(e)(v) below;~~

~~(iv) further as to subparagraph (ii), 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 or refused to pay the legal fees as alleged for the reasons pleaded at subparagraph 15(c) (ii) to (iii) above;~~
- ~~(B) the directors of LMIM would not have caused LMIM as trustee of the MPF to take those steps, because doing so would have constituted a breach of sections 601FC(1)(e) and 601FC(3) of the Act;~~

~~(v) further as to subparagraph (iii):~~

- ~~(A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (i) to (iv) 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 2FASOC in a way which prioritised 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:~~

- ~~(1) in the premises pleaded at subparagraphs (i) to (iv) hereof, LMIM would not have caused or permitted LMIM as RE of the FMIF to be exposed to the risks alleged; and~~
- ~~(2) 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:
 - ~~(i) Loans assigned by LMIM as RE of the FMIF to LMIM as trustee of the MPF, being described as the "Albaasit", "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

- ~~(i) The Assigned Loans were assigned on or about 28 August 2008 for approximately \$33,513,345.00;~~
- ~~(ii) As to March 2010, the balance of these loans was approximately \$31m;~~
- ~~(iii) As at 31 December 2010, the balance of these loans was approximately \$20.2m;~~
- ~~(ii) An assignment of debt/management fee receivable of \$5.1m, 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) denies subparagraph (C) on the basis that, in the premises pleaded at subparagraphs (i) to (iv), 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 2FASOC;~~

(d) as to subparagraph (d):

- (i) adopts the admission therein;

- (ii) ~~otherwise 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;~~
- (iii) ~~does not admit subparagraphs (ii) and (iii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;~~
- (e) admits the matters alleged at subparagraph (e);
- (f) as to subparagraph (f):
 - (i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30C(d)(i) of the 35FASOC;
 - (ii) ~~does not admit~~ denies the allegation at subparagraph (ii) 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" because the allegation that the directors "always understood" the matters alleged is vague and unparticularised and having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation there was no such understanding as alleged;
 - (iii) says that at the time LMIM as trustee of the MPF agreed to fund the Proceedings as registered mortgagee of the Property with second priority under the Deed of Priority in or about July 2009, the first to sixth defendants had not considered that MPF's contribution to the funding of the Proceedings was to be recognised by providing MPF with a share of any proceeds recovered by the litigation as a litigation funder;
 - (iv) says the subsequent conduct of the first to sixth defendants as pleaded at paragraphs 30A to 32 of the 35FASOC is inconsistent with the existence of any such prior understanding or agreement that MPF's contribution to the funding of the Proceedings was to be recognised by providing MPF with a share of any proceeds recovered by the litigation as a litigation funder;
- (fa) adopts the admission at subparagraph (fa);
- (g) as to subparagraph (g):
 - (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii), says there is no subparagraph (g)(iv);
 - (iii) as to subparagraph (iii), repeats and relies upon its responses to paragraphs 22(c), 22(e), ~~28(e)(i) to (iii)~~, 34(c), 38(a) and 39(c)(iv) of the Defence

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

- (a) adopts the admission at subparagraph (a) and further:
 - (i) as to subparagraph (i), admits that the WMS Report was addressed to Monaghan Lawyers;
 - (ii) as to subparagraph (ii):

- (A) admits that the WMS Report contained the opinion alleged; and
 - (B) repeats and relies upon the matters pleaded at paragraph 34(a) of the 35FASOC;
 - (C) says that the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC
- (iii) 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.
17. As to paragraph 30 of the Defence, the plaintiff:
- (a) adopts the admissions at subparagraph (a);
 - (ab) admits subparagraph (ab);
 - (ac) admits subparagraph (ac);
 - (ad) as to subparagraph (ad):
 - (i) says that regardless of her belief as to Monaghan's advice, the second defendant as a director of LMIM was required to read and consider the Allens Advice for herself, if she intended to rely on the Allens Advice in support of a decision;
 - (ii) 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;
 - (ae) admits subparagraph (ae);
 - (af) as to subparagraph (af):
 - (i) says that regardless of her belief as to Monaghan's advice, the second defendant as a director of LMIM was required to read and consider the Allens Advice for herself, if she intended to rely on the Allens Advice in support of a decision;
 - (ii) 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;
 - (ag) as to subparagraph (ag):
 - (i) says that regardless of her belief as to Monaghan's advice, the second defendant as a director of LMIM was required to read and consider the Allens Advice for herself, if she intended to rely on the Allens Advice in support of a decision;

- (ii) 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;
- (b) as to subparagraph (b):
 - (i) admits that the Allens Advice contained the statements alleged at subparagraphs (i) and (iii) ~~and did not advise the matters referred to at subparagraph (ii) and was addressed as alleged at subparagraph (iv);~~
 - (ii) repeats and relies upon the matters pleaded at paragraph 34(a) of the 35FASOC;
 - (iii) says that the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC.

17A. As to paragraph 30A of the Defence, the plaintiff:

- (a) joins issue with subparagraph (a);
- (b) admits subparagraphs (b), (c) and (d).

17B. As to paragraph 30B of the Defence, the plaintiff:

- (a) adopts the admission at subparagraph (a);
- (b) admits subparagraph (b);
- (c) as to subparagraph (c):
 - (i) admits subparagraph (i);
 - (ii) denies subparagraph (ii) 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;
- (d) denies subparagraph (d) as untrue.

17C. As to paragraph 30C of the Defence, the plaintiff:

- (a) is not required to plead to subparagraph (a);
- (b) as to subparagraph (b), repeats and relies upon the responses pleaded above to paragraphs 2(b), 2(c) to (i), 30(ab) and (ae) and 30(b) above;
- (c) denies subparagraph (c) on the basis that a reasonable person in the position of the second defendant would have:
 - (i) carefully read the Allens Advice; and
 - (ii) thereby appreciated the matters pleaded at paragraph 30H of the 35FASOC;
- (d) as to subparagraph (d):
 - (i) adopts the admission at subparagraph (i);

(ii) as to subparagraph (ii):

(A) as to subparagraph (A), admits that paragraph 16 of the Allens advice contained the text alleged, but says that the statement was qualified by the matters 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;

(B) as to subparagraph (B), admits that the Allens Advice did not expressly state or warn that the proposed split of the proceeds of the settlement of the Proceedings would constitute or would be a contravention of section 601FD(1)(b) or (c) of the Act, but says that the second defendant as a director of LMIM should have carefully read the Allens Advice and thereby appreciated the matters pleaded at paragraph 30H of the 35FASOC;

(e) as to subparagraph (e):

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

(ii) denies subparagraph (ii) for the reasons pleaded at paragraph 30H(b) of the 35FASOC;

(f) as to subparagraph (f):

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

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

(iii) as to subparagraph (iii):

(A) admits that the Allens Advice did not expressly state that paying 35% of the proceeds of settlement of the Proceedings to LMIM as trustee of the MPF would be consistent with the interests of members of the FMIF or inconsistent with the duties owed under sections 601FD(1)(b) or (c) of the Act; but

(B) says that the second defendant as a director of LMIM should have carefully read the Allens Advice and thereby appreciated the matters pleaded at paragraph 30H of the 35FASOC;

(iv) as to subparagraph (iv):

(A) admits that the Allens Advice contained at paragraph 16 text to the effect alleged;

(B) says that whether a payment was "legally acceptable" was a matter for legal, not accounting, advice;

(C) says that the WMS Advice was concerned only with the reasonableness of the percentage division selected, but not the question whether such a split would be consistent with the duties of LMIM as RE of the FMIF;

(g) as to subparagraph (g):

- (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) denies subparagraph (iii) for the reasons pleaded at paragraph 30H(d) of the 35FASOC and at subparagraph (B) above;
- (h) as to subparagraph (h):
- (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii), repeats and relies upon its responses above to subparagraphs (f)(iii) and (iv) and (g)(ii) of the Defence;
 - (iii) denies subparagraph (iii) for the reasons pleaded at paragraph 30H(e) of the 35FASOC and at subparagraph (ii) above;
- (i) as to subparagraph (i):
- (i) denies subparagraph (i) for the reasons pleaded at paragraph 30H(f) of the 5FASOC;
 - (ii) as to subparagraph (ii), admits that paragraph 9 of the Allens Advice contained the text alleged;
 - (iii) denies subparagraph (iii) for the reasons pleaded at paragraph 30H(f) of the 35FASOC;
- (j) as to subparagraph (j):
- (i) denies subparagraph (j) for the reasons pleaded at paragraph 30H(g) of the 35FASOC;
 - (ii) denies subparagraph (ii), on the basis that the Allens Advice set out inconsistent matters, a reasonable person in the position of the second defendant as a director of LMIM would not construe the Allens Advice as opining that it was legally acceptable to split the litigation proceeds without:
 - (A) independently ascertaining whether the qualifications were made good; and/or
 - (B) seeking advice which was not compromised by such inconsistencies, and in those premises would not have relied on the Allens Advice in:
 - (C) executing the Deed Poll; or

(D) approving the payment of the Settlement payment to the MPF.

(k) as to subparagraph (k):

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

(ii) as to subparagraph (ii), says that the terms pleaded at paragraph 30G are found in the September 2009 revision of the Conflicts Management Policy [FMIF.500.005.5086], the September 2010 revision of the Conflicts Management Policy [FMIF.500.005.4683] and the Compliance Plan [FMIF.500.015.1877];

(iii) as to subparagraph (iii), repeats and relies upon its responses above to paragraphs 30B and 30G of the Defence;

(iv) as to subparagraph (iv):

(A) admits subparagraph (A);

(B) denies subparagraph (B) on the basis that LMIM as RE of the FMIF was the holder of a AFS Licence (as stated at paragraph 55 of the Allens Advice) and sections 601FD(1)(b) and (c) apply to directors of REs which are AFS Licensees;

(v) as to subparagraph (v), repeats and relies upon its responses to subparagraphs (d)(iii) and (f)(iii) and (iv) above;

(vi) as to subparagraph (vi), repeats and relies upon its responses to subparagraphs (iii) to (v) above;

(l) as to subparagraph (l):

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

(ii) as to subparagraph (ii), repeats and relies upon its responses above to subparagraphs (d)(iii) and (f)(iii) and (iv) and (k) of the Defence;

(iii) as to subparagraph (iii):

(A) admits that there is no express allegation in the 35FASOC that the second defendant breached the LMIM Conflicts Management Policy;

(B) says that paragraph 30G of the 35FASOC is relevant to establishing the second defendant's breaches at paragraph 45 of the 35FASOC;

(iv) as to subparagraph (iv), repeats and relies upon its responses above to subparagraphs (ii) and (iii) of the Defence;

(m) as to subparagraph (m):

(i) as to subparagraph (i), admits that paragraph 63 of the Allens Advice contains the text alleged;

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

- (iii) as to subparagraph (iii), repeats and relies upon its responses to subparagraphs (d)(iii) and (f)(iii) and (iv) above;
- (iv) admits subparagraph (iv);
- (v) denies subparagraph (v), on the basis that the matters pleaded at subparagraph 30H(j) are relevant to establishing the second defendant's breaches at paragraph 45 of the 35FASOC;
- (vi) is not required to plead to subparagraph (vi);
- (n) denies subparagraph (n) for the reasons pleaded in response to subparagraphs (a) to (m) and (o) of the Defence;
- (o) as to subparagraph (o):
 - (i) admits subparagraph (i);
 - (ii) denies subparagraph (ii) as untrue and says that the true position is as pleaded at subparagraph 30H(k) of the 35FASOC.

17D. As to paragraph 31 of the Defence, the plaintiff:

- (a) adopts the admissions at subparagraphs (a) and (b);
- (b) is not required to plead to subparagraph (c).

17E. As to paragraph 33A of the Defence, the plaintiff:

- (a) as to subparagraph (a):
 - (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii):
 - (A) admits the matters alleged; but
 - (B) denies that the text referred to is a reference to the Allens Advice;
 - (iii) as to subparagraph (iii):
 - (A) admits the matters alleged; but
 - (B) denies that the text referred to is a reference to the Allens Advice;
 - (iv) as to subparagraph (iv):
 - (A) denies subparagraph (A) as untrue;
 - (B) does not admit subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (v) as to subparagraph (v):

(A) repeats and relies upon the matters pleaded in response to paragraphs 2(b), 2(c) to (i), 30(ab) to (ae) and 30(b) of the Defence and to subparagraphs (ii), (iii) and (iv) above;

(B) says that the WMS Advice was not, and did not purport to be, legal advice as to whether it was "legally acceptable" or consistent with the director defendants' duties as directors of LMIM as RE of the FMIF to cause the Settlement payment to be made to LMIM as trustee of the MPF;

(b) as to subparagraph (b):

(i) admits subparagraphs (i) to (ix):

(ii) denies subparagraph (x) as untrue.

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

(aaa) as to subparagraph (aaa), repeats and relies upon its responses to subparagraphs (aa) to (c) of the Defence below;

(aa) as to subparagraph (aa), repeats and relies upon ~~his~~ its responses above to paragraph 28 of the Defence and the paragraphs referred to therein;

(a) joins issue with the matters alleged at subparagraph (a);

(b) admits subparagraph (b);

(c) as to subparagraph (c), admits there was no formal agreement entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF;

(d) otherwise ~~does not admit~~ denies the matters alleged at subparagraph (c) for the reasons pleaded at paragraph 15(f)-14(e) above.

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

(aa) denies subparagraph (aa) on the basis that the true position is as pleaded at paragraph 34(aa) of the 35FASOC;

(a) as to subparagraph (a), repeats and relies upon the matters pleaded at subparagraph 14 15(c) above and further:

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

(ii) as to subparagraph (iv), repeats and relies upon its responses above to paragraphs 20, 22, 27(d), 28 and 30(ac) to (b) of the Defence;

(b) as to subparagraph (b)(ii):

(ia) as to subparagraph (ia), repeats and relies upon its responses to subparagraphs (i) and (ii) of the Defence below;

~~(i) as to subparagraph (i), repeats and relies upon its response above to paragraph 28 of the Defence;~~

(iia) as to subparagraph (iia), repeats and relies upon its response above to paragraph 28(g) of the Defence;

(iib) as to subparagraph (iib):

(A) admits subparagraphs A(1), (2) and (4) and as to subparagraph (3), repeats and relies upon its responses above to paragraphs 25 and 25A of the Defence;

(B) as to subparagraph (B):

(1) admits that Allens held the original certificates of title for the Property;

(2) otherwise does not admit the matters alleged at subparagraph (B) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

(C) as to subparagraph (C):

(1) admits that LMIM as trustee for the MPF was paying the legal fees alleged;

(2) denies that only the MPF had the capacity to pay those fees, because 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:

(i) 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

(a) The Assigned Loans were assigned on or about 28 August 2008 for approximately \$33,513,345.00.

(b) As to March 2010, the balance of those loans was approximately \$31m.

(c) As at 31 December 2010, the balance of those loans was approximately \$20.2m.

(ii) An assignment of debt/management fee receivable of \$5.1m, 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:

- (D) as to subparagraph (D), denies subparagraph (D) for the reasons pleaded at
subparagraph 19(b)(iib)(C) above;
- (E) as to subparagraph (E), denies that LMIM as trustee of the MPF was
entitled to or would have taken the steps alleged therein because:
 - (1) LMIM as trustee of the MPF would not have withheld such
consent or refused to pay the legal fees as 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
 - (2) the directors or LMIM would not 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;
 - (3) there was no basis for LMIM as trustee of the MPF to seek
an injunction or other relief to prevent the sale of the
Property or to sue LMIM as RE of the FMIF in the manner
alleged;
 - (4) clause 29 of the FMIF Constitution did not entitle LMIM as
RE for the MPF to take the steps alleged for the reasons
pleaded in 1AB, and paragraphs (1) and (2) above;
- (ii) further as to subparagraph (F):
 - (A) denies subparagraph (1) on the basis that, in the premises pleaded at
subparagraphs (C) to (E) hereof, LMIM would not have withheld its
consent or cooperation to the settlement of the Proceedings in a way which
prioritised the interests of LMIM as trustee of the MPF over the interests
of members of the FMIF;
 - (B) denies subparagraph (2) on the basis that:
 - (1) in the premises pleaded at subparagraphs (C) to (E) hereof,
LMIM would not have caused or permitted LMIM as RE of
the FMIF to be exposed to the risks alleged; and
 - (2) the Proceedings could have alternatively been funded by
LMIM as RE of the FMIF as pleaded in (C)(2) above;
 - (C) admit subparagraph (3);

- (iii) as to subparagraph (ii), denies that the agreement of LMIM as trustee of the MPF was required as alleged for the reasons pleaded at subparagraph 15(c) above and further:
 - (A) as to subparagraph (A), admits the matters alleged but says that LMIM as RE of the FMIF held a registered mortgage over the relevant property with first ranking priority;
 - (B) denies subparagraph (B) as untrue and says that the sale of the Property pursuant to the Gujarat Contract was part of a series of arrangements in relation to the settlement of the Proceedings;
 - (C) denies subparagraph (C) as untrue and repeats and relies upon the matters pleaded at paragraphs 12A and 15(c) above;
 - (D) does not admit as to subparagraph (D):
 - (1) admits that Allens had possession of the certificates of title for the Property,
 - (2) otherwise does not admit the allegation on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (E) repeats and relies upon paragraph 15(c) above;
- (c) as to subparagraph (c):
 - (i) joins issue with subparagraph (i);
 - (ii) as to subparagraph (ii):
 - (A) joins issue with the allegation that the second defendant gave adequate considerations to the matters referred to;
 - (B) ~~does not admit~~ denies that there was any understanding between LMIM's directors that MPF's contribution to funding the Proceedings would be recognised as alleged, or that the second defendant had regard to any such understanding, for the reasons pleaded at paragraph 15(f)+4(e) above;
- ~~(iii) as to subparagraph (iii), denies that LMIM as trustee of the MPF had any such entitlement as alleged because it did not;~~
- (d) as to subparagraph (d):
 - (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), admits that the fact that LMIM as trustee of the MPF was a registered mortgagee with second priority did not impair its ability to theoretically act as a litigation funder, but denies that LMIM as trustee of the MPF entered into any form of litigation funding agreement or arrangement prior to funding the Proceedings;

- (iii) denies subparagraph (iii) as untrue and says that the WMS Advice and the Allens Advice were premised on the contention that LMIM as trustee of the MPF could be considered as an arms-length litigation funder;
- (iv) does not admit subparagraph (iv) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (e) joins issue with subparagraph (e);
- (f) as to subparagraph (f):
 - (i) as to subparagraph (i), admits that there was no legal impediment to LMIM as trustee of the MPF being treated as if it were an arm's-length litigation funder if there was such an arrangement, but denies that there was any such arrangement for the reasons pleaded in paragraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
 - (ia) as to subparagraph (ia), repeats and relies upon its response to subparagraph (d)(iii) of the Defence;
 - (ib) as to subparagraph (ib), repeats and relies upon its responses herein to the matters referred to in the Defence;
 - (ii) denies subparagraph (ii) on the basis that it was appropriate to seek such advice in the circumstances pleaded in paragraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
 - (iii) otherwise denies ~~does not admit~~ that there was any understanding between LMIM's directors that MPF's contribution to funding the Proceedings would be recognised as alleged for the reasons pleaded at paragraph 15(f)-14(e) above;
 - (iv) as to subparagraph (iii), denies it was "clearly in the interests of the FMIF" for LMIM as trustee of the MPF to be paid the Proceeds Split because it was to the detriment of LMIM as RE of the FMIF and not required in order to effect settlement of the Proceedings for the reasons pleaded in the 35FASOC and the plaintiff repeats and relies upon the matters pleaded at paragraph 15-14(c) above;
 - (v) as to subparagraph (iv), denies the advice which LMIM did seek and receive was adequate for the reasons pleaded at paragraph 30C of the 35FASOC;
- (g) as to subparagraph (g)(ii):
 - (i) as to subparagraph (A), admits that it was appropriate for the second defendant to take the Allens Advice and the WMS Report into consideration but denies that it was sufficient for the second defendant to do so because the Allens Advice and the WMS Advice had the characteristics pleaded at paragraph 30C of the 35FASOC and the first to sixth defendants' decision-making had the deficiencies pleaded at paragraph 34 of the 35FASOC; and
 - (ii) denies subparagraph (B) for the reasons pleaded at paragraph 34 of the 35FASOC; and
- (h) as to subparagraph (h), repeats and relies upon the matters pleaded at subparagraphs (a) to (g) above.

20. As to paragraphs 36 and 37 of the Defence, the plaintiff:

- (a) denies that the amount paid to LMIM as trustee of the MPF is appropriately categorised or defined as a “Litigation Funding Fee” because it is not;
- (b) does not admit subparagraph 36(b), on the basis that, having made reasonable enquiries, it remains uncertain as to the date on which the documents referred to therein were in fact executed;
- (c) admits subparagraphs 36(c) and (d);
- (d) as to subparagraph 36(e):

- (i) admits that by letter dated 21 June 2011 (**Direction Letter**) Allens, on behalf of LMIM as RE for the FMIF, directed that funds payable to PTAL pursuant to the Gujarat Contract and the Deed of Release be paid in accordance with the Direction Letter;

- (ii) says that the Direction Letter provided for cheques to be drawn and paid as follows:

Wollongong Council	\$291,106.31;
Sydney Water	\$3,278.24
Office of State Revenue	\$99,487.50;
LMIM ATF LM Managed Performance Fund	\$13,601,649.61;
PTAL ATF LM First Mortgage Income Fund	\$25,260,206.41;
PTAL ATF LM First Mortgage Income Fund	\$4,055,572.81;
Harris Friedman Lawyers Trust Account	\$1,300,000.00;
Brian James Gillard CMA Gujarat PTAL Settlement	\$5,000,000.00;
Brian James Gillard CMA Gujarat PTAL Settlement	\$500,000.00;

- (iii) says further that the cheques provided at settlement on 21 June 2011 included:

- (A) a cheque made payable to PTAL ATF LM First Mortgage Income Fund in the amount of \$25,268,459.01;

- (B) a further cheque made payable to PTAL ATF LM First Mortgage Income Fund in the amount of \$4,055,864.92; and

- (C) a cheque made payable to LMIM ATF LM Managed Performance Fund in the amount of \$13,606,093.32;

- (iv) denies that the Direction Letter directed Gujarat to draw a cheque in the amount set out in paragraph 36(f)(i) of the Defence because it is untrue by reason of the matters pleaded in sub-paragraphs (d)(i), (ii) and (iii) above;

- (e) as to subparagraph 36(f):

- (i) admits LMIM as trustee for the MPF received the amounts set out in subparagraphs 36(f)(i) and (ii) of the Defence;
 - (ii) but says that on or about 29 June 2011, an amount of \$4,545.94 was refunded by LMIM as trustee for the MPF to Gujarat for an overpayment made on settlement;
 - (iii) denies that the amount received by LMIM as trustee of the MPF is appropriately categorised or defined as a "Litigation Funding Fee" because it is not;
- (f) admits subparagraph 36(g); and
- (g) denies subparagraph 36(h) on the basis there was no "Litigation Funding Fee" payable as alleged.
21. As to paragraph 38 of the Defence, the plaintiff:
- (a) ~~does not admit~~ denies the matters alleged at subparagraph (a) for the reasons pleaded at paragraph ~~15(f)~~~~14(e)~~ above;
 - (b) as to subparagraph (b), repeats and relies upon the matters pleaded at paragraph 30C of the ~~35~~FASOC;
 - (c) as to subparagraph (c), repeats and relies upon the matters pleaded herein in response to paragraphs 28(c) and 39 of the Defence;
 - (d) admits subparagraph (d);
 - (e) does not admit subparagraph (e) on the basis it is not clear what "accounts" are being referred to therein, and having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (f) as to subparagraph (f):
 - (i) admits that LMIM as RE of the FMIF directed part of the Gujarat Settlement Payment to LMIM as trustee of the MPF as it similarly directed other parts of the Gujarat Settlement Payment to another six parties; but
 - (ii) denies that LMIM as RE of the FMIF was entitled to direct the payment pleaded therein for the reasons pleaded in paragraphs 37 and 37A of the ~~35~~FASOC;
 - (g) as to subparagraph (g):
 - (i) says that the matters alleged therein are not responsive to paragraph 37 of the ~~35~~FASOC;
 - (ii) denies the matters alleged on the basis that, pursuant to the Deed of Priority, as pleaded at paragraph 12 of the ~~35~~FASOC, LMIM as RE of the FMIF was granted first priority over LMIM as trustee of the MPF.
22. As to paragraph 39 of the Defence, the plaintiff:
- (a) denies the matters alleged at subparagraph (a) for the reasons pleaded above in response to paragraph 18 of the Defence;
 - (b) as to subparagraph (b):

- (i) denies that there was any "Litigation Funding Fee" as that term is described in the Defence;
 - (ii) denies that it was appropriate for the second defendant to rely merely on the WMS Report and the Allens Advice because those advices had the deficiencies pleaded at paragraph 30C of the 35FASOC;
 - (iii) denies that there was any reasonable basis for an "after the event" calculation of a rate to be paid to LMIM as trustee of the MPF "properly to protect the interests of both the FMIF and the MPF" and says the Settlement payment should have been accounted for in the manner pleaded at paragraphs 37 and 37A of the 35FASOC;
- (c) as to subparagraph (c):
- (i) denies that it was reasonable for the second defendant to reach the conclusions alleged because:
 - (A) ~~the proposed settlement of the Proceedings did not require the consent of LMIM as trustee of the MPF for the reasons pleaded at paragraph 1514(e) above;~~
 - (B) the Proceeds Split was not fair to FMIF because the Proceeds Split was to the detriment of LMIM as RE of the FMIF and the plaintiff repeats and relies upon the matters pleaded at paragraph 1514(e) 19 above;
 - (C) the Proceeds Split was not in the best interests of FMIF's members because it was to the detriment of FMIF's members and the plaintiff repeats and relies upon the matters pleaded at paragraph 1514(e) 19 above;
 - (D) the Proceeds Split was excessive and unnecessary;
 - (E) LMIM as trustee of the MPF was not in an analogous position to a litigation funder at all because it had funded the Proceedings as registered mortgagee with second priority under the Deed of Priority;
 - (ii) ~~otherwise does not admit~~ denies that there was any such understanding between the directors of LMIM as alleged for the reasons pleaded at paragraph 15(f)14(e) above;
- (d) as to subparagraph (d), denies that the second defendant gave adequate consideration to the matters referred to, for the reasons pleaded at paragraph 37A of the 35FASOC, and further:
- (i) denies that LMIM as trustee of the MPF was entitled to be paid any "Litigation Funding Fee" because it was not;
 - (ii) ~~does not admit~~ denies that there was any such understanding between the directors of LMIM as alleged for the reasons pleaded at paragraph 15(f)14(e) above;
 - (iii) says it was not in the best interests if FMIF's members and it was unlikely that LMIM as trustee of the MPF would sue LMIM as RE of the FMIF as alleged where the former had no entitlement to any split of the settlement proceeds; and

- (iv) says the Proceeds Split caused detriment to LMIM as RE of the FMIF because it reduced the amount recovered by it from the settlement of the Proceedings;
- (e) as to subparagraph (e):
 - (i) ~~does not admit~~ denies that there was any such understanding between the directors of LMIM as alleged for the reasons pleaded at paragraph 15(f)14(e) above; and
 - (ii) says the Settlement payment should have been accounted for in the manner pleaded at paragraphs 37 and 37A of the 25FASOC.

~~23. As to paragraph 41 of the Defence, the plaintiff:~~

- ~~(a) adopts the admission at subparagraph (a);~~
- ~~(b) as to subparagraph (b):~~
 - ~~(i) denies that the duties were owed solely to LMIM without regard to its role as RE of the FMIF because those duties were owed to LMIM and to LMIM as RE of the FMIF;~~
 - ~~(ii) admits that the statutory duties of officers of a responsible entity of a registered scheme are prescribed in s 601FD of the Act; but~~
 - ~~(iii) says that the duties are not mutually exclusive.~~

~~23A. As to paragraph 42(e) of the Defence, the plaintiff:~~

- ~~(a) says that it is pleaded at paragraph 39(a) of the 2FASOC that the first to sixth defendants' breach of duty, as was reasonably foreseeable, caused harm to the interests of LMIM as RE of the FMIF;~~
- ~~(b) as to subparagraph (i):~~
 - ~~(i) admits the matters alleged at subparagraph (i); but~~
 - ~~(ii) says that the matters alleged are not responsive to paragraph 39 of the 2FASOC;~~
- ~~(c) as to subparagraph (ii):~~
 - ~~(i) denies subparagraph (A) for the reasons pleaded at paragraph 15(e) above;~~
 - ~~(ii) does not admit subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
 - ~~(iii) 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; and~~
 - ~~(iv) denies subparagraph (D) as untrue.~~

~~24. As to paragraph 66 of the Defence, the plaintiff:~~

- ~~(a) as to subparagraph (a):~~

- ~~(i) denies that the payment made to LMIM as trustee of the MPF is or was to be properly categorised as a "Litigation Funding Fee" because it was not; but~~
- ~~(ii) otherwise admits that the decision of the second 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) does not admit that the directors of LMIM "always understood at 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 repeats and relies upon the matters pleaded at paragraph 15(i)14(c) above;~~
 - ~~(ii) 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 the plaintiff repeats and relies upon the matters pleaded at paragraphs 30A to 34 of the 2FASOC;~~
 - ~~(iii) denies as untrue the allegation that there was any "Litigation Funding Fee" because the allegation is untrue as there was no such fee;~~
- ~~(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) as to subparagraphs (i) and (ii), denies the second defendant properly informed herself about the amount proposed to be paid to LMIM as trustee of the MPF for the reasons pleaded at paragraphs 30A to 34 of the 2FASOC;~~
 - ~~(ii) 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;~~
- ~~(e) as to the matters alleged at subparagraph (e), denies that the second defendant rationally believed the judgment she made was in the best interests of LMIM 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;~~
- ~~(f) denies the matters alleged at subparagraph (f) on the basis that, for the reasons pleaded at paragraph 37A of the 2FASOC, the decision to enter into the Deed Poll was not a decision that any reasonable person in the position of the second defendant would have taken; and~~
- ~~(g) denies the matters alleged at subparagraph (g) for the reasons pleaded at subparagraphs (a) to (f) hereof.~~

25A. As to paragraph 52 of the Defence, the plaintiff denies the payment was within the power conferred on LMIM as RE of the FMIF:

- (a) for the reasons pleaded at paragraph 1AB above; and
- (b) because the payment of the settlement sum to the MPF was a breach of LMIM's duties under section 601FC of the Act.

25B. As to paragraph 52A of the Defence, the plaintiff:

- (a) as to subparagraphs (a) and (c), repeats and relies on the responses to paragraphs 39 to 52 above;
- (b) as to subparagraph (b):
 - (i) as to subparagraph (ii), does not admit that it would have been a breach of the duties of LMIM as trustee of the MPF as alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (ii) admits subparagraph (iii);
 - (iii) as to subparagraph (iv), denies that LMIM as trustee for the MPF would not have entered into the Deed of Release and Deed of Settlement and Release because LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in paragraph 19(b)(iib) above;
 - (iv) as to subparagraph (v), denies the allegation for the reasons pleaded in (iii) above;
 - (v) as to subparagraph (vi), denies the allegation for the reasons pleaded in (iii) above;
 - (vi) as to subparagraph (vii):
 - (A) denies the allegation for the reasons pleaded in (iii) above;
 - (B) says that it was not a party to the Gujarat Contract;
 - (vii) as to the second subparagraph (vii), denies the allegation for the reasons pleaded in (iii) above.

25C. As to paragraph 52AA of the Defence, the plaintiff repeats and relies on the responses to paragraphs 39 to 52 above and on paragraph 25B above;

25D. As to paragraph 53(b) of the Defence, the plaintiff:

- (a) denies the settlement would not have occurred for the reasons pleaded in paragraph 25B above;
- (b) denies the payments or funding alleged in 22(b) and 22(e) would not have been made or provided for the reasons pleaded in paragraph 25B above;
- (c) repeats and relies on the responses to paragraphs 22, 27(d), 35(b)(iib), 35(iii) (A) to (C) and 52A to 52AA above.

25E. As to paragraph 54(b) of the Defence, the plaintiff:

- (a) denies the settlement would not have occurred for the reasons pleaded in paragraph 25B above;
- (b) denies the payments or funding alleged in 22(b) and 22(e) would not have been made or provided for the reasons pleaded in paragraph 25B above;

- (c) repeats and relies on the responses to paragraphs 22, 27(d), 35(b)(iib) and 35(f)(iii) (A) to (C) and 52A to 52AA above.

25F. As to paragraph 55 of the Defence, the plaintiff:

- (a) as to subparagraph (b), denies the allegation therein and repeats and relies on paragraph 45B of the 5FASOC;
- (b) as to subparagraph (c):
 - (i) denies the settlement would not have occurred for the reasons pleaded in paragraph 25B above;
 - (ii) denies the payments or funding alleged in 22(b) and 22(e) would not have been made or provided for the reasons pleaded in paragraph 25B above;
 - (iii) repeats and relies on the responses to paragraphs 22, 27(d), 35(b)(iib) and 35(f)(iii) (A) to (C) and 52A to 52AA above.

25. As to paragraph 67 of the Defence, the plaintiff:

- (a) as to subparagraph (a), does not admit that the second 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
- (ba) is not required to plead to subparagraph (ba);
- (bb) does not admit subparagraph (bb) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
- (bc) as to subparagraph (bc):
 - (i) admits subparagraph (i);
 - (ii) admits subparagraph (ii);
 - (iii) admits subparagraph (iii);
 - (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) 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;
- (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 5FASOC and the second 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 second defendant ought fairly be excused for any contravention of the Act.

~~26. As to paragraph 68 of the Defence, the plaintiff:~~

~~(a) as to subparagraph (a), does not admit that the second defendant acted in good faith in relying on the Allens Advice or the WMS Report on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;~~

~~(b) as to subparagraph (b), does not admit that the second defendant made the independent assessment as alleged, whether at all or whether to a sufficient degree having regard to the second defendant's knowledge of LMM and the complexity and structure of the operations of LMM, on the basis that having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.~~

~~27. As to paragraph 69 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.~~

28. Save as aforesaid, the Plaintiff joins issue with the matters pleaded in the Defence.

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

Signed:



Description:

Solicitors for the Plaintiff

Dated:

~~15 May 2018~~

~~12 March 2019~~ 4 April 2019

"SC-11"

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 12317/14

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

Gadens Lawyers

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

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

~~Further Amended Amended~~ Reply to the
~~Amended~~ Defence of the third defendant to the
~~Third Fifth Further Amended~~ Statement of
~~Claim~~

Filed on behalf of the Plaintiff

GADENS LAWYERS
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BRISBANE QLD 4000
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SCZ:JSO:201401822

The plaintiff hereby replies to the ~~Further~~ Amended Defence of the third defendant dated 12 ~~March 2018~~ ~~22 February 2019~~ 4 April 2019 as follows (the Defence):

1. The plaintiff adopts the:
 - (a) admissions made in paragraphs 1, 3(a), 7(a), 10(a), 11(a), 12(a), 13, 14, 15(a), 19(aa), 20(a), 24(a), 25(a); ~~26(a)~~, 27(a), 28(a), 34(a) ~~and (b)~~, 35(a), ~~36~~, and 43 and 53 of the Defence;
 - (b) the definitions used in the ~~Third~~ ~~Second~~ Fifth Further Amended Statement of Claim dated ~~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 made therein ~~in subparagraphs (a) to (e)~~;
 - ~~(b) joins issue with subparagraph (d)~~;
 - (c) does not admit subparagraphs (a) ~~and (f)~~ on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (d) admits subparagraph (b).
- 2A. As to paragraph 2A of the Defence, the plaintiff:
 - (a) adopts the admission in subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) repeats and relies upon the matters pleaded at paragraph 3 of the 35FASOC;
 - (ii) says further that the first to sixth defendants were acting in their capacity as directors of the seventh defendant in its capacity as RE of the FMIF in relation to the matters pleaded at paragraph 36 of the 35FASOC;
 - (iii) for the reasons pleaded in sub-paragraphs (i) and (ii) above denies that the plaintiff does not have standing as alleged.
- 2B. As to paragraph 2B of the Defence, the plaintiff does not admit the allegations therein on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.
- 2C. As to paragraph 2C of the Defence, the plaintiff:
 - (a) does not admit the allegations in 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) joins issue with the allegations in subparagraph (c);
 - (c) as to the allegations in subparagraph (d):
 - (i) repeats and relies upon the matters pleaded in paragraphs 5 to 36, ~~38 to 40~~ and 44 to 46 of the 35FASOC;

- (ii) 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.
- 2D. As to the allegations at subparagraphs 3(b)(i), 4(a), 5(a), 6(b)(i), 7(b)(i), 8(i), 9(b)(i), 10~~(d)~~(c)(i), 11(b)(i), 12(b)(i), 15(b)(i), 16(b)(i), 17(a), 18(b)(i), 19(a), 20(e)(i), 22(c)(i), 23(b)(i), 24(b)(i), 25(b), 26(b)(i), 27(b)(i), 28(b)(i) and 43(a) of the Defence which refer to paragraphs 2B and 2C of the Defence:
- (a) those allegations purport to be made in support of a non-admission;
 - ~~(b) those allegations are not proper non-admissions and are liable to be struck out;~~
 - (c) to the extent that the third defendant relies on those allegations as positive allegations of material fact, the plaintiff repeats and relies upon the matters pleaded in the 35FASOC and at paragraphs 2B and 2C above.
3. As to paragraph 6 of the Defence, the plaintiff:
- (a) adopts the admission in subparagraph (a);
 - (b) says further as to subparagraph (a) that:
 - (i) the document referred to in subparagraph (a)(iv) was not executed on behalf of Balgow Pty Limited;
 - (ii) 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.
4. As to paragraph 9(a) of the Defence, the plaintiff:
- (a) adopts the admissions 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.
- ~~5. As to paragraphs 10(b) and the second 10(b) of the Defence, the plaintiff admits that clause 8 contained the text alleged and says further that:~~
- ~~(a) LMIM as trustee of the MPF signed the Deed of Priority;~~
 - ~~(b) the term "Mortgage" in clause 8 of the Deed of Priority was defined in clause 1.1 to mean the First Mortgage, the Second Mortgage, the Third Mortgage or Austere;~~
 - ~~(c) the term "First Mortgage" was defined in clause 1.1 to include "the Custodian" and the "Responsible Entity";~~

- ~~(d) — “the Custodian” was defined to mean PTAL;~~
- ~~(e) — the terms of clause 13 of the Deed of Priority relate to LMIM as responsible entity for the FMIF;~~
- ~~(f) — the terms of clause 14 of the Deed of Priority relate to LMIM as trustee of the MPF only;~~
- ~~(g) — the names of the Parties in the deed include a reference to LMIM twice, once defined as “Responsible entity” and once defined as “LM”;~~
- ~~(h) — the term “Third Mortgagee” was defined as “LM”;~~
- ~~(i) — in fact, LMIM as trustee of the MPF held a third registered mortgage over the Property.~~

6. As to paragraph 16(a) of the Defence, the plaintiff:

- (a) adopts the admission in subparagraph (a) that it disclosed to the third defendant those documents described therein but says that the copy of the document disclosed and entitled “Access Licence Bellpac 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.

7. As to paragraph 18(a) of the Defence, the plaintiff:

- (a) adopts the admission in subparagraph (a);
- (b) says that these documents are the Settlement Deeds.

8. As to paragraph 20 of the Defence, the plaintiff:

- (a) admits the allegations in subparagraphs (b) and (bb);
- (b) adopts the admission at as to subparagraph (c):
 - ~~(i) — denies that the Coalfields cross claim was commenced by way of first cross claim summons filed 18 March 2010 because it was commenced by way of first cross claim summons filed 16 March 2010;~~
 - ~~(ii) — says that the Coalfields cross claim was filed in the Bellpac proceedings;~~
- (c) ~~does not admit the allegation in as to~~ subparagraph (d) ~~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;~~ admits that LMIM as trustee for the MPF was also a party to the Proceedings.

9. — As to paragraph 21 of the Defence, the plaintiff:

- (a) — as to subparagraphs (a) and (b):

~~(i) — says that the allegations therein are not responsive to the matters pleaded at paragraph 23 of the 2FASOC;~~

~~(ii) — 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;~~

~~(b) — joins issue with the allegations in subparagraphs (c) and (d).~~

10. As to paragraphs 22(a) and (b) of the Defence, the plaintiff:

(a) repeats and relies upon the matters pleaded in paragraphs ~~23~~ and 24 of the ~~35~~FASOC;

(b) ~~adopts the admission in~~ as to subparagraph (a):

(i) denies that the FMIF was frozen on the basis that from 3 March 2009, LMIM as RE of the FMIF determined that it would not accept any applications for investment in the FMIF from any person who was not an existing member in the FMIF;

(ii) admits subparagraph (ii);

(c) as to subparagraph (b):

(i) denies the allegation in subparagraph (i) as untrue because LMIM as trustee of the MPF funded the Proceedings as second mortgagee in the manner pleaded at paragraph 24 of the 35FASOC;

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

(iii) as to subparagraph (iii);

(A) admits that “funding was not provided pursuant to the Deed of Priority”;

(B) says that the Deed of Priority was not a facility agreement (or similar) pursuant to which funds were advanced, but rather regulated the priority between LMIM as RE of the FMIF and LMIM as trustee of the MPF in relation to recovery of their respective loans to Bellpac.

11. As to paragraph 23 of the Defence, the plaintiff:

(a) adopts the admissions in subparagraph (a);

(b) says the document referred to in subparagraph (a)(ii) was also purportedly executed on behalf of Bellpac;

(c) does not admit the allegation of material fact at subparagraph (b)(i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;

(d) is not required to otherwise plead thereto.

11A. As to paragraph 26 of the Defence, the plaintiff:

- (a) adopts the admission at subparagraph (a);
- (b) adopts the admission at subparagraph (aa);
- (c) as to subparagraph (bb):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii), admits that the recitals to the Deed of Release contained references to the matters alleged;
 - (iii) as to subparagraph (iii), admits that clauses 5 and 6 of the Deed of Release contained references to the matters alleged;
 - (iv) as to subparagraph (iv), admits that clause 2 of the Deed of Release contained references to the matters alleged;
 - (v) as to subparagraph (v), admits that clauses 5 and 6 of the Deed of Settlement and Release contained references to the matters alleged;
 - (vi) admits subparagraph (vi);
 - (vii) does not admit subparagraph (vii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (viii) denies subparagraph (viii) on the basis that the words of clause 22.1 of the Deed of Release did not have the effect alleged;
 - (ix) admits subparagraph (ix);
 - (x) as to subparagraph (x):
 - (A) says that the allegation is vague and unparticularised;
 - (B) admits (and says) that LMIM as trustee of the MPF was bound by the Deed of Release;
 - ~~(C) denies that, on the proper construction of the Deed of Release, LMIM as trustee of the MPF was also a party on the basis that by the references to PTAL, which acted as custodian for the FMIF, and 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;~~
- (cc) admits subparagraph (cc);
- (dd) as to subparagraph (dd):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii), admits that the recitals to the Deed of Release contained references to the matters alleged;

(iii) as to subparagraph (iii), repeats and relies upon its response to subparagraph (aa)(v) above;

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

(v) admits subparagraph (v);

(vi) denies subparagraph (vi) on the basis that the words of clause 19.1 of the Deed of Release did not have the effect alleged;

(vii) admits subparagraph (vii);

(viii) as to subparagraph (viii):

(A) says that the allegation is vague and unparticularised;

(B) admits (and says) that LMIM as trustee of the MPF was bound by the Deed of Settlement and Release;

~~(C) denies that, on the proper construction of the Deed of Settlement and Release, LMIM as trustee of the MPF was also a party on the basis that, by the reference 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 Release and Settlement to LMIM could only have been a reference to LMIM as RE of the FMIF;~~

(ee) admits subparagraph (ee).

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

(a) adopts the admission contained therein;

(b) admits the allegation of material fact therein.

~~(c) repeats and relies upon the matters pleaded in paragraphs 30A of the 2FASOC;~~

~~(d) otherwise joins issue with the allegations therein.~~

13. As to paragraph 30 of the Defence, the plaintiff:

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

(b) admits the allegations at subparagraph (b);

(c) as to subparagraph (c), admits the email from the second defendant to the first, third, fourth and sixth defendants and Mr Fischer dated 14 March 2011 at 3:35pm.

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

(a) as to subparagraph (a):

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

(ii) does not admit that the final forms of the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement were not in existence at the dates of the WMS instructions on 6 December 2010 and the Allens instructions on 14 March 2011, 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 at subparagraph (i);~~

~~(ii) as to subparagraph (ii):~~

~~(A) repeats and relies upon the matters pleaded at paragraph 30C of the 3FASOC; and~~

~~(B) admits that, at the date of the instructions, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised and was the subject of continuing discussions between the parties to the Mediation Heads of Agreement;~~

~~(iii) as to subparagraph (iii):~~

~~(A) does not admit the allegations therein on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;~~

~~(B) says that, in any event, the instructions to WMS and Allens were deficient in that the instructions had the characteristics pleaded at paragraph 30C of the 3FASOC; and~~

(iv) as to subparagraph (iv):

(A) as to admits the allegations in subparagraph (A):

(i) does not admit that Allens were engaged "at all material times from or on about 1 December 2010" in relation to the settlement negotiations in respect of the Proceedings on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

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

(B) as to the allegations in subparagraph (B), admits that the instructions to Allens contained the information pleaded at paragraph 30(b) of the Defence;

~~(BB) admits subparagraph (BB);~~

(C) says that the allegations in subparagraph (C) are vague and embarrassing and therefore do not admit the allegations on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

(D) denies the allegations in subparagraph (D) on the basis that, if the Defendants intended to rely upon advice from WMS or Allens, they should have ensured that the instructions on which that advice would be based were accurately communicated to the relevant persons who provided the advice at WMS and Allens;

(v) does not admit the allegations in subparagraph (v) 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):~~

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

~~(ii) as to subparagraph (ii), repeats and relies upon the matters pleaded at subparagraph (b) above;~~

~~(iii) joins issue with the allegations at subparagraph (iii);~~

~~(iv) as to subparagraph (iv) (iii):~~

~~(A) says the allegations in subparagraphs (A) to (F) are not responsive to the matters pleaded at paragraph 20C(b)(ii) of the 3EASOC;~~

~~(B) 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;~~

~~(C) repeats and relies upon the plea at paragraph 20C(b)(ii) of the 3EASOC 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) denies as untrue that the matters alleged therein 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 20C(b)(ii);~~

~~(E) as to subparagraph (E) in particular, denies as untrue that there was any proper basis for such a "distribution of the sale proceeds";~~

~~(F) otherwise does not admit the allegations therein (in particular whether any sale was not at market value) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~

~~(v) as to subparagraph (v), 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 for the reasons pleaded at subparagraph 1314(c) (ii) to (iv) above;~~

~~(B) neither the directors nor LMIM would not 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;~~

~~(vi) as to subparagraph (vi):~~

~~(A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (ii) to (v) 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 3FASOC in a way which prioritised 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 (v) 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 (v), 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 3FASOC;~~

(d) as to subparagraph (d):

(i) ~~adopts the admission therein;~~ as to subparagraph (i):

(A) admits subparagraph (A);

(B) as to subparagraph (B), does not admit that the authors of the Allens Advice were aware of the matters alleged at the time of drawing the Allens Advice on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

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

~~(iii) joins issue with the allegations in denies subparagraph (ii) on the basis that the true position is as pleaded at subparagraph 30C(c) of the 3FASOC;~~

(e) admits the allegations in subparagraph (e);

(f) as to subparagraph (f):

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

(ii) adopts the admission in subparagraph (ii);

(iii) as to subparagraph (iii):

(A) joins issue with the allegations in subparagraph (A);

- (B) denies subparagraph (B) as untrue because LMIM as trustee of the MPF funded the Proceedings as second mortgagee;
 - (C) as to subparagraph (C), ~~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.
- (iv) as to subparagraph (iv):
- (A) adopts the admission at subparagraph (A);
 - (B) does not admit the allegations at subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (C) denies as to subparagraph (C) as untrue for the reasons that leded at subparagraph 14(e) above:
 - (i) admit subparagraph C.2;
 - (ii) admit subparagraph C.3;
 - (iii) otherwise denies the allegations on the basis that:
 - (1) 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;
 - (2) LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF;
 - (3) LMIM as trustee of the MPF could not have, and would not have, "insisted" on obtaining a "reasonable share" of the settlement proceeds.

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

- (a) adopts the admission at subparagraph (a);
- (b) as to subparagraph (b):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii):
 - (A) denies that the WMS Report contained the opinion alleged because it did not;
 - (B) 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”;

- (C) repeats and relies upon the matters pleaded at paragraph 34(a) of the 35FASOC;
 - (D) says that the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
- (iii) 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;
- (c) as to subparagraph (c), repeats and relies upon the matters pleaded above in response to paragraph 29 of the Defence.

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

- (a) adopts the admissions at subparagraph (a);
- (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 subparagraph (i) 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 paragraphs 34(a) and 34(aa) 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.

16A. As to paragraph 33A of the Defence, the plaintiff:

- (a) adopts the admissions at subparagraph (a);
- (b) admits subparagraph (b);
- (c) admits subparagraph (c);
- (d) admits subparagraph (d);
- (e) joins issue with subparagraph (e).

16B. As to paragraph 33B of the Defence, the plaintiff:

(a) denies subparagraph (a) as untrue and further:

(i) as to subparagraph (i), admits that the 35FASOC does not allege against the director defendants any breach of Part 2D.1 of the Act;

(ii) denies subparagraph (ii) 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;

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

16C. As to paragraph 33C of the Defence, the plaintiff:

(a) as to subparagraph (a)

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

(ii) as to subparagraph (ii):

(A) adopts the admission contained therein;

(B) denies as untrue that the Allens Advice expressly opined that the proposed split of proceeds of settlement of the proceedings was legally acceptable because the opinion offered therein 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;

(C) denies that the Allens Advice did not state or warn that the proposed split of the proceeds would constitute, or result in, breach of section 601FD of the Act, on the basis that the Allens Advice referred to sections 601FC and 601FD of the Act, warned that LMIM would need to comply with those sections and did not explain how making the proceeds split was consistent with those requirements;

(iii) as to subparagraph (iii), repeats and relies upon its response above to paragraph 33(b) of the Defence;

(iv) as to subparagraph (iv):

(A) admits that the Allens Advice was obtained as part of LMIM's consideration of the proper and most appropriate treatment of the proceeds of settlement of the Proceedings;

(B) says that, to the extent the Allens Advice was sought, or the director defendants believed the Allens Advice was being sought, to consider how to split the proceeds "having regard to the context in which those proceeds were produced and the respective interests of FMIF and the MPF", those considerations did not negative the requirement pursuant to sections 601FC(1)(c) and 601FD(1)(c) of the Act to pay the whole of the proceeds of the settlement of the Proceedings to LMIM as RE of the FMIF;

(b) is not required to plead to subparagraph (b);

(c) as to subparagraph (c):

- (i) adopts the admissions at subparagraphs (i), (ii) and (iii);
- (ii) as to subparagraph (iv):
 - (A) repeats and relies upon its response above to subparagraph 33(b) of the Defence;
 - (B) otherwise denies the allegations on the basis that the statement at paragraph 16 of the Allens Advice 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;
- (iii) denies subparagraph (v) because paragraph 16 of the Allens Advice 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;
- (iv) denies subparagraph (vi) on the basis that:
 - (A) whether the proceeds split was in the best interests of members of the FMIF within the meaning of sections 601FC(1)(c) and 601FD(1)(c) was a matter, in respect of which LMIM sought legal advice from Allens, in the form of the Allens Advice;
 - (B) alternatively, if and to the extent that the decision to pay part of the proceeds of the settlement of the Bellpac proceeding was a commercial, corporate or ethical judgment, it was not and could not have been in the interests of members of the FMIF to pay the sum of \$15,546,147.85 to the MPF as pleaded at paragraph 35 of the 35FASOC;
- (vii) as to subparagraph (vii):
 - (A) as to subparagraph (A), admits that the Allens Advice did not expressly state the matters alleged but says that the effect of the Allens Advice was, inter alia, that:
 - (1) LMIM as RE of the FMIF was required to act in the best interests of members of the FMIF;
 - (2) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF may be inconsistent with LMIM's obligations;
 - (3) the directors of LMIM needed to give consideration to the matters raised in the Allens Advice in deciding whether to split the proceeds of the Bellpac litigation between the FMIF and the MPF (as stated at paragraph 50 thereof);
 - (B) as to subparagraph (B), admits that the Allens Advice did not expressly state the matters alleged but says that the effect of the Allens Advice was, inter alia, that:
 - (1) LMIM as RE of the FMIF was required to act in the best interests of members of the FMIF;

(2) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF may be inconsistent with LMIM's obligations;

(3) the directors of LMIM needed to give consideration to the matters raised in the Allens Advice in deciding whether to split the proceeds of the Bellpac litigation between the FMIF and the MPF (as stated at paragraph 50 thereof);

(C) as to subparagraph (C):

(1) denies the allegations as untrue;

(2) says that, if the assumptions referred to at paragraphs 25 and 27 of the Allens Advice were "invalid or incapable of being confirmed" and the director defendants read, considered and relied upon the Allens Advice in deciding to proceed with the proceeds split, a reasonable person in their position would have followed up or asked questions about those matters, either to Mr Monaghan or Allens and not proceeded with the proceeds split;

(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) denies subparagraph (iii) as untrue;

(e) as to subparagraph (e):

(i) denies subparagraph (i) as untrue;

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

(iii) as to subparagraph (iii), admits that the Allens Advice did not expressly state the matters alleged but says that the effect of the Allens advice was, inter alia, that:

(A) LMIM as RE of the FMIF was required to act in the bests interests of members of the FMIF, consistently with sections 601FC and 601FD of the Act;

(B) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF may be inconsistent with LMIM's obligations;

(C) the directors of LMIM needed to give consideration to the matters raised in the Allens Advice in deciding whether to split the proceeds of the Bellpac litigation between the FMIF and the MPF (as stated at paragraph 50 thereof);

(iv) as to subparagraph (iv), repeats and relies upon its responses above to subparagraphs 33C(v)(iv) to (vi) of the Defence;

(f) as to subparagraph (f):

(i) denies subparagraphs (i), (ii) and (iii) on the basis that the true position is as pleaded at subparagraph 30H(f) of the 35FASOC;

(ii) as to subparagraph (iv):

(A) admits that the instructions provided to Allens on 14 March 2011 expressly informed Allens that FMIF and MPF had not entered into an agreement concerning the proposed split of any proceeds from the Proceedings;

(B) says that the email [FMIF.300.004.3198] from Mr Monaghan to Mr Lavell of WMS, which was forwarded to Allens, states, inter alia:

"It was always 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, however as the outcome of the litigation was so uncertain, and the possible methods of resolving the litigation so varied, it was not considered appropriate to enter into any formal agreement to split the proceeds at that time."

(C) says that the Allens Advice at paragraph 9 recites the substance of the passage pleaded at subparagraph (B) above;

(g) as to subparagraph (g):

(i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30H(g) of the 35FASOC;

(ii) as to subparagraph (ii):

(A) admits that the matters set out at paragraphs 25, 27, 35, 37 and 53 of the Allens Advice were not conclusions;

(B) says that the Allens Advice did not in fact reach an unqualified opinion that the proceeds split was consistent with the duties of LMIM as RE of the FMIF or its directors;

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

(iii) denies subparagraph (iii) on the basis that the Allens Advice 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;

(h) as to subparagraph (h):

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

(ii) denies subparagraph (ii) on the basis that references in the Allens Advice to the effect of section 601FC ought to have alerted the director defendants to the need for LMIM to comply with those provisions, including section 601FC(1)(c);

(iii) as to subparagraph (iii):

(A) if and to the extent it is alleged, says that the proceeds split was justified on the basis that the third defendant acted in the best interests of members of the MPF, proceeding on that basis was a breach of sections 601FD(1)(b) and (1)(c);

(B) admits that there may be situations in which LMIM may have acted in the best interests of members of the MPF without breaching the duties imposed by sections 601FD(1)(b) or (c);

(C) denies as untrue that causing the Settlement payment to be made to LMIM as trustee of the MPF was consistent with or reconcilable with the duties imposed by sections 601FD(1)(b) or (c);

(D) repeats and relies upon its responses above to paragraphs 33C(c)(v) and 33C(f)(iii) of the Defence;

(iv) is not required to plead to the non-admission at subparagraph (iv);

(i) as to subparagraph (i):

(i) admits subparagraph (i);

(ii) as to subparagraph (ii):

(A) is not required to plead to the non-admission made therein;

(B) to the extent the further matters alleged are allegations of material fact:

(1) admits subparagraph (A);

(2) 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;

(iii) as to subparagraph (iii), repeats and relies upon its responses above to subparagraphs 33(b), 33C(a)(ii), 33C(c)(iv), 33C(c)(v), 33C(e)(iii), 33C(g)(ii) and 33C(g)(iii) of the Defence;

(j) as to subparagraph (j):

(i) admits subparagraph (i);

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

(iii) as to subparagraph (iii), repeats and relies upon its responses above to subparagraphs 33(b), 33C(a)(ii), 33C(c)(iv), 33C(c)(v), 33C(e)(iii), 33C(g)(ii) and 33C(g)(iii) of the Defence;

(k) as to subparagraph (k):

(i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30H(k) of the 35FASOC;

(ii) is not required to plead to subparagraph (ii);

(l) as to subparagraph (l):

(i) admits subparagraph (i);

(ii) admits subparagraph (ii);

(iii) as to subparagraph (iii):

(A) admits the matters alleged; but

(B) says that the third defendant was required to make his own independent assessment of the Allens Advice and the appropriateness of the proceeds split, as referred to at paragraph 50 of the Allens Advice;

(iv) denies subparagraph (iv) on the basis that a reasonable director in the position of the director defendants, who read the Allens Advice, would have appreciated that the Allens Advice had the deficiencies pleaded in the 35FASOC and would have sought further advice before acting in reliance on the Allens Advice;

(v) denies subparagraph (v) as untrue and repeats and relies upon the matters pleaded at subparagraphs (iii) and (iv) 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.

17. As to paragraph 34(e) of the Defence, the plaintiff:

~~does not admit the allegations therein on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.~~

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

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

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

(d) admits subparagraph (d);

(e) as to subparagraph (e):

(i) adopts the admission contained therein;

(ii) is not required to plead to the non-admission contained therein;

(f) denies subparagraph (f) on the basis that the true position is as pleaded at paragraph 31 of the 35FASOC.

17A. As to paragraph 35 of the Defence, the plaintiff:

(a) as to subparagraph (a):

- (i) adopts the admission contained therein;
- (ii) does not admit the further allegation of material fact on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
- (b) is not required to plead to subparagraph (b);
- (c) as to subparagraph (c):
 - (i) is not required to plead thereto, to the extent the matters pleaded are non-admissions;
 - (ii) admits that 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;
 - (iii) otherwise denies the allegations on the basis that the true position is as pleaded at paragraph 31A of the 35FASOC.

17B. As to paragraph 36A of the Defence, the plaintiff:

- (a) as to subparagraph (a), adopts the admission contained therein and further:
 - (i) admits subparagraph (i);
 - (ii) denies subparagraphs (ii) and (iii) as untrue;
- (b) as to subparagraph (b), says that the true position was as pleaded at paragraph 32A of the 35FASOC and further:
 - (i) as to subparagraph (i):
 - (A) admits the Deed Poll contained the text quoted;
 - (B) does not admit that the directors discussed or properly considered the Allens Advice among themselves or with Mr Monaghan prior to the director defendants executing the Deed Poll or determining to proceed with the split of the settlement proceeds 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 there is similarity between the text of the background matters set out in the Deed Poll and the text of the background matters set out in the Allens Advice;
 - (B) does not admit that the "Background" summary of the Deed Poll was prepared with reference to the Allens Advice on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) admits subparagraphs (iii) and (iv).

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

- (a) as to subparagraph (a):

- (i) repeats and relies upon the matters pleaded above in response to paragraph 22(b) of the Defence;
 - (ii) otherwise joins issue with the allegations therein;
- (b) as to subparagraph (b):
- ~~(i) — says that those allegations are not a proper non-admission and are liable to be struck out;~~
 - (ii) does not admit the allegations in subparagraphs (i) or (ii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) joins issue with subparagraph (iii);
- (c) as to subparagraph (c):
- (i) adopts the admission at subparagraphs (i) ~~and (iii)~~;
 - (ii) as to subparagraph (ii), repeats and relies upon its responses to paragraphs 2B, 2C and 37(b) of the Defence above;
 - (iii) as to subparagraph (iii), says that the true position was as pleaded at paragraph 33(a) of the 35FASOC and further:
 - (A) as to subparagraph (A), repeats and relies upon its response above to subparagraph 30C(d)(iii) of the Defence;
 - (B) admits subparagraph (B);
 - (C) as to subparagraph (C), ~~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 allegation;
 - ~~(iv) — joins issue with subparagraph (v);~~
- (d) as to subparagraph (d), says that the true position was as pleaded at paragraph 33(b) of the 35FASOC and further:
- ~~(i) — joins issue with subparagraph (i)(A) and (C); and~~
 - ~~(ii) — does not admit the allegations in subparagraph (i)(B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.~~
 - (i) joins issue with subparagraph (i);
 - (ii) denies subparagraph (ii) on the basis that there was no such understanding as alleged;
 - (iii) denies subparagraph (iii) on the basis that there was no understanding of the kind alleged at subparagraph (iii);
- (e) denies subparagraph (e) on the basis that:

- (i) it was not necessary to pay any amount to the MPF to ensure the cooperation of LMIM as trustee of the MPF because LMIM was required by section 601FC(1)(c) to cause the whole of the proceeds of settlement of the Proceedings to be paid to LMIM as RE of the FMIF;
- (ii) in those circumstances, LMIM as trustee of the MPF would not withhold its consent or otherwise prevent the settlement of the Bellpac proceeding from occurring.

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

(a) is not required to plead to subparagraph (a);

(aa) joins issue with subparagraph (aa);

(b) as to subparagraph (b):

(i) as to subparagraph (i):

(A) admits subparagraphs (A) and (B);

(B) does not admit the allegations in subparagraphs ~~(A), (B) or (C)~~ on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

(C) as to subparagraph (D), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 30, 31(c) and (f), 33(b) and 38(b)(ii) of the Defence;

(ii) as to subparagraph (ii):

(A) as to subparagraph (A), repeats and relies upon the matters pleaded above in response to paragraph 31 of the Defence and denies as untrue that the priority set out at clause 3.1 of the Deed of Priority was affected by clause 3.2;

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

(C) denies the allegations in subparagraph (C) on the basis that:

(1) the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;

(2) the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;

(3) as to subparagraph (iii), admits (to the extent it is alleged) that it was possible for the Deed of Priority to be varied but denies as untrue that there was any such variation;

(ba) as to subparagraph (ba):

(i) admits subparagraphs (i), (ii), (iii) and (vi);

- (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;
- (iii) denies subparagraph (iv) as untrue because LMIM as RE of the FMIF and/or PTAL had no such authority;
- (iv) as to subparagraph (v):
 - (A) admit that 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; but
 - (B) otherwise deny that being a party to the Deed of Release and Deed of Settlement and Release was subject to the "agreement" alleged in subparagraph (v) because it is untrue and because it was not subject to such "agreement" as alleged;
- (v) as to the second subparagraph (iv), denies that LMIM as trustee of the MPF was entitled to or would have taken the steps alleged therein because the directors or LMIM would not 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;
- (vi) further as to the second subparagraph (v):
 - (A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (ii) to (v) hereof, LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF and the true position is as pleaded at paragraphs 45AA or 45AB of the 5FASOC;
 - (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) admits subparagraph (C) but says that LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in subparagraphs (ii) to (vi) above;
- (c) as to subparagraph (c):
 - (i) repeats and relies upon the matters pleaded in response to paragraphs 2B, 2C, 26, 30, 31, 33(b) and 38(b)(i) and (c) above;
 - (ii) otherwise joins issue with the allegations therein;
- (d) as to subparagraph (d):
 - (i) adopts the admission in subparagraph (i);
 - (ii) joins issue with the allegations in subparagraph (ii);

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

~~(iv) as to subparagraph (iv):~~

~~(A) does not admit the allegations in subparagraphs (A), (B) or (C) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;~~

~~(B) as to subparagraph (D), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 30, 31(e), 33(b) and 38(b)(ii) of the Defence;~~

(iv) as to subparagraph (iv):

(A) joins issue with the allegations in subparagraph (A);

(B) admits subparagraphs (B) and (C);

(C) does not admit the allegations in subparagraphs (B), (C) or (D) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

(D) as to subparagraph (E), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 22(b), 26, 30, 31(c), 31(f), 33(b) and 38(b)(ii) of the Defence;

(v) as to subparagraph (vi):

~~(A) does not admit the allegations in~~ admits subparagraph (A) ~~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), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 30, 31(c) and (f), 33(b) and 38(b)(ii) of the Defence;

~~(vi) as to subparagraph (vii):~~

~~(A) joins issue with the allegations in subparagraph (A);~~

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

(e) as to subparagraph (e):

(i) denies the allegation at subparagraph (i) on the basis that Allens Advice was not sought as to “whether LMIM as trustee of the MPF could lawfully be treated as an arm’s-length litigation funder” but rather, the advice sought from Allens was identified in the Allens Advice as follows:

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

- (ii) as to the allegations in subparagraph (ii), repeats and relies upon its responses above to paragraphs 30, 31(b)(iv), and ~~31(e)-(d)~~ (e) and (f) and 38(ba) of the Defence;
- (iii) as to the allegations in subparagraph (iii), repeats and relies upon its response above to paragraph 33(b), 33C(a), 33C(c)(v) and 33C(g) of the Defence;
- (iv) does not admit the allegations in subparagraph (iv) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (v) denies subparagraph (v) and says that the director defendants, including the third defendant, ought to have considered whether LMIM as trustee of the MPF could be treated as if it was an arm's-length litigation funder and determined that it could not be so considered;
- (vi) as to subparagraph (vi):
 - (A) admits the allegations; but
 - (B) the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (C) the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (D) the third defendant was obliged to have regard to or give adequate consideration to the matters referred to at paragraph 34 of the 35FASOC;
- (f) as to subparagraph (f):
 - (i) as to the allegations in subparagraph (i):
 - (A) does not admit the allegations as to the third defendant's state of mind on the basis that those matters are not within the knowledge of the plaintiff; but
 - (B) says that, even if the third defendant believed that the second and sixth defendants together with Monaghan were taking the steps alleged, the third defendant was obliged to have regard to or give adequate consideration to the matters referred to at paragraph 34 of the 35FASOC;
 - (ii) denies the allegations at subparagraphs (ii) and (iii) on the basis that:
 - (A) the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (B) the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;

- (C) the third defendant was obliged to have regard to or give adequate consideration to the matters referred to at paragraph 34 of the 35FASOC;
- (g) joins issue with the allegations in subparagraph (g);
- (h) denies subparagraph (h) on the basis that:
- (i) as to subparagraph (i), admits that there was no legal impediment to LMIM as trustee of the MPF being treated as if it were an arm's-length litigation funder if there was such an arrangement, but denies that there was any such arrangement for the reasons pleaded in paragraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
- (ii) denies subparagraph (ii) on the basis that it was appropriate to seek such advice in the circumstances pleaded in paragraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
- (iii) otherwise ~~does not admit~~ denies as untrue that there was any understanding between LMIM's directors that MPF's contribution to funding the Proceedings would be recognised as alleged ~~on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;~~
- (iv) as to subparagraph (iii):
- (A) does not admit the allegation in subparagraph (A) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
- ~~(B) repeats and relies upon the matters pleaded in paragraph 23 of the 2FASOC;~~
- (C) otherwise denies the allegation that it was "clearly in the interests of the FMIF" for LMIM as trustee of the MPF to be paid the Proceeds Split because it was to the detriment of LMIM as RE of the FMIF and not required in order to effect settlement of the Proceedings for the reasons pleaded in the 35FASOC and the plaintiff repeats and relies upon the matters pleaded at paragraph ~~14(e)~~ 19(ba) above;
- (v) as to subparagraph (iv), denies the advice which LMIM did seek and receive was adequate for the reasons pleaded at paragraph 30C of the 35FASOC;
- (vi) as to subparagraph (v), denies the allegations on the basis that:
- (A) whether the proceeds split was in the best interests of members of the FMIF within the meaning of sections 601FC(1)(c) and 601FD(1)(c) was a legal matter, in respect of which LMIM sought legal advice from Allens, in the form of the Allens Advice;
- (B) alternatively, if and to the extent that the decision to pay part of the proceeds of the settlement of the Bellpac proceeding was a commercial, corporate or ethical judgment, it was not and could not have been in the interests of members of the FMIF to pay the

sum of \$15,546,147.85 to the MPF as pleaded at paragraph 35 of the ~~35~~FASOC;

- (i) as to subparagraph (i):
 - (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii), admits that it was appropriate for the second defendant to take the Allens Advice and the WMS Report into consideration but denies that it was sufficient for the second defendant to do so because the Allens Advice and the WMS Advice had the characteristics pleaded at paragraph 30C of the ~~35~~FASOC and the first to sixth defendants' decision-making had the deficiencies pleaded at paragraph 34 of the ~~35~~FASOC;
- (j) joins issue with the allegations in subparagraph (j);
- (k) as to subparagraph (k):
 - (i) as to subparagraph (i), does not admit that the third defendant made the independent assessment alleged, whether at all or whether to a sufficient degree having regard to the third defendant's knowledge of LMIM and the complexity and structure of the operations of LMIM, on the basis that having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (ii) as to subparagraph (ii), does not admit that the third defendant acted in good faith and after making his own independent assessment of the matters referred to, on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) as to subparagraph (iii), denies the allegations therein for the reasons pleaded at paragraph 34 of the ~~35~~FASOC and because s 189 does not apply to contraventions of Part 5C.2 of the Act ~~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.~~

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

- (a) adopts the admission at subparagraph (a);
- (b) joins issue with the allegations at subparagraph (b);
- (c) as to subparagraph (c):
 - (i) ~~does not admit~~ denies as untrue that there was any understanding as ~~alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
 - (ii) as to the allegations in subparagraph (ii):
 - (A) admits that LMIM as RE of the FMIF made the Settlement payment in purported reliance on the advice of WMS; but
 - (B) denies that it was appropriate for the Settlement payment to be made for the reasons pleaded in the ~~35~~FASOC;
 - (iii) as to the allegations in subparagraph (iii):

- (A) admits that LMIM as RE of the FMIF made the Settlement payment in purported reliance on the Allens Advice; but
 - (B) denies that it was appropriate for the Settlement payment to be made for the reasons pleaded in the 35FASOC;
 - (iv) as to the allegations in subparagraph (iv), denies as untrue the allegation that the settlement of the Proceedings could only occur with the consent and cooperation of LMIM as trustee of the MPF and says that the true position was as set out at paragraph 30C(b)(ii) of the 35FASOC;
 - (v) denies subparagraph (v) as untrue;
 - (vi) denies subparagraph (vi) as untrue.
21. As to paragraph 40 of the Defence, the plaintiff:
- (a) joins issue with the allegations in subparagraph (a);
 - (b) as to the allegations in subparagraph (b):
 - (i) adopts the admission at subparagraph (i);
 - (ii) denies the allegations in subparagraph (ii) on the basis that the true position was as set out in the 35FASOC and the plaintiff repeats and relies upon the matters pleaded in this Reply to the allegations referred to therein.
22. As to paragraph 41 of the Defence, the plaintiff:
- (a) joins issue with the allegations in subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) ~~does not admit~~ denies the allegations in subparagraph (i) on the basis that, ~~having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation there was no understanding of the kind alleged and LMIM as trustee of the MPF funded the Bellpac proceeding in the manner pleaded at paragraph 24 of the 35FASOC;~~
 - (ii) ~~as to denies the allegations in~~ subparagraph (ii) ~~as untrue and says that the true position is as pleaded at paragraph 30C(b)(ii) of the 35FASOC;~~
 - (A) admit it was necessary to obtain the consent and cooperation of LMIM as RE of the MPF; but
 - (B) deny LMIM would have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF; and
 - (C) repeat and rely on the response to paragraph 38(ba) above;
 - (iii) as to subparagraph (iii), repeats and relies upon its responses above to paragraphs 26, ~~31(e) and~~ 31(f)(iii) and 38(ba) of the Defence;

~~(iv) denies that LMIM as RE of the FMIF was entitled to direct the payment pleaded therein for the reasons pleaded in paragraphs 37 and 37A of the 2FASOC~~

(iv) denies subparagraph (iv) on the basis that the true position was as pleaded at paragraph 37 of the 35FASOC;

(v) as to subparagraph (v):

(A) admits that, as at 21 June 2011, the directors of LMIM had already executed the Deed Poll and thereby recorded their decision to pay part of the proceeds of settlement of the Bellpac proceeding to LMIM as trustee of the MPF;

(B) denies as untrue that there was in fact a need to LMIM as trustee of the MPF to agree to the overall settlement of the Proceedings or that it was necessary or appropriate to pay 35% of those proceeds to LMIM as trustee of the MPF;

(vi) as to subparagraph (vi):

(A) admits subparagraph (A);

(B) denies subparagraph (B) on the basis that any and all moneys received by LMIM as RE of the FMIF from or in relation to Bellpac were subject to the Deed of Priority;

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

(i) PTAL or LMIM as RE of the FMIF's entitlement to payment under the Deed of Release was not subject to the agreed split of the settlement proceeds;

(ii) directing all or part of the proceeds of settlement of the Proceeding to LMIM as trustee of the ~~FMIF~~ MPF was a breach of LMIM's duties under section 601FC of the Act.

23. As to paragraph 42 of the Defence, the Plaintiff:

(a) denies the allegations in subparagraph (a) for the reasons pleaded in response to paragraphs 2B, 2C, 26, 31(c), 33C and 38 above and because the true position is as pleaded at paragraph 37A of the 35FASOC;

(aa) as to subparagraph (aa), repeats and relies upon its response above to paragraph 33C of the Defence;

(b) denies the allegations in subparagraph (b) as untrue and 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;

(c) denies the allegations in subparagraph (c) on the basis of the matters pleaded at subparagraph (b) above and because the circumstances referred to therein did not justify the conduct of the third defendant;

- (d) denies the allegations in subparagraph (d) on the basis of the matters pleaded at subparagraph (b) above and because each of the conclusions referred to therein was incorrect;
- (e) denies the allegations in subparagraph (e) on the basis of the matters pleaded at subparagraph (b) above and because each of the premises referred to therein was incorrect and further:
 - (i) as to subparagraph (iv), the WMS Report was not legal advice; and
 - (ii) denies subparagraph (v) on the basis that reasoning of the kind alleged was not consistent with LMIM's duties under section 601FC of the Act and the director defendants' duties under section 601FD of the Act.

24. ~~As to paragraph 44 of the Defence, the plaintiff:~~

- ~~(a) joins issue with the allegations in subparagraph (a);~~
- ~~(b) denies subparagraph (b) on the basis those duties were owed to LMIM and to LMIM as RE of the FMIF.~~

25. ~~As to paragraphs 45 to 61 of the Defence, the plaintiff:~~

- ~~(a) repeats and relies upon the matters pleaded in paragraphs 39 to 49 of the 2FASQC;~~
- ~~(b) otherwise joins issue with the allegations therein.~~

25AA. As to paragraph 53 of the Defence, the plaintiff:

- (a) adopts the admission therein;
- (b) admits that clause 13.1 and 29.1 of the FMIF Constitution is in the terms pleaded save that the terms in 29.1 were subject to the opening words at clause 29.1 "Subject to the Law";

Particulars

- (iv) The Law was defined in clause 1.1 of the FMIF Constitution as "the Corporations Act 2001 and the Corporations Regulations".
- (c) 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;
- (d) says that clause 29.2 of the Constitution of the FMIF did not exclude the obligations at s601FD(1)(b) or (c) of the Corporations Act 2001.

25AB. As to paragraph 54(c) of the Defence, the plaintiff denies the payment was within the power conferred on LMIM as RE of the FMIF:

- (a) for the reasons pleaded at paragraph 25AA above; and
- (b) because the payment of the settlement sum to the MPF was a breach of LMIM's duties under section 601FC of the Act.

25AC. As to paragraph 54A of the Defence, the plaintiff:

(a) as to subparagraph (a):

(i) as to subparagraph (i):

(A) does not admit that taking the steps pleaded at paragraph 45AA of the 5FASOC would have been contrary to the duties of LMIM as trustee of the MPF 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 contrary to 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;

(ii) as to subparagraph (ii):

(A) denies that it would have been unreasonable to do so for the reasons pleaded at subparagraph (i);

(B) denies that it would have been uncommercial to do so because the MPF had funded the Bellpac proceeding as second mortgagee;

(C) as to subparagraph (A), admits that LMIM as trustee of the MPF had funded more than 90% of the costs of the Bellpac proceedings;

(D) as to subparagraph (B), denies as untrue that there was any such understanding as alleged;

(E) denies subparagraph (C) as untrue and says that the conduct of the Bellpac Proceeding and the negotiations of directors of LMIM as RE of the FMIF also contributed to the settlement of the Bellpac proceedings;

(F) admits subparagraph (D);

(G) as to subparagraph (E), admits that as part of the settlement, LMIM as trustee of the MPF was required to forever release and forgo its rights against Gujarat as claimed in the Bellpac proceedings;

(H) admits subparagraph (F);

(I) as to subparagraph (G), repeats and relies upon its responses above to subparagraphs 31(f)(iv) and 38(ba) of the Defence;

- (J) as to subparagraph (H), admits that LMIM had obtained the Allens Advice but says that the Allens Advice had the deficiencies pleaded in the 5FASOC;
- (K) as to subparagraph (I), admits that LMIM had obtained the WMS Report but says that the WMS Report was not legal advice and that LMIM as trustee of the MPF was not an arms'length litigation funder to LMIM as RE of the FMIF;
- (iii) as to subparagraph (iii), does not admit the allegations therein as it is unaware of the truth or falsity of the allegations despite having made reasonable inquiries and says that such an allegation is irrelevant as LMIM as trustee of the MPF was not an "independent trustee" because LMIM was at the same time the RE of the FMIF and the trustee of the MPF;
- (b) as to the subparagraph (b), the plaintiff:
 - (i) admits the matters alleged;
 - (ii) but says that LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in paragraph 19(ba) above;
- (c) as to subparagraph (c) repeats and relies on its response to paragraph 45AA of the first defendant's fourth further amended defence to the 5FASOC;
- (d) deny on the basis that the true position is that pleaded in paragraph 45AA of the 5FASOC.

25AD. The plaintiff denies the allegations of material fact at paragraph 54B of the Defence on the basis that the true position is as pleaded at paragraph 45AA of the 5FASOC.

25AE. As to paragraph 54C of the Defence, the plaintiff repeats and relies on paragraph 45AB of the 5FASOC.

25A. As to paragraph 55 of the Defence, the plaintiff adopts the admission therein and:

- (a) denies subparagraph (a) as untrue and repeats and relies upon its response above to paragraph 41 of the Defence;
- (b) denies subparagraph (b) as untrue and says that LMIM as RE of the FMIF was entitled to receive the whole of the proceeds of the settlement of the Proceeding in circumstances where the proceeds were insufficient to fully discharge the FMIF Bellpac Loan;
- (c) denies subparagraph (c) as untrue and repeats and relies upon the matters pleaded at paragraph (e) above.

25BA. As to paragraph 56A of the Defence, the plaintiff:

- (a) as to subparagraph (a), denies the allegation therein and repeats and relies on its responses to paragraphs 20, 31(f)(iv), 38(ba), 54A and 54C;
- (b) as to subparagraph (b), denies the allegation therein and repeats and relies on paragraph 45B of the 5FASOC,

25B. As to paragraph 58A of the Defence, the plaintiff:

- (a) adopts the admission at subparagraph (a);
- (b) denies subparagraph (b) as untrue;
- (c) as to subparagraph (c):
 - (i) joins issue with subparagraph (i);
 - (ii) joins issue with subparagraph (ii);
 - (iii) denies subparagraph (iii) on the basis that, on its proper construction, by execution by the directors of LMIM as RE of the FMIF, it was a party to and was intended by its directors to be bound by the Deed Poll;

25C. As to paragraph 58B of the Defence, the plaintiff:

- (a) as to subparagraph (a), admits that the sum of \$15,546,147.85 was paid directly to LMIM as trustee of the MPF;
- (b) denies subparagraph (b) as untrue;
- (c) admits subparagraph (c) but says that the Deed Poll was executed by the directors of LMIM as RE of the FMIF;
- (d) joins issue with subparagraph (d);
- (e) denies subparagraph (e) on the basis that, on its proper construction, by execution by the directors of LMIM as RE of the FMIF, it was a party to and was intended by its directors to be bound by the Deed Poll;

26. As to paragraph 63 of the Defence, the plaintiff:

- (a) as to subparagraph (a), admits that the decision of the third 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), 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 35FASOC;
- (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 its responses to paragraphs 2B, 2C and 38(k) above;

- (ii) denies that the third 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) as to subparagraph (e):
 - (i) repeats and relies upon the matters pleaded above in response to paragraph 38(k) of the Defence; and
 - (ii) otherwise does not admit the matters alleged on the basis that, having made reasonable enquiries, he remains uncertain as to the truth or falsity of the allegation;
 - (f) as to subparagraph (f), denies that the third 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 35FASOC;
 - (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;
 - (i) says that there is no statutory business judgment rule defence to a claim for breach of section 601FD of the Act.
27. As to paragraph 64 of the Defence, the plaintiff:
- (a) as to subparagraph (a), does not admit that the third 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 35FASOC and the third 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 third defendant ought fairly be excused for any contravention of the Act.
28. As to paragraph 65 of the Defence, the plaintiff denies the allegations therein because s 189 of the Act does not apply to contraventions of Part 5C.2 of the Act 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.
29. The plaintiff is not required to plead to paragraph 66 of the Defence.
30. Save as aforesaid, the plaintiff joins issue with the matters pleaded in the Defence.

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

Signed: 

Description: Solicitors for the Plaintiff

Dated: ~~29 March 2018~~ ~~12 March 2019~~ 4 April 2019

"SC-12"

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



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

The plaintiff hereby replies to the ~~Further~~ Amended Defence of the fourth defendant dated 12
~~March 2018~~ ~~22 February 2019~~ 4 April 2019 as follows (the Defence):

**Further Amended Amended Reply to the
Amended Defence of the fourth defendant to
the ~~Third Fifth~~ Further Amended Statement of
Claim**

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:JSO:201401822

1. The plaintiff adopts the:
 - (a) admissions made in paragraphs 1, 3(a), 7(a), 10(a), 11(a), 12(a), 13, 14, 15(a), 19(aa), 20(a), 24(a), 25(a); ~~26(a)~~, 27(a), 28(a), 34(a) and (b), ~~35(a)~~, 36, and 43 and 53 of the Defence;
 - (b) the definitions used in the Second ~~Third~~ Fifth Further Amended Statement of Claim dated ~~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 made therein in subparagraphs (a) to (e);
 - ~~(b) joins issue with subparagraph (d);~~
 - (c) does not admit subparagraphs ~~(a)~~ and ~~(f)~~ on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (d) admits subparagraph (b).
- 2A. As to paragraph 2A of the Defence, the plaintiff:
 - (a) adopts the admission in subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) repeats and relies upon the matters pleaded at paragraph 3 of the 35FASOC;
 - (ii) says further that the first to sixth defendants were acting in their capacity as directors of the seventh defendant in its capacity as RE of the FMIF in relation to the matters pleaded at paragraph 36 of the 35FASOC;
 - (iii) for the reasons pleaded in sub-paragraphs (i) and (ii) above denies that the plaintiff does not have standing as alleged.
- 2B. As to paragraph 2B of the Defence, the plaintiff does not admit the allegations therein on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.
- 2C. As to paragraph 2C of the Defence, the plaintiff:
 - (a) does not admit the allegations in 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) joins issue with the allegations in subparagraph (c);
 - (c) as to the allegations in subparagraph (d):
 - (i) repeats and relies upon the matters pleaded in paragraphs 5 to 36, ~~38 to 40~~ and 44 to 46 of the 35FASOC;
 - (ii) 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.

- 2D. As to the allegations at subparagraphs 3(b)(i), 4(a), 5(a), 6(b)(i), 7(b)(i), 8(i), 9(b)(i), 10(~~dc~~)(i), 11(b)(i), 12(b)(i), 15(b)(i), 16(b)(i), 17(a), 18(b)(i), 19(a), 20(e)(i), 22(c)(i), 23(b)(i), 24(b)(i), 25(b), 26(b)(i), 27(b)(i), 28(b)(i), 31(f)(iii) and 43(a) of the Defence which refer to paragraphs 2B and 2C of the Defence:
- (a) those allegations purport to be made in support of a non-admission;
 - ~~(b) those allegations are not proper non-admissions and are liable to be struck out;~~
 - (c) to the extent that the fourth defendant relies on those allegations as positive allegations of material fact, the plaintiff repeats and relies upon the matters pleaded in the 35 FASOC and at paragraphs 2B and 2C above.
3. As to paragraph 6 of the Defence, the plaintiff:
- (a) adopts the admission in subparagraph (a);
 - (b) says further as to subparagraph (a) that:
 - (i) the document referred to in subparagraph (a)(iv) was not executed on behalf of Balgow Pty Limited;
 - (ii) 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.
4. As to paragraph 9(a) of the Defence, the plaintiff:
- (a) adopts the admissions 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.
- ~~5. As to paragraphs 10(b) and the second 10(b) of the Defence, the plaintiff admits that clause 8 contained the text alleged and says further that:~~
- ~~(a) LMIM as trustee of the MPF signed the Deed of Priority;~~
 - ~~(b) the term "Mortgagee" in clause 8 of the Deed of Priority was defined in clause 1.1 to mean the First Mortgagee, the Second Mortgagee, the Third Mortgagee or Austeorp;~~
 - ~~(c) the term "First Mortgagee" was defined in clause 1.1 to include "the Custodian" and the "Responsible Entity";~~
 - ~~(d) "the Custodian" was defined to mean PTAL;~~
 - ~~(e) the terms of clause 13 of the Deed of Priority relate to LMIM as responsible entity for the FMIF;~~

- ~~(f) — the terms of clause 14 of the Deed of Priority relate to LMIM as trustee of the MPF only;~~
- ~~(g) — the names of the Parties in the deed include a reference to LMIM twice, once defined as “Responsible entity” and once defined as “LM”;~~
- ~~(h) — the term “Third Mortgage” was defined as “LM”;~~
- ~~(i) — in fact, LMIM as trustee of the MPF hold a third registered mortgage over the Property;~~

6. As to paragraph 16(a) of the Defence, the plaintiff:

- (a) adopts the admission in subparagraph (a) that it disclosed to the fourth defendant those documents described therein but says that the copy of the document disclosed and entitled “Access Licence Bellpac 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.

7. As to paragraph 18(a) of the Defence, the plaintiff:

- (a) adopts the admission in subparagraph (a);
- (b) says that these documents are the Settlement Deeds.

8. As to paragraph 20 of the Defence, the plaintiff:

- (a) admits the allegations in subparagraphs (b) and (bb);
- (b) ~~adopts the admission at as to~~ subparagraph (c):
 - ~~(i) — denies that the Coalfields cross-claim was commenced by way of first cross-claim summons filed 18 March 2010 because it was commenced by way of first cross-claim summons filed 16 March 2010;~~
 - ~~(ii) — says that the Coalfields cross-claim was filed in the Bellpac proceedings;~~
- (c) ~~does not admit the allegation in as to~~ subparagraph (d) 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, admits that LMIM as trustee for the MPF was also a party to the Proceedings.

9. ~~As to paragraph 21 of the Defence, the plaintiff:~~

- ~~(a) — as to subparagraphs (a) and (b):~~
 - ~~(i) — says that the allegations therein are not responsive to the matters pleaded at paragraph 23 of the 3FASOC;~~
 - ~~(ii) — 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;~~

~~(b) joins issue with the allegations in subparagraphs (c) and (d).~~

10. As to paragraphs 22(a) and (b) of the Defence, the plaintiff:

(a) repeats and relies upon the matters pleaded in paragraphs ~~23~~ and 24 of the 35FASOC;

(b) ~~adopts the admission in~~ as to subparagraph (a):

(i) denies that the FMIF was frozen on the basis that from 3 March 2009, LMIM as RE of the FMIF determined that it would not accept any applications for investment in the FMIF from any person who was not an existing member in the FMIF;

(ii) admits subparagraph (ii);

(c) as to subparagraph (b):

(i) denies the allegation in subparagraph (i) as untrue because LMIM as trustee of the MPF funded the Proceedings as second mortgagee in the manner pleaded at paragraph 24 of the 35FASOC;

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

(iii) as to subparagraph (iii):

(A) admits that "funding was not provided pursuant to the Deed of Priority";

(B) says that the Deed of Priority was not a facility agreement (or similar) pursuant to which funds were advanced, but rather regulated the priority between LMIM as RE of the FMIF and LMIM as trustee of the MPF in relation to recovery of their respective loans to Bellpac.

11. As to paragraph 23 of the Defence, the plaintiff:

(a) adopts the admissions in subparagraph (a);

(b) says the document referred to in subparagraph (a)(ii) was also purportedly executed on behalf of Bellpac;

(c) does not admit the allegation of material fact at subparagraph (b)(i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;

(d) is not required to otherwise plead thereto.

11A. As to paragraph 26 of the Defence, the plaintiff:

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

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

(c) as to subparagraph (bb):

- (i) admits subparagraph (i);
- (ii) as to subparagraph (ii), admits that the recitals to the Deed of Release contained references to the matters alleged;
- (iii) as to subparagraph (iii), admits that clauses 5 and 6 of the Deed of Release contained references to the matters alleged;
- (iv) as to subparagraph (iv), admits that clause 2 of the Deed of Release contained references to the matters alleged;
- (v) as to subparagraph (v), admits that clauses 5 and 6 of the Deed of Settlement and Release contained references to the matters alleged;
- (vi) admits subparagraph (vi);
- (vii) does not admit subparagraph (vii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (viii) denies subparagraph (viii) on the basis that the words of clause 22.1 of the Deed of Release did not have the effect alleged;
- (ix) admits subparagraph (ix);
- (x) as to subparagraph (x):
 - (A) says that the allegation is vague and unparticularised;
 - (B) admits (and says) that LMIM as trustee of the MPF was bound by the Deed of Release;
 - ~~(C) denies that, on the proper construction of the Deed of Release, LMIM as trustee of the MPF was also a party on the basis that by the references to PTAL, which acted as custodian for the FMIF, and 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;~~
- (cc) admits subparagraph (cc);
- (dd) as to subparagraph (dd):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii), admits that the recitals to the Deed of Release contained references to the matters alleged;
 - (iii) as to subparagraph (iii), repeats and relies upon its response to subparagraph (aa)(v) above;
 - (iv) does not admit subparagraph (iv) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (v) admits subparagraph (v);

(vi) denies subparagraph (vi) on the basis that the words of clause 19.1 of the Deed of Release did not have the effect alleged;

(vii) admits subparagraph (vii);

(viii) as to subparagraph (viii):

(A) says that the allegation is vague and unparticularised;

(B) admits (and says) that LMIM as trustee of the MPF was bound by the Deed of Settlement and Release;

(C) denies that, on the proper construction of the Deed of Settlement and Release, LMIM as trustee of the MPF was also a party on the basis that, by the reference 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 Release and Settlement to LMIM could only have been a reference to LMIM as RE of the FMIF;

(ee) admits subparagraph (ee).

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

(a) adopts the admission contained therein;

(b) admits the allegation of material fact therein.

(c) repeats and relies upon the matters pleaded in paragraphs 30A of the 2FASOC;

(d) otherwise joins issue with the allegations therein.

13. As to paragraph 30 of the Defence, the plaintiff:

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

(b) admits the allegations at subparagraph (b);

(c) as to subparagraph (c), admits the email from the second defendant to the first, third, fourth and sixth defendants and Mr Fischer dated 14 March 2011 at 3:35pm.

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

(a) as to subparagraph (a):

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

(ii) does not admit that the final forms of the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement were not in existence at the dates of the WMS instructions on 6 December 2010 and the Allens instructions on 14 March 2011, 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 at subparagraph (i);

~~(ii) as to subparagraph (ii):~~

~~(A) repeats and relies upon the matters pleaded at paragraph 30C of the 3FASOC; and~~

~~(B) admits that, at the date of the instructions, whether or not a settlement would take place and the ultimate structure of any settlement between LMIM and Gujarat had not been finalised and was the subject of continuing discussions between the parties to the Mediation Heads of Agreement;~~

~~(iii) as to subparagraph (iii):~~

~~(A) does not admit the allegations therein on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;~~

~~(B) says that, in any event, the instructions to WMS and Allens were deficient in that the instructions had the characteristics pleaded at paragraph 30C of the 3FASOC; and~~

(iv) as to subparagraph (iv):

(A) as to admits the allegations in subparagraph (A):

(i) does not admit that Allens were engaged "at all material times from or on about 1 December 2010" in relation to the settlement negotiations in respect of the Proceedings on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

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

(B) as to the allegations in subparagraph (B), admits that the instructions to Allens contained the information pleaded at paragraph 30(b) of the Defence;

(BB) admits subparagraph (BB):

(C) says that the allegations in subparagraph (C) are vague and embarrassing and therefore do not admit the allegations on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

(D) denies the allegations in subparagraph (D) on the basis that, if the Defendants intended to rely upon advice from WMS or Allens, they should have ensured that the instructions on which that advice would be based were accurately communicated to the relevant persons who provided the advice at WMS and Allens;

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

- ~~(e) as to subparagraph (e):~~
- ~~(i) adopts the admission at subparagraph (i);~~
 - ~~(ii) as to subparagraph (ii), repeats and relies upon the matters pleaded at subparagraph (b) above;~~
 - ~~(iii) joins issue with the allegations at subparagraph (ii);~~
 - ~~(iv) as to subparagraph (iv) (iii):~~
 - ~~(A) says the allegations in subparagraphs (A) to (F) are not responsive to the matters pleaded at paragraph 30C(b)(ii) of the 3EASOC;~~
 - ~~(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 3EASOC 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) denies as untrue that the matters alleged therein 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);~~
 - ~~(E) as to subparagraph (E) in particular, denies as untrue that there was any proper basis for such a "distribution of the sale proceeds";~~
 - ~~(F) otherwise does not admit the allegations therein (in particular whether any sale was not at market value) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
 - ~~(v) as to subparagraph (iv), 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 for the reasons pleaded at subparagraph 1314(e) (ii) to (iv) above;~~
 - ~~(B) neither the directors nor LMIM would not have caused LMIM as trustee of the MPF to take those steps, because doing so would have constituted a breach of sections 601FC(1)(e) and 601FC(3) of the Act;~~
 - ~~(vi) as to subparagraph (vi):~~

- (A) ~~denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (ii) to (v) 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 3FASOC in a way which prioritised 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 (v) 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 (v), 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 3FASOC;~~
- (d) as to subparagraph (d):
- (i) ~~adopts the admission therein;~~ as to subparagraph (i):
- (A) ~~admits subparagraph (A);~~
- (B) as to subparagraph (B), ~~does not admit that the authors of the Allens Advice were aware of the matters alleged at the time of drawing the Allens Advice on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
- (ii) ~~does not admit the allegations in subparagraph (i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
- (iii) ~~joins issue with the allegations in~~ denies subparagraph (ii) on the basis that the true position is as pleaded at subparagraph 30C(c) of the 35FASOC;
- (e) admits the allegations in subparagraph (e);
- (f) as to subparagraph (f):
- (i) adopts the admission in subparagraph (i);
- (ii) as to subparagraph (ii):
- (A) denies subparagraph (A) as untrue because LMIM as trustee of the MPF funded the Proceedings as second mortgagee;
- (B) as to subparagraph (B), ~~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.~~
- (iii) is not required to plead to subparagraph (iii);
- (iv) as to subparagraph (iv):
- (A) adopts the admission at subparagraph (A);

- (B) does not admit the allegations at subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (C) denies as to subparagraph (C) as untrue for the reasons that leaded at subparagraph 14(c) above:
 - (i) admit subparagraph C.2;
 - (ii) admit subparagraph C.3;
 - (iii) otherwise denies the allegations on the basis that:
 - (1) 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;
 - (2) LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF;
 - (3) LMIM as trustee of the MPF could not have, and would not have, "insisted" on obtaining a "reasonable share" of the settlement proceeds.

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

- (a) adopts the admission at subparagraph (a);
- (b) as to subparagraph (b):
 - (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii):
 - (A) denies that the WMS Report contained the opinion alleged because it did not;
 - (B) 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*";
 - (C) repeats and relies upon the matters pleaded at paragraph 34(a) of the 35FASOC;
 - (D) says that the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (iii) 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;
 - (c) as to subparagraph (c), repeats and relies upon the matters pleaded above in response to paragraph 29 of the Defence.
16. As to paragraph 33 of the Defence, the plaintiff:
- (a) adopts the admissions at subparagraph (a);
 - (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 subparagraph (i) 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 paragraphs 34(a) and 34(aa) 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.

16A. As to paragraph 33A of the Defence, the plaintiff:

- (a) adopts the admissions at subparagraph (a);
- (b) admits subparagraph (b);
- (c) admits subparagraph (c);
- (d) admits subparagraph (d);
- (e) joins issue with subparagraph (e).

16B. As to paragraph 33B of the Defence, the plaintiff:

- (a) denies subparagraph (a) as untrue and further:
 - (i) as to subparagraph (i), admits that the 35FASOC does not allege against the director defendants any breach of Part 2D.1 of the Act;
 - (ii) denies subparagraph (ii) 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;
- (b) is not required to plead to subparagraph (b).

16C. As to paragraph 33C of the Defence, the plaintiff:

(a) as to subparagraph (a)

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

(ii) as to subparagraph (ii):

(A) adopts the admission contained therein;

(B) denies as untrue that the Allens Advice expressly opined that the proposed split of proceeds of settlement of the proceedings was legally acceptable because the opinion offered therein 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;

(C) denies that the Allens Advice did not state or warn that the proposed split of the proceeds would constitute, or result in, breach of section 601FD of the Act, on the basis that the Allens Advice referred to sections 601FC and 601FD of the Act, warned that LMIM would need to comply with those sections and did not explain how making the proceeds split was consistent with those requirements;

(iii) as to subparagraph (iii), repeats and relies upon its response above to paragraph 33(b) of the Defence;

(iv) as to subparagraph (iv):

(A) admits that the Allens Advice was obtained as part of LMIM's consideration of the proper and most appropriate treatment of the proceeds of settlement of the Proceedings;

(B) says that, to the extent the Allens Advice was sought, or the director defendants believed the Allens Advice was being sought, to consider how to split the proceeds "having regard to the context in which those proceeds were produced and the respective interests of FMIF and the MPF", those considerations did not negative the requirement pursuant to sections 601FC(1)(c) and 601FD(1)(c) of the Act to pay the whole of the proceeds of the settlement of the Proceedings to LMIM as RE of the FMIF;

(b) is not required to plead to subparagraph (b);

(c) as to subparagraph (c):

(i) adopts the admissions at subparagraphs (i), (ii) and (iii);

(ii) as to subparagraph (iv):

(A) repeats and relies upon its response above to subparagraph 33(b) of the Defence;

(B) otherwise denies the allegations on the basis that the statement at paragraph 16 of the Allens Advice 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;

(iii) denies subparagraph (v) because paragraph 16 of the Allens Advice 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;

(iv) denies subparagraph (vi) on the basis that:

(A) whether the proceeds split was in the best interests of members of the FMIF within the meaning of sections 601FC(1)(c) and 601FD(1)(c) was a matter, in respect of which LMIM sought legal advice from Allens, in the form of the Allens Advice;

(B) alternatively, if and to the extent that the decision to pay part of the proceeds of the settlement of the Bellpac proceeding was a commercial, corporate or ethical judgment, it was not and could not have been in the interests of members of the FMIF to pay the sum of \$15,546,147.85 to the MPF as pleaded at paragraph 35 of the 35FASOC;

(vii) as to subparagraph (vii):

(A) as to subparagraph (A), admits that the Allens Advice did not expressly state the matters alleged but says that the effect of the Allens Advice was, inter alia, that:

(1) LMIM as RE of the FMIF was required to act in the best interests of members of the FMIF;

(2) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF may be inconsistent with LMIM's obligations;

(3) the directors of LMIM needed to give consideration to the matters raised in the Allens Advice in deciding whether to split the proceeds of the Bellpac litigation between the FMIF and the MPF (as stated at paragraph 50 thereof);

(B) as to subparagraph (B), admits that the Allens Advice did not expressly state the matters alleged but says that the effect of the Allens Advice was, inter alia, that:

(1) LMIM as RE of the FMIF was required to act in the best interests of members of the FMIF;

(2) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF may be inconsistent with LMIM's obligations;

(3) the directors of LMIM needed to give consideration to the matters raised in the Allens Advice in deciding whether to split the proceeds of the Bellpac litigation between the FMIF and the MPF (as stated at paragraph 50 thereof);

(C) as to subparagraph (C):

(1) denies the allegations as untrue;

(2) says that, if the assumptions referred to at paragraphs 25 and 27 of the Allens Advice were “invalid or incapable of being confirmed” and the director defendants read, considered and relied upon the Allens Advice in deciding to proceed with the proceeds split, a reasonable person in their position would have followed up or asked questions about those matters, either to Mr Monaghan or Allens and not proceeded with the proceeds split;

(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) denies subparagraph (iii) as untrue;

(e) as to subparagraph (e):

(i) denies subparagraph (i) as untrue;

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

(iii) as to subparagraph (iii), admits that the Allens Advice did not expressly state the matters alleged but says that the effect of the Allens advice was, inter alia, that:

(A) LMIM as RE of the FMIF was required to act in the best interests of members of the FMIF, consistently with sections 601FC and 601FD of the Act;

(B) paying 35% of the Settlement proceeds to LMIM as trustee of the MPF may be inconsistent with LMIM’s obligations;

(C) the directors of LMIM needed to give consideration to the matters raised in the Allens Advice in deciding whether to split the proceeds of the Bellpac litigation between the FMIF and the MPF (as stated at paragraph 50 thereof);

(iv) as to subparagraph (iv), repeats and relies upon its responses above to subparagraphs 33C(v)(iv) to (vi) of the Defence;

(f) as to subparagraph (f):

(i) denies subparagraphs (i), (ii) and (iii) on the basis that the true position is as pleaded at subparagraph 30H(f) of the 35FASOC;

(ii) as to subparagraph (iv):

(A) admits that the instructions provided to Allens on 14 March 2011 expressly informed Allens that FMIF and MPF had not entered into an agreement concerning the proposed split of any proceeds from the Proceedings;

(B) says that the email [FMIF.300.004.3198] from Mr Monaghan to Mr Lavell of WMS, which was forwarded to Allens, states, inter alia:

"It was always 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, however as the outcome of the litigation was so uncertain, and the possible methods of resolving the litigation so varied, it was not considered appropriate to enter into any formal agreement to split the proceeds at that time."

(C) says that the Allens Advice at paragraph 9 recites the substance of the passage pleaded at subparagraph (B) above;

(g) as to subparagraph (g):

(i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30H(g) of the 35FASOC;

(ii) as to subparagraph (ii):

(A) admits that the matters set out at paragraphs 25, 27, 35, 37 and 53 of the Allens Advice were not conclusions;

(B) says that the Allens Advice did not in fact reach an unqualified opinion that the proceeds split was consistent with the duties of LMIM as RE of the FMIF or its directors;

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

(iii) denies subparagraph (iii) on the basis that the Allens Advice 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;

(h) as to subparagraph (h):

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

(ii) denies subparagraph (ii) on the basis that references in the Allens Advice to the effect of section 601FC ought to have alerted the director defendants to the need for LMIM to comply with those provisions, including section 601FC(1)(c);

(iii) as to subparagraph (iii):

(A) if and to the extent it is alleged, says that the proceeds split was justified on the basis that the fourth defendant acted in the best interests of members of the MPF, proceeding on that basis was a breach of sections 601FD(1)(b) and (1)(c);

- (B) admits that there may be situations in which LMIM may have acted in the best interests of members of the MPF without breaching the duties imposed by sections 601FD(1)(b) or (c);
 - (C) denies as untrue that causing the Settlement payment to be made to LMIM as trustee of the MPF was consistent with or reconcilable with the duties imposed by sections 601FD(1)(b) or (c);
 - (D) repeats and relies upon its responses above to paragraphs 33C(c)(v) and 33C(f)(iii) of the Defence;
- (iv) is not required to plead to the non-admission at subparagraph (iv);
- (i) as to subparagraph (i):
- (i) admits subparagraph (i);
 - (ii) as to subparagraph (ii):
 - (A) is not required to plead to the non-admission made therein;
 - (B) to the extent the further matters alleged are allegations of material fact:
 - (1) admits subparagraph (A);
 - (2) denies subparagraph (B) on the basis that one of the breaches pleaded against the first to sixth defendants in the 25FASOC is the contravention of section 601FD(1)(c) at paragraph 45 thereof;
- (iii) as to subparagraph (iii), repeats and relies upon its responses above to subparagraphs 33(b), 33C(a)(ii), 33C(c)(iv), 33C(c)(v), 33C(e)(iii), 33C(g)(ii) and 33C(g)(iii) of the Defence;
- (j) as to subparagraph (j):
- (i) admits subparagraph (i);
 - (ii) adopts the admission at subparagraph (ii);
 - (iii) as to subparagraph (iii), repeats and relies upon its responses above to subparagraphs 33(b), 33C(a)(ii), 33C(c)(iv), 33C(c)(v), 33C(e)(iii), 33C(g)(ii) and 33C(g)(iii) of the Defence;
- (k) as to subparagraph (k):
- (i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30H(k) of the 25FASOC;
 - (ii) is not required to plead to subparagraph (ii);
- (l) as to subparagraph (l):
- (i) admits subparagraph (i);
 - (ii) admits subparagraph (ii);

(iii) as to subparagraph (iii):

(A) admits the matters alleged; but

(B) says that the fourth defendant was required to make her own independent assessment of the Allens Advice and the appropriateness of the proceeds split, as referred to at paragraph 50 of the Allens Advice;

(iv) denies subparagraph (iv) on the basis that a reasonable director in the position of the director defendants, who read the Allens Advice, would have appreciated that the Allens Advice had the deficiencies pleaded in the 35FASOC and would have sought further advice before acting in reliance on the Allens Advice;

(v) denies subparagraph (v) as untrue and repeats and relies upon the matters pleaded at subparagraphs (iii) and (iv) 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.

17. As to paragraph 34(e), of the Defence, the plaintiff:

does not admit the allegations therein on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.

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

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

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

(d) admits subparagraph (d);

(e) as to subparagraph (e):

(i) adopts the admission contained therein;

(ii) is not required to plead to the non-admission contained therein;

(f) denies subparagraph (f) on the basis that the true position is as pleaded at paragraph 31 of the 35FASOC.

17A. As to paragraph 35 of the Defence, the plaintiff:

(a) as to subparagraph (a):

(i) adopts the admission contained therein;

(ii) does not admit the further allegation of material fact on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;

(b) is not required to plead to subparagraph (b);

(c) as to subparagraph (c):

- (i) is not required to plead thereto, to the extent the matters pleaded are non-admissions;
- (ii) admits that 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;
- (iii) otherwise denies the allegations on the basis that the true position is as pleaded at paragraph 31A of the 35FASOC.

17B. As to paragraph 36A of the Defence, the plaintiff:

- (a) as to subparagraph (a), adopts the admission contained therein and further:
 - (i) admits subparagraph (i);
 - (ii) denies subparagraphs (ii) and (iii) as untrue;
- (b) as to subparagraph (b), says that the true position was as pleaded at paragraph 32A of the 35FASOC and further:
 - (i) as to subparagraph (i):
 - (A) admits the Deed Poll contained the text quoted;
 - (B) does not admit that the directors discussed or properly considered the Allens Advice among themselves or with Mr Monaghan prior to the director defendants executing the Deed Poll or determining to proceed with the split of the settlement proceeds 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 there is similarity between the text of the background matters set out in the Deed Poll and the text of the background matters set out in the Allens Advice;
 - (B) does not admit that the "Background" summary of the Deed Poll was prepared with reference to the Allens Advice on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) admits subparagraphs (iii) and (iv).

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

- (a) as to subparagraph (a):
 - (i) repeats and relies upon the matters pleaded above in response to paragraph 22(b) of the Defence;
 - (ii) otherwise joins issue with the allegations therein;
- (b) as to subparagraph (b):
 - (i) says that these allegations are not a proper non-admission and are liable to be struck out;

- (ii) does not admit the allegations in subparagraphs (i) or (ii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (iii) joins issue with subparagraph (ii);
- (c) as to subparagraph (c):
 - (i) adopts the admission at subparagraphs (i) and (iii);
 - (ii) as to subparagraph (ii), repeats and relies upon its responses to paragraphs 2B, 2C and 37(b) of the Defence above;
 - (iii) as to subparagraph (iii), says that the true position was as pleaded at paragraph 33(a) of the 35FASOC and further:
 - (A) as to subparagraph (A), repeats and relies upon its response above to subparagraph 30C(d)(iii) of the Defence;
 - (B) admits subparagraph (B);
 - (C) as to subparagraph (C), 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 allegation;
 - ~~(iv) joins issue with subparagraph (v);~~
- (d) as to subparagraph (d), says that the true position was as pleaded at paragraph 33(b) of the 35FASOC and further:
 - ~~(i) joins issue with subparagraph (i)(A) and (C); and~~
 - ~~(ii) does not admit the allegations in subparagraph (i)(B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.~~
 - (i) joins issue with subparagraph (i);
 - (ii) denies subparagraph (ii) on the basis that there was no such understanding as alleged;
 - (iii) denies subparagraph (iii) on the basis that there was no understanding of the kind alleged at subparagraph (iii);
- (e) denies subparagraph (e) on the basis that:
 - (i) it was not necessary to pay any amount to the MPF to ensure the cooperation of LMIM as trustee of the MPF because LMIM was required by section 601FC(1)(c) to cause the whole of the proceeds of settlement of the Proceedings to be paid to LMIM as RE of the FMIF;
 - (ii) in those circumstances, LMIM as trustee of the MPF would not withhold its consent or otherwise prevent the settlement of the Bellpac proceeding from occurring.

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

(a) is not required to plead to subparagraph (a);

(aa) joins issue with subparagraph (aa):

(b) as to subparagraph (b):

(iii) as to subparagraph (i):

(A) admits subparagraphs (A) and (B);

(B) does not admit the allegations in subparagraphs ~~(A), (B)~~ or (C) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;

(B) as to subparagraph (D), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 30, 31(c) and (f), 33(b) and 38(b)(ii) of the Defence;

(iv) as to subparagraph (ii):

(A) as to subparagraph (A), repeats and relies upon the matters pleaded above in response to paragraph 31 of the Defence and denies as untrue that the priority set out at clause 3.1 of the Deed of Priority was affected by clause 3.2;

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

(C) denies the allegations in subparagraph (C) on the basis that:

(1) the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the ~~35~~FASOC;

(2) the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the ~~35~~FASOC;

(3) as to subparagraph (iii), admits (to the extent it is alleged) that it was possible for the Deed of Priority to be varied but denies as untrue that there was any such variation;

(ba) as to subparagraph (ba):

(i) admits subparagraphs (i), (ii), (iii) and (vi);

(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;

(iii) denies subparagraph (iv) as untrue because LMIM as RE of the FMIF and/or PTAL had no such authority;

(iv) as to subparagraph (v):

- (A) admit that 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; but
 - (B) otherwise deny that being a party to the Deed of Release and Deed of Settlement and Release was subject to the “agreement” alleged in subparagraph (v) because it is untrue and because it was not subject to such “agreement” as alleged;
- (v) as to the second subparagraph (iv), denies that LMIM as trustee of the MPF was entitled to or would have taken the steps alleged therein because the directors or LMIM would not 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;
- (vi) further as to the second subparagraph (v):
- (A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (ii) to (v) hereof, LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF and the true position is as pleaded at paragraphs 45AA or 45AB of the 5FASOC;
 - (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) admits subparagraph (C) but says that LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in subparagraphs (ii) to (vi) above;
- (c) as to subparagraph (c):
- (i) repeats and relies upon the matters pleaded in response to paragraphs 2B, 2C, 26, 30, 31, 33(b) and 38(b)(ii) and 38(c) above;
 - (ii) otherwise joins issue with the allegations therein;
- (d) as to subparagraph (d):
- (i) adopts the admission in subparagraph (i);
 - (ii) joins issue with the allegations in subparagraph (ii);
 - (iii) does not admit the allegations in subparagraph (iii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iv) ~~as to subparagraph (iv):~~
 - (A) ~~does not admit the allegations in subparagraphs (A), (B) or (C) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;~~

- ~~(B) — as to subparagraph (D), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 30, 31(e), 33(b) and 38(b)(ii) of the Defence;~~
- (iv) as to subparagraph (iv):
- (A) joins issue with the allegations in subparagraph (A);
- ~~(B) admits subparagraphs (C) and (D);~~
- (C) does not admit the allegations in subparagraphs (B), ~~(C), (D)~~ or (E) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;
- (D) as to subparagraph (F), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 22(b), 26, 30, 31(c) and (f), 33(b) and 38(b)(ii) of the Defence;
- (v) as to subparagraph (vi):
- ~~(A) does not admit the allegations in admits subparagraph (A) 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), repeats and relies upon its responses above and below to paragraphs 2B, 2C, 30, 31(c) and (f), 33(b) and 38(b)(ii) of the Defence;
- ~~(vi) — as to subparagraph (vii):~~
- ~~(A) — joins issue with the allegations in subparagraph (A);~~
- ~~(B) — does not admit the allegations in subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
- (e) as to subparagraph (e):
- (i) denies the allegation at subparagraph (i) on the basis that Allens Advice was not sought as to “whether LMIM as trustee of the MPF could lawfully be treated as an arm’s-length litigation funder” but rather, the advice sought from Allens was identified in the Allens Advice as follows:
- “15. You have asked us whether it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, given that the RE is in a position of conflict (in its capacity as responsible entity for FMIF and in its capacity as trustee for MPF).”*
- (ii) as to the allegations in subparagraph (ii), repeats and relies upon its responses above to paragraphs 30, 31(b)(iv), and 31(c), (d), (e) and (f) of the Defence;
- (iii) as to the allegations in subparagraph (iii), repeats and relies upon its response above to paragraphs 33(b), 33C(a), 33C(c)(v) and 33C(g) of the Defence;

- (iv) does not admit the allegations in subparagraph (iv) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (v) denies subparagraph (v) and says that the director defendants, including the fourth defendant, ought to have considered whether LMIM as trustee of the MPF could be treated as if it was an arm's-length litigation funder and determined that it could not be so considered;
- (vi) as to subparagraph (vi):
 - (A) admits the allegations; but
 - (B) the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (C) the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (D) the fourth defendant was obliged to have regard to or give adequate consideration to the matters referred to at paragraph 34 of the 35FASOC;
- (f) as to subparagraph (f):
 - (i) as to the allegations in subparagraph (i):
 - (A) does not admit the allegations as to the fourth defendant's state of mind on the basis that those matters are not within the knowledge of the plaintiff; but
 - (B) says that, even if the fourth defendant believed that the second and sixth defendants together with Monaghan were taking the steps alleged, the fourth defendant was obliged to have regard to or give adequate consideration to the matters referred to at paragraph 34 of the 35FASOC;
 - (ii) denies the allegations at subparagraphs (ii) and (iii) on the basis that:
 - (A) the WMS Report was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (B) the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC;
 - (C) the fourth defendant was obliged to have regard to or give adequate consideration to the matters referred to at paragraph 34 of the 35FASOC;
- (g) joins issue with the allegations in subparagraph (g);
- (h) denies subparagraph (h) on the basis that:

- (i) as to subparagraph (i), admits that there was no legal impediment to LMIM as trustee of the MPF being treated as if it were an arm's-length litigation funder if there was such an arrangement, but denies that there was any such arrangement for the reasons pleaded in paragraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
- (ii) denies subparagraph (ii) on the basis that it was appropriate to seek such advice in the circumstances pleaded in paragraphs 34(a)(i) and (ii), (b)(i) and (ii) and (c)(i), (ii) and (iii) of the 35FASOC;
- (iii) ~~otherwise does not admit~~ denies as untrue that there was any understanding between LMIM's directors that MPF's contribution to funding the Proceedings would be recognised as alleged ~~on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;~~
- (iv) as to subparagraph (iii):
 - (A) does not admit the allegation in subparagraph (A) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (B) ~~repeats and relies upon the matters pleaded in paragraph 23 of the 2FASOC;~~
 - (C) otherwise denies the allegation that it was "clearly in the interests of the FMIF" for LMIM as trustee of the MPF to be paid the Proceeds Split because it was to the detriment of LMIM as RE of the FMIF and not required in order to effect settlement of the Proceedings for the reasons pleaded in the 35FASOC and the plaintiff repeats and relies upon the matters pleaded at paragraph ~~14(e)~~19(ba) above;
- (v) as to subparagraph (iv), denies the advice which LMIM did seek and receive was adequate for the reasons pleaded at paragraph 30C of the 35FASOC;
- (vi) as to subparagraph (v), denies the allegations on the basis that:
 - (A) whether the proceeds split was in the best interests of members of the FMIF within the meaning of sections 601FC(1)(c) and 601FD(1)(c) was a legal matter, in respect of which LMIM sought legal advice from Allens, in the form of the Allens Advice;
 - (B) alternatively, if and to the extent that the decision to pay part of the proceeds of the settlement of the Bellpac proceeding was a commercial, corporate or ethical judgment, it was not and could not have been in the interests of members of the FMIF to pay the sum of \$15,546,147.85 to the MPF as pleaded at paragraph 35 of the 35FASOC;
- (i) as to subparagraph (i):
 - (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii), admits that it was appropriate for the second defendant to take the Allens Advice and the WMS Report into consideration but denies that it was sufficient for the second defendant to do so because the Allens Advice and the WMS Advice had the

characteristics pleaded at paragraph 30C of the 35FASOC and the first to sixth defendants' decision-making had the deficiencies pleaded at paragraph 34 of the 35FASOC;

- (j) joins issue with the allegations in subparagraph (j);
- (k) as to subparagraph (k):
 - (i) as to subparagraph (i), does not admit that the fourth defendant made the independent assessment alleged, whether at all or whether to a sufficient degree having regard to the fourth defendant's knowledge of LMIM and the complexity and structure of the operations of LMIM, on the basis that having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
 - (ii) as to subparagraph (ii), does not admit that the fourth defendant acted in good faith and after making his her own independent assessment of the matters referred to, on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (iii) as to subparagraph (iii), denies the allegations therein for the reasons pleaded at paragraph 34 of the 35FASOC and because s 189 does not apply to contraventions of Part 5C.2 of the Act 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.

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

- (a) adopts the admission at subparagraph (a);
- (b) joins issue with the allegations at subparagraph (b);
- (c) as to subparagraph (c):
 - (i) does not admit denies as untrue that there was any understanding as alleged on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) as to the allegations in subparagraph (ii):
 - (A) admits that LMIM as RE of the FMIF made the Settlement payment in purported reliance on the advice of WMS; but
 - (B) denies that it was appropriate for the Settlement payment to be made for the reasons pleaded in the 35FASOC;
 - (iii) as to the allegations in subparagraph (iii):
 - (A) admits that LMIM as RE of the FMIF made the Settlement payment in purported reliance on the Allens Advice; but
 - (B) denies that it was appropriate for the Settlement payment to be made for the reasons pleaded in the 35FASOC;
 - (iv) as to the allegations in subparagraph (iv), denies as untrue the allegation that the settlement of the Proceedings could only occur with the consent and cooperation of LMIM as trustee of the MPF and says that the true position was as set out at paragraph 30C(b)(ii) of the 35FASOC;

(v) denies subparagraph (v) as untrue;

(vi) denies subparagraph (vi) as untrue.

21. As to paragraph 40 of the Defence, the plaintiff:
- (a) joins issue with the allegations in subparagraph (a);
 - (b) as to the allegations in subparagraph (b):
 - (i) adopts the admission at subparagraph (i);
 - (ii) denies the allegations in subparagraph (ii) on the basis that the true position was as set out in the 35FASOC and the plaintiff repeats and relies upon the matters pleaded in this Reply to the allegations referred to therein.
22. As to paragraph 41 of the Defence, the plaintiff:
- (a) joins issue with the allegations in subparagraph (a);
 - (b) as to subparagraph (b):
 - (i) ~~does not admit~~ denies the allegations in subparagraph (i) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation there was no understanding of the kind alleged and LMIM as trustee of the MPF funded the Bellpac proceeding in the manner pleaded at paragraph 24 of the 35FASOC;
 - (ii) ~~as to denies the allegations in~~ subparagraph (ii) as untrue and says that the true position is as pleaded at paragraph 30C(b)(ii) of the 3FASOC:
 - (A) admit it was necessary to obtain the consent and cooperation of LMIM as RE of the MPF; but
 - (B) deny LMIM would have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF; and
 - (C) repeat and rely on the response to paragraph 38(ba) above;
 - (iii) as to subparagraph (iii), repeats and relies upon its responses above to paragraphs 26, ~~31(e) and~~ 31(f)(iii) and 38(ba) of the Defence;
 - (iv) ~~denies that LMIM as RE of the FMIF was entitled to direct the payment pleaded therein for the reasons pleaded in paragraphs 37 and 37A of the 35FASOC;~~
 - (iv) denies subparagraph (iv) on the basis that the true position was as pleaded at paragraph 37 of the 35FASOC;
 - (v) as to subparagraph (v):
 - (A) admits that, as at 21 June 2011, the directors of LMIM had already executed the Deed Poll and thereby recorded their decision to pay part of the proceeds of settlement of the Bellpac proceeding to LMIM as trustee of the MPF;

(B) denies as untrue that there was in fact a need to LMIM as trustee of the MPF to agree to the overall settlement of the Proceedings or that it was necessary or appropriate to pay 35% of those proceeds to LMIM as trustee of the MPF;

(vi) as to subparagraph (vi):

(A) admits subparagraph (A);

(B) denies subparagraph (B) on the basis that any and all moneys received by LMIM as RE of the FMIF from or in relation to Bellpac were subject to the Deed of Priority;

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

(i) PTAL or LMIM as RE of the FMIF's entitlement to payment under the Deed of Release was not subject to the agreed split of the settlement proceeds;

(ii) directing all or part of the proceeds of settlement of the Proceeding to LMIM as trustee of the ~~FMIF~~ MPF was a breach of LMIM's duties under section 601FC of the Act.

23. As to paragraph 42 of the Defence, the Plaintiff:

(a) denies the allegations in subparagraph (a) for the reasons pleaded in response to paragraphs 2B, 2C, 26, 31(c), 33C and 38 above and because the true position is as pleaded at paragraph 37A of the ~~35~~FASOC;

(aa) as to subparagraph (aa), repeats and relies upon its response above to paragraph 33C of the Defence;

(b) denies the allegations in subparagraph (b) as untrue and 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;

(c) denies the allegations in subparagraph (c) on the basis of the matters pleaded at subparagraph (b) above and because the circumstances referred to therein did not justify the conduct of the fourth defendant;

(d) denies the allegations in subparagraph (d) on the basis of the matters pleaded at subparagraph (b) above and because each of the conclusions referred to therein was incorrect;

(e) denies the allegations in subparagraph (e) on the basis of the matters pleaded at subparagraph (b) above and because each of the premises referred to therein was incorrect and further:

(i) as to subparagraph (iv), the WMS Report was not legal advice; and

(ii) denies subparagraph (v) on the basis that reasoning of the kind alleged was not consistent with LMIM's duties under section 601FC of the Act and the director defendants' duties under section 601FD of the Act.

24. As to paragraph 44 of the Defence, the plaintiff:

- (a) ~~joins issue with the allegations in subparagraph (a);~~
- (b) ~~denies subparagraph (b) on the basis those duties were owed to LMIM and to LMIM as RE of the FMIF.~~

25. ~~As to paragraphs 45 to 61 of the Defence, the plaintiff:~~

- (a) ~~repeats and relies upon the matters pleaded in paragraphs 39 to 49 of the 5FASOC;~~
- (b) ~~otherwise joins issue with the allegations therein.~~

25AA. As to paragraph 53 of the Defence, the plaintiff:

- (c) adopts the admission therein;
- (d) admits that clause 13.1 and 29.1 of the FMIF Constitution is in the terms pleaded save that the terms in 29.1 were subject to the opening words at clause 29.1 "Subject to the Law";

Particulars

- (iv) The Law was defined in clause 1.1 of the FMIF Constitution as "the Corporations Act 2001 and the Corporations Regulations";
- (e) 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;
- (f) says that clause 29.2 of the Constitution of the FMIF did not exclude the obligation at s601FD(1)(b) or s601FD(1)(c) of the Corporations Act 2001.

25AB. As to paragraph 54(c) of the Defence, the plaintiff denies the payment was within the power conferred on LMIM as RE of the FMIF:

- (b) for the reasons pleaded at paragraph 25AA above; and
- (c) because the payment of the settlement sum to the MPF was a breach of LMIM's duties under section 601FC of the Act.

25AC. As to paragraph 54A of the Defence, the plaintiff:

- (a) as to subparagraph (a):
 - (i) as to subparagraph (i):
 - (A) does not admit that taking the steps pleaded at paragraph 45AA of the 5FASOC would have been contrary to the duties of LMIM as trustee of the MPF 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 contrary to 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;
- (ii) as to subparagraph (ii):
- (A) denies that it would have been unreasonable to do so for the reasons pleaded at subparagraph (i);
 - (B) denies that it would have been uncommercial to do so because the MPF had funded the Bellpac proceeding as second mortgagee;
 - (C) as to subparagraph (A), admits that LMIM as trustee of the MPF had funded more than 90% of the costs of the Bellpac proceedings;
 - (D) as to subparagraph (B), denies as untrue that there was any such understanding as alleged;
 - (E) denies subparagraph (C) as untrue and says that the conduct of the Bellpac Proceeding and the negotiations of directors of LMIM as RE of the FMIF also contributed to the settlement of the Bellpac proceedings;
 - (F) admits subparagraph (D);
 - (G) as to subparagraph (E), admits that as part of the settlement, LMIM as trustee of the MPF was required to forever release and forgo its rights against Gujarat as claimed in the Bellpac proceedings;
 - (H) admits subparagraph (F);
 - (I) as to subparagraph (G), repeats and relies upon its responses above to subparagraphs 31(f)(iv) and 38(ba) of the Defence;
 - (J) as to subparagraph (H), admits that LMIM had obtained the Allens Advice but says that the Allens Advice had the deficiencies pleaded in the 5FASOC;
 - (K) as to subparagraph (I), admits that LMIM had obtained the WMS Report but says that the WMS Report was not legal advice and that LMIM as trustee of the MPF was not an arms'length litigation funder to LMIM as RE of the FMIF;
- (iii) as to subparagraph (iii), does not admit the allegations therein as it is unaware of the truth or falsity of the allegations despite having made reasonable inquiries and says that such an allegation is irrelevant as LMIM as trustee of the MPF was not an "independent trustee" because LMIM was at the same time the RE of the FMIF and the trustee of the MPF;
- (b) as to the subparagraph (b), the plaintiff:

- (i) admits the matters alleged;
- (ii) but says that LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in paragraph 19(ba) above;
- (c) as to subparagraph (c) repeats and relies on its response to paragraph 45AA of the first defendant's fourth further amended defence to the 5FASOC;
- (d) deny on the basis that the true position is that pleaded in paragraph 45AA of the 5FASOC.
- (e) 5FASOC.

25AD. The plaintiff denies the allegations of material fact at paragraph 54B of the Defence on the basis that the true position is as pleaded at paragraph 45AA of the 5FASOC.

25AE. As to paragraph 54C of the Defence, the plaintiff repeats and relies on paragraph 45AB of the 5FASOC.

25A. As to paragraph 55 of the Defence, the plaintiff adopts the admission therein and:

- (a) denies subparagraph (a) as untrue and repeats and relies upon its response above to paragraph 41 of the Defence;
- (b) denies subparagraph (b) as untrue and says that LMIM as RE of the FMIF was entitled to receive the whole of the proceeds of the settlement of the Proceeding in circumstances where the proceeds were insufficient to fully discharge the FMIF Bellpac Loan;
- (c) denies subparagraph (c) as untrue and repeats and relies upon the matters pleaded at paragraph **Error! Reference source not found.** above.

25BA. As to paragraph 56A of the Defence, the plaintiff:

- (a) as to subparagraph (a), denies the allegation therein and repeats and relies on its responses to paragraphs 20, 31(f)(iv), 38(ba), 54A and 54C;
- (b) as to subparagraph (b), denies the allegation therein and repeats and relies on paragraph 45B of the 5FASOC.

~~25B. As to paragraph 58A of the Defence, the plaintiff:~~

- ~~(a) adopts the admission at subparagraph (a);~~
- ~~(b) denies subparagraph (b) as untrue;~~
- ~~(c) as to subparagraph (c):~~
 - ~~(i) joins issue with subparagraph (i);~~
 - ~~(ii) joins issue with subparagraph (ii);~~
 - ~~(iii) denies subparagraph (iii) on the basis that, on its proper construction, by execution by the directors of LMIM as RE of the FMIF, it was a party to and was intended by its directors to be bound by the Deed Poll;~~

~~25C. As to paragraph 58B of the Defence, the plaintiff:~~

~~(a) as to subparagraph (a), admits that the sum of \$15,546,147.85 was paid directly to LMIM as trustee of the MPF;~~

~~(b) denies subparagraph (b) as untrue;~~

~~(c) admits subparagraph (c) but says that the Deed Poll was executed by the directors of LMIM as RE of the FMIF;~~

~~(d) joins issue with subparagraph (d);~~

~~(e) denies subparagraph (e) on the basis that, on its proper construction, by execution by the directors of LMIM as RE of the FMIF, it was a party to and was intended by its directors to be bound by the Deed Poll;~~

26. As to paragraph 63 of the Defence, the plaintiff:

- (a) as to subparagraph (a), admits that the decision of the fourth 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), 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 35FASOC;
- (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 its responses to paragraphs 2B, 2C and 38(k) above;
 - (ii) denies that the fourth defendant properly informed ~~himself herself~~ about the Proceeds Split and the Settlement payment for the reasons pleaded at paragraphs 30A to 34 of the 35FASOC;
- (e) as to subparagraph (e):
 - (i) repeats and relies upon the matters pleaded above in response to paragraph 38(k) of the Defence; and
 - (ii) otherwise does not admit the matters alleged on the basis that, having made reasonable enquiries, ~~he it~~ remains uncertain as to the truth or falsity of the allegation;
- (f) as to subparagraph (f), denies that the fourth defendant rationally believed the judgment ~~she~~ 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 35FASOC;
- (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;
- (i) says that there is no statutory business judgment rule defence to a claim for breach of section 601FD of the Act.

27. As to paragraph 64 of the Defence, the plaintiff:

- (a) as to subparagraph (a), does not admit that the fourth 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 ~~25~~FASOC and the fourth 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 fourth defendant ought fairly be excused for any contravention of the Act.

28. As to paragraph 65 of the Defence, the plaintiff denies the allegations therein because s 189 of the Act does not apply to contraventions of Part 5C.2 of the Act ~~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.~~

29. The plaintiff is not required to plead to paragraph 66 of the Defence.

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

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

Signed:

Description: Solicitors for the Plaintiff

Dated: ~~29 March 2018~~ ~~12 March 2019~~ 4 April 2019

"SC-13"

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

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

Gadens Lawyers

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 REPLY TO THE ~~AMENDED~~ DEFENCE OF THE SIXTH DEFENDANT TO THE ~~THIRD FIFTH~~ FURTHER AMENDED STATEMENT OF CLAIM

The Plaintiff relies on the following facts in reply to the Amended Defence of the Sixth Defendant to the ~~Third Fifth~~ Further Amended Statement of Claim, filed in the Supreme Court of Queensland, Brisbane Registry on ~~27 April 2018~~ ~~7 March 2019~~ 4 April 2019 (Defence) as follows:

1. The plaintiff adopts the:

Amended Reply to the amended Defence of the Sixth Defendant to the ~~Third Fifth~~ Further Amended Statement of Claim
Filed on behalf of the Plaintiff

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Ref: SCZ:JSO:201401822

- (a) admissions made in paragraphs 1, 3(a), 4, 4A, 5 to 11, 12(b), 13 to 16, 18, 19, 20(a), 21, ~~22, 23~~, 24(a) and (d), ~~25 to 30B, 25 to 27, 29 to 30, 30D(a), 30E(a), 31, 31A(a), 32(a), and 34(g)(i), 38(a), 44 and 53~~ of the Defence; and
 - (b) the definitions used in the ~~Second~~ Fifth Further Amended Statement of Claim dated ~~7 November 2016~~ 2 April 2019 (~~35~~FASOC) and the Defence (unless the contrary intention is expressed).
2. As to paragraph 2 of the Defence, the plaintiff:
 - (a) adopts the admission in subparagraph (a);
 - ~~(b) admits the matters alleged at subparagraph (b);~~
 - ~~(c) is not required to plead to subparagraph (c);~~
 - (d) as to subparagraph (d):
 - (i) admits subparagraphs (i) and (iv);
 - (ii) 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.
- ~~3. As to paragraph 3(b) of the Defence, the plaintiff denies the allegation therein as they are untrue because his powers are not limited in the manner alleged.~~
4. As to paragraph 12(a) of the Defence, the plaintiff:
 - (a) ~~adopts the admission therein, as to subparagraph (i), admits that clause 8 is in the terms pleaded in paragraph 12(c)(i) save the words "the Deed" should be "this Deed";~~
 - ~~(b) as to subparagraph (ii), admits that PTAL is not specifically mentioned in clause 8 but says:
 - (i) the term "Mortgagee" in clause 8 of the Deed of Priority was defined in clause 1.1 to mean the First Mortgagee, the Second Mortgagee, the Third Mortgagee or Austeorp;
 - (ii) the term "First Mortgagee" was defined in clause 1.1 to include "the Custodian" and the "Responsible Entity"; and
 - (iii) "the Custodian" was defined to mean PTAL.~~
5. As to paragraph 17 of the Defence, the plaintiff:
 - (a) admits the LASA is dated 21 October 2004; and
 - (b) adopts the admission in subparagraph (b).
6. The plaintiff admits the allegations in subparagraph 20(b) of the Defence.
7. As to paragraph 22(aa) of the Defence, the plaintiff:

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

(aaa) admits subparagraph (aaa):

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

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

~~denies the matters alleged as untrue because the Amended Commercial List Statement:~~

~~(a) did not specify whether LM sued in its capacity as RE of the FMIF or as trustee for the MPF;~~

~~(b) at paragraph 4, referred to money loaned by LMIM as RE of the FMIF to Bellpac;~~

~~(c) at paragraph 20B, referred to demands issued by PTAL, which was custodian for the FMIF.~~

8A. As to paragraph 24(aa) of the Defence, the plaintiff repeat and relies on its responses to paragraph 22(b) of the Amended Defence of the Second Defendant to the 5FASOC.

8. The plaintiff denies the allegations in subparagraph 24(c) of the Defence as they are untrue because LMIM as trustee of the MPF funded the Proceedings as mortgagee with second priority as pleaded in paragraph 24 of the ~~3~~5FASOC and repeats and relies upon its responses in this Reply to paragraphs 30C(k)(ii), 33(c), 34(c)(ii), 37(a), 37A(c)(vi), 37A(d)(i) and 55(b)(ii) of the Defence and further:

(a) ~~admits~~ as to subparagraph (i):

(i) admits the defendants formed the view alleged:

(ii) does not admit they formed that view because of “conditions imposed on it by the financiers” on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

(b) as to subparagraph (ii):

(i) says that LMIM as RE of the FMIF funded some of the costs of the Proceedings; but

(ii) admits that LMIM as trustee of the MPF funded the majority of the costs of the Proceedings and, from the time that PTAL was joined as a party, LMIM as trustee of the MPF continued to provide funding to progress and defend the Proceedings

(c) as to subparagraph (iv), denies that the ~~3~~5FASOC alleges that funding of the Proceeding was provided “pursuant to the Deed of Priority”, but says rather the ~~3~~5FASOC pleads that LMIM as trustee of the MPF had “second priority under the Deed of Priority”.

9. As to paragraph 24(e) of the Defence, the plaintiff:

(a) admits that LMIM as trustee of the MPF agreed to provide an undertaking as to damages in the Bellpac proceedings; and

- (b) does not admit that LMIM as trustee of the MPF agreed to fund the \$1.3m payment to Coalfields in order to facilitate settlement of the Proceedings on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.

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

- (a) adopts the admission therein and admits the matters alleged therein;
- ~~(b) denies that, on the proper construction of the Deed of Release, LMIM as trustee of the MPF was also a party on the basis that by the references to PTAL, which acted as custodian for the FMIF, and 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; and~~
- ~~(c) denies that, on the proper construction of the Deed of Settlement and Release, LMIM as trustee of the MPF was also a party on the basis that, by the reference to PTAL being a signatory of the instrument, which acted as custodian of the FMIF, and 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 Release and Settlement to LMIM could only have been a reference to LMIM as RE of the FMIF.~~

11. As to paragraph 30A of the Defence, the plaintiff adopts the admission therein and admits the matters alleged at subparagraphs (a) to (d).

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

- (a) adopts the admission therein; and'
- (b) says that the reference to 'the ongoing solicitor and client relationship between LMIM and Allens in relation to matters concerned with and incidental to the Proceeding and settlement thereof' is vague and therefore does not admit the allegation on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.

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

- (a) adopts the admissions in subparagraphs (a), ~~(e)~~ (h) and (j);
- (b) as to subparagraph (b):
 - (i) does not admit the date on which the Gujarat Contract, the Deed of Release and the Deed of Release of Settlement were executed on the basis that, having made reasonable enquiries, he it remains uncertain as to the truth or falsity of the allegations;
 - (ii) admits the executed versions of those documents could not have been provided to WMS or Allens before they were executed;
- ~~(c) denies the allegations in subparagraph (d) as they are untrue for the reasons pleaded in paragraph 30C(b) of the 3EASOC and subparagraphs (d) and (f) below;~~
- (d) as to subparagraph (e):

- (i) does not admit that the final forms of the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement were not in existence at the dates of the WMS instructions on 6 December 2010 and the Allens instructions on 14 March 2011, on the basis that, having made reasonable enquiries, he it remains uncertain as to the truth or falsity of the allegations;
 - (ii) admits that the structure of any final settlement was not finally agreed upon until the point the Gujarat Contract, the Deed of Release and the Deed of Release and Settlement were entered into;
- (e) admits the matters alleged at subparagraph (f);
- (fa) as to subparagraph (fa):
- (i) admits the matters alleged therein; but
 - (ii) says that the failure of the instructions to WMS and Allens to identify the matters referred to in paragraph 30C of the 35FASOC (including the matters referred to at subparagraph (b)(i) thereof) is relevant to the assessment of the director defendants' breaches of duty pleaded at paragraph 45 of the 35FASOC;
- ~~(f) as to subparagraph (g), denies as untrue that the separate 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 and further:~~
- ~~(i) says that the matters alleged at subparagraphs (i), (ii) and (iii) are not responsive to the matters pleaded at paragraph 30C(b)(ii) of the 2FASOC;~~
 - ~~(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;~~
 - ~~(iii) denies subparagraph (ia) as untrue;~~
 - ~~(iv) admits subparagraph (ib);~~
 - ~~(v) denies subparagraph (ic) as untrue and repeats, relies upon the matters pleaded at subparagraph (ii) above and says further that LMIM would not and could not have prevented itself as RE of the FMIF from complying with its obligations pursuant to sections 601FC(1)(c) and 601FC(3) of the Act;~~
 - ~~(vi) denies subparagraph (id) for the reasons pleaded at paragraph 10 above;~~
 - ~~(vii) denies subparagraph (ie) for the reasons pleaded at paragraph 10 above and subparagraphs (ii) and (v) hereof;~~
 - ~~(viii) further as to subparagraph (i):~~
- ~~(AA) says that the allegation is irrelevant because the 3FASOC does not rely on clause 8 of the Deed of Priority;~~

- ~~(A) 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, LMM as RE of the FMI could effect the settlement of the Proceedings without the consent of LMM as trustee of the MPF;~~
 - ~~(B) denies so untrue that the matters alleged therein created a requirement for consent by LMM as trustee for the MPF in order for LMM as RE of the FMI or PTAL to perform their obligations under the documents pleaded at subparagraph 30C(b)(i);~~
 - ~~(C) otherwise does not admit the allegations therein (in particular whether any sale was not at market value) on the basis that, having made reasonable enquiries, he it remains uncertain as to the truth or falsity of the allegations;~~
- ~~(ai) denies that only the MPF had the capacity to fund any payment that had to be made because it could have been funded by LMM as RE for the FMI for the reasons pleaded in subparagraph (x)(B)(2) below, but otherwise does not admit the matters alleged at subparagraph (ai) on the basis that, having made reasonable enquiries, they remain uncertain as to the truth or falsity of the allegations;~~
- (ix) further as to subparagraph (ii), denies that LMM as trustee of the MPF was entitled to or would have taken the steps alleged therein because:
- ~~(A) LMM as trustee of the MPF would not have withheld such consent for the reasons pleaded at subparagraph 12(D)(i) to (viii) above;~~
 - ~~(B) the directors of LMM would not have caused LMM as trustee of the MPF to take those steps, because:~~
 - ~~(1) doing so would have constituted a breach of sections 601FC(1)(c) and 601FC(3) of the Act;~~
 - ~~(2) there was no basis for LMM as trustee of the MPF to seek an injunction or other relief to prevent the sale of the Property or to sue LMM as RE of the FMI in the manner alleged, where there was not (and there is not alleged by any director defendant to have been) any prior binding or enforceable agreement between LMM as RE of the FMI and LMM as trustee of the MPF precluding LMM as RE of the FMI from selling the Property and retaining all of the proceeds of sale for itself while any amount owing under the FMI Bellco Loan remained outstanding;~~
- (x) further as to subparagraph (iii):
- ~~(A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (i) to (iv) hereof, LMM 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 2FASOC in a way which prioritised the interests of LMM as trustee of the MPF over the interests of members of the FMI;~~
 - ~~(B) denies subparagraph (B) on the basis that:~~

- ~~(1) in the premises pleaded at subparagraphs (i) to (ix) hereof LMIM would not have caused or permitted LMIM as RE of the FMIF to be exposed to the risks alleged; and~~
- ~~(2) 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:~~
- ~~(i) Loans assigned by LMIM as RE of the FMIF to LMIM as trustee of the MPF, being described as the "Albanit", "KPC 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

- ~~(a) The Assigned Loans were assigned on or about 28 August 2008 for approximately \$33,513,345.00;~~
- ~~(b) As to March 2010, the balance of these loans was approximately \$31m;~~
- ~~(c) As at 31 December 2010, the balance of these loans was approximately \$20.2m;~~

- ~~(ii) An assignment of debt management fee receivable of \$5.1m, 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) denies subparagraph (C) on the basis that, in the premises pleaded at subparagraphs (i) to (ix) hereof, 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 20C(b)(i) of the 3EASOC;~~

- (g) as to subparagraph (h):
- (i) adopts the admission therein;
- (ii) otherwise 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;
- (iii) does not admit subparagraph (ii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;
- (h) admits the matters alleged at subparagraph (i);
- (i) as to subparagraph (k):

- (i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30C(d)(i) of the 35FASOC;
 - (ii) ~~does not admit~~ denies subparagraph (ii) 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" because ~~the allegation that the directors "always understood" the matters alleged is vague and unparticularised and having made reasonable enquiries, he remains uncertain as to the truth or falsity of the allegation~~ there was no such understanding as alleged;
 - (iii) says that at the time LMIM as trustee of the MPF agreed to fund the Proceedings as registered mortgagee of the Property with second priority under the Deed of Priority in or about July 2009, the first to sixth defendants had not considered that MPF's contribution to the funding of the Proceedings was to be recognised by providing MPF with a share of any proceeds recovered by the litigation as a litigation funder;
 - (iv) says the subsequent conduct of the first to sixth defendants as pleaded at paragraphs 30A to 32 of the 35FASOC is inconsistent with the existence of any such prior understanding or agreement that MPF's contribution to the funding of the Proceedings was to be recognised by providing MPF with a share of any proceeds recovered by the litigation as a litigation funder.
- (j) as to subparagraph (l):
- (i) adopts the admission made therein;
 - (ii) admits the allegation of material fact made therein;
- (k) as to subparagraph (m):
- (i) adopts the admission at subparagraph (i);
 - (ii) as to subparagraph (ii) denies as untrue that there was any binding express prior arrangement and further:
 - (A) as to subparagraph (A):
 - (1) admits that LMIM as trustee of the MPF was funding the Proceedings for its own benefit;
 - (2) says that that benefit had been the prospect that, if enough was recovered from the Proceeding to discharge the FMIF Bellpac Loan in full, any surplus would be applied in reduction of the MPF Bellpac Loan;
 - (3) denies that LMIM as trustee of the MPF was not subordinated to the interests of LMIM as RE of the FMIF in any settlement which might occur because it was so subordinated by reason of the requirements of section 601FC(1)(c) of the Act and the priority of the FMIF pursuant to the Deed of Priority;
 - (B) denies subparagraph (B) on the basis that there was no such understanding as alleged;

(iii) denies as to subparagraph (iii) for the reasons that:

(AA) admits subparagraph (AA):

(A) admits subparagraph (A):

(B) otherwise denies the allegations on the basis that:

(1) 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:

(2) LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF:

(3) pleaded at subparagraph (f) above and says further that LMIM as trustee of the MPF could not have, and would not have, "insisted" on obtaining a "reasonable share" of the settlement proceeds.

14. As to paragraph 30D(b) of the Defence, the plaintiff:

- (a) admits that the WMS Advice contained the opinion alleged and was addressed to Monaghan Lawyers; but
- (b) repeats and relies upon the matters pleaded at paragraph 34(a) of the 35FASOC; and
- (c) says that the WMS Advice was deficient in that the instructions provided to WMS had the characteristics pleaded at paragraph 30C of the 35FASOC.

15. As to paragraph 30E(b) of the Defence, the plaintiff:

- (a) admits that the Allens Advice contained the statements alleged at subparagraphs (i) and (iii) and did not advise the matters referred to at subparagraph (ii) and that the Allens Advice was addressed to Monaghan of Monaghan Lawyers and was provided to LMIM by Monaghan Lawyers);
- (b) repeats and relies upon the matters pleaded at paragraph 34(a) of the 35FASOC;
- (c) says that the Allens Advice was deficient in that the instructions provided to Allens had the characteristics pleaded at paragraph 30C of the 35FASOC.

15A. As to paragraph 30F of the Defence, the plaintiff:

- (a) adopts the admission at subparagraph (a);
- (b) admits subparagraphs (b), (c), (d) and (e).

15B. As to paragraph 30G of the Defence, the plaintiff:

- (a) as to subparagraph (a), adopts the admission therein says that the terms pleaded at paragraph 30G are found in the September 2009 revision of the Conflicts Management Policy [FMIF.500.005.5086], the September 2010 revision of the Conflicts Management Policy [FMIF.500.005.4683] and the Compliance Plan [FMIF.500.015.1877];
- (b) as to subparagraph (b):
 - (i) admits that there is no express allegation in the 35FASOC that the second defendant breached the LMIM Conflicts Management Policy;
 - (ii) says that paragraph 30G of the 35FASOC is relevant to establishing the second defendant's breaches at paragraph 45 of the 35FASOC;

15C. As to paragraph 30H of the Defence, the plaintiff:

- (a) as to subparagraph (a):
 - (i) adopts the admission contained therein;
 - (ii) admits the allegation of material fact contained therein;
- (b) is not required to plead to subparagraph (b);
- (c) as to subparagraph (c):
 - (i) adopts the admission at subparagraph (i)
 - (ii) as to subparagraph (ii):
 - (A) admits that paragraph 27 of the Allens Advice contained the text alleged;
 - (B) says that paragraph 27 of the Allens Advice also contained other text; and
 - (C) says that the plea in the 35FASOC is that paragraphs 25 and 27 (together) has the effect pleaded and says that the true position is as pleaded at subparagraph 30H(c) of the 35FASOC;
 - (iii) adopts the admission at subparagraph (iii);
 - (iv) as to subparagraph (iv):
 - (A) denies subparagraph (A) on the basis that providing such advice was a necessary component of reaching a conclusion whether the proposed payment was "legally acceptable";
 - (B) admits subparagraph (B);
 - (C) as to subparagraph (C), says the statement referred to therein 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), admits that the Allens advice did not expressly state that paying 35% of the anticipated settlement proceeds to the MPF would be inconsistent with sections 601FC or 601FD, but repeats and relies upon the matters pleaded in subparagraph 30H(c) of the 5FASOC and in this paragraph 15C;

(d) as to subparagraph (d):

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

(ii) denies subparagraph (ii) on the basis that the true position was as pleaded at subparagraph 30H(d) of the 5FASOC and further:

(A) as to subparagraph (A):

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

(2) denies as untrue, to the extent it is alleged, that such placement negatives the plea in the 5FASOC that paragraph [56] misconstrued or was inconsistent with the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act;

(B) as to subparagraph (B):

(1) admits that the Allens Advice did not advise upon the proper construction of section 601FC(1)(c) and 601FD(1)(c) of the Act;

(2) says that the Allens Advice was deficient in failing to do so, having regard to the instructions to advise on whether the proposed proceeds split was legally acceptable, the recognition of the position of conflict of LMIM and the identification (correctly) of those sections as being relevant to the question on which LMIM sought advice;

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

(1) paragraph 56 of the Allens advice addressed the requirement not to put the interests of "one client" (FMIF) ahead of the interests of "its other client" (MPF);

(2) the Allens Advice elsewhere (correctly) identified the relevance of sections 601FC and 601FD of the Act to the question of priority of interests of the FMIF and the MPF;

(3) the reference to "vice versa" directly misconstrued that the effect of subsections 601FC(1)(c) and 601FD(1)(c) was to require LMIM and its directors to give priority to the interests of members of the FMIF;

(e) as to subparagraph (e):

(i) adopts the admissions at subparagraphs (i) and (ii);

- (ii) as to subparagraph (iii), repeats and relies upon the matters pleaded at subparagraphs (c) and (d) above;
- (f) as to subparagraph (f):
 - (i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 30H(f) of the 35FASOC;
 - (ii) as to subparagraph (ii), admits the Allens Advice contains the text alleged therein;
 - (iii) denies subparagraph (iii) as it is untrue as there was no such understanding as alleged;
 - (iv) denies subparagraph (iv) as untrue;
- (g) as to subparagraph (g):
 - (i) denies subparagraph (i) on the basis that the true position is as pleaded at paragraph 30H(g) of the 35FASOC;
 - (ii) denies subparagraph (ii) on the basis that the true position is as pleaded at paragraph 30H(g) of the 35FASOC;
 - (iii) as to subparagraph (iii):
 - (A) is not required to plead to subparagraph (A);
 - (B) admits subparagraph (B);
 - (C) as to subparagraph (C):
 - (1) admits that the case against the director defendants is for breaches of section 601FD of the Act rather than for breaches of general law duties;
 - (2) denies as untrue that the allegations at paragraph 30H(g) are irrelevant as they are relevant to the court's assessment of the conduct of the director defendants in response to the Allens Advice;
 - (D) denies subparagraph (D) on the basis that paragraph 16 of the Allens advice 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;
- (h) as to subparagraph (h):
 - (i) as to subparagraph (i), the compliance plan of the FMIF would be the compliance plan of its responsible entity, being LMIM;
 - (ii) as to subparagraph (ii), says that the terms pleaded at paragraph 30G are found in the September 2009 revision of the Conflicts Management Policy [FMIF.500.005.5086], the September 2010

revision of the Conflicts Management Policy [FMIF.500.005.4683]
and the Compliance Plan [FMIF.500.015.1877];

(iii) as to subparagraph (iii):

(A) admits subparagraph (A);

(B) admits subparagraph (B);

(C) denies subparagraph (C) on the basis that section 601FC(1) is in similar terms to paragraph 601FD(1);

(D) admits subparagraph (D);

~~(E) denies subparagraph (E) on the basis that, whether or not LMIM had or the directors considered whether LMIM had in place adequate arrangements for the management of conflicts of interest in relation to the proposed proceeds split may be relevant to an assessment of the breaches pleaded at paragraph 45 of the 3FASOC;~~

(F) admits subparagraph (F);

(G) as to subparagraph (G):

(1) admits that the case against the director defendants is for breaches of section 601FD of the Act rather than for breaches of general law duties;

(2) denies as untrue that the allegations at paragraph 30H(g) are irrelevant as they are relevant to the court's assessment of the conduct of the director defendants in response to the Allens Advice;

(H) denies subparagraph (H) as untrue as acting in the best interests of members of the MPF, being in the interests of LMIM as trustee of the MPF, rather than in the best interests of members of the FMIF, would be a breach of section 601FD(1)(c) of the Act.

(i) as to subparagraph (i):

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

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

(iii) as to subparagraph (iii):

~~(AA) denies subparagraph (AA) on the basis that, whether or not LMIM had or the directors considered whether LMIM had in place adequate arrangements for the management of conflicts of interest in relation to the proposed proceeds split is relevant to an assessment of the breaches pleaded at paragraph 45 of the 5FASOC;~~

- (A) denies subparagraph (A) on the basis that section 601FD(1)(c) is concerned with "a conflict between the [FMIF] members' interests and the interests of the responsible entity";
- (B) as to subparagraph (B):
 - (1) says the conflict alleged at subparagraph (A) is not the conflict pleaded in the 35FASOC;
 - (2) says that the breach alleged in relation to section 601FD(1)(c) of the Act is in relation to "a conflict between the [FMIF] members' interests and the interests of the responsible entity";
- (C) denies subparagraph (C) on the basis that the matters pleaded at subparagraph 30H(j) are relevant to establishing the second defendant's breaches at paragraph 45 of the 35FASOC;
- (j) denies subparagraph (j) on the basis that the true position is as pleaded at subparagraph 30H(j) of the Act;
- (k) as to subparagraph (k):
 - (i) denies subparagraph (i) on the basis that the statement was qualified by the matters 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;
 - (ii) as to subparagraph (ii):
 - (A) is not required to plead to subparagraph (A);
 - (B) denies subparagraph (B) on the basis that the true position is as pleaded at subparagraph 30H(j) thereof;
- (l) as to subparagraph (l):
 - (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;
 - (iii) as to subparagraph (iii):
 - (A) admits the matters alleged; but
 - (B) says that the ~~third~~ sixth defendant was required to make his own independent assessment of the Allens Advice and the appropriateness of the proceeds split, as referred to at paragraph 50 of the Allens Advice;
 - (iv) denies subparagraph (iv) on the basis that a reasonable director in the position of the director defendants, who read the Allens Advice, would have appreciated that the Allens Advice had the deficiencies

pleaded in the 35FASOC and would have sought further advice before acting in reliance on the Allens Advice;

(v) denies subparagraph (v) as untrue and repeats and relies upon the matters pleaded at subparagraphs (iii) and (iv) 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) does not admit subparagraph (vii) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations.

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

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

(b) as to subparagraph (b), admits that the Deed Poll contained the text alleged;

(c) does not admit denies as untrue that there was any such "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" as alleged, for the reasons pleaded at paragraph 13(i) above;

(d) otherwise denies the allegations therein as they are untrue because the first to sixth defendants' decision-making had the deficiencies pleaded at paragraph 34 of the 35FASOC.

16A. As to paragraph 32A of the Defence, the plaintiff:

(a) denies subparagraph (a) on the basis that the reference to "expert advice" was not clearly a reference to the WMS Report or the Allens Advice as alleged;

(b) as to subparagraph (b):

(i) admits the Deed Poll contained the text alleged;

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

(c) as to subparagraph (c), denies that the passage cited was, or was construed by the sixth defendant, as a reference to section 601FD of the Act on the basis that:

(i) the sixth defendant did not comply with section 601FD of the Act in executing the Deed Poll and causing LMIM to give effect to the proposed proceeds split;

(ii) the Defence above denies the application of section 601FD.

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

(aa) as to subparagraph (aa), repeats and relies upon his ~~his~~ its responses above to paragraph 24(c) of the Defence and the paragraphs referred to therein;

- (a) joins issue with the matters alleged at subparagraph (a);
- (b) admits subparagraph (b);
- (c) admits there was no formal agreement entered into between LMIM as RE of the FMIF and LMIM as trustee of the MPF;
- (d) denies there was any understanding of the type alleged as it is untrue as there was no such understanding;
- (e) otherwise does not admit the matters alleged at subparagraph (c) for the reasons pleaded at paragraph 13(i) above;
- (f) as to subparagraphs (d) and (e):
 - (i) admits the matters alleged;
 - (ii) says that LMIM as RE of the FMIF had issued a notice of default and a notice of exercise of power of sale to Bellpac at or about the time LMIM as trustee of the MPF issued a notice of default and notice of exercise of power of sale to Bellpac.

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

(aa) as to subparagraph (aa):

- (i) denies subparagraph (i) on the basis that the true position is as pleaded at subparagraph 34(aa) of the 35FASOC;
- (ii) denies subparagraph (ii) on the basis that the true position is as pleaded at subparagraph 34(aa) of the 35FASOC;
- (iii) as to subparagraph (iii), repeats and relies upon its responses above to subparagraph 30H(l) of the Defence;
- (iv) denies subparagraph (iv) for the reasons pleaded above in response to paragraph 32A of the Defence;
- (v) denies subparagraph (v) on the basis that the true position is as pleaded at subparagraph 34(aa) of the 35FASOC;

(a) as to subparagraph (a):

- (i) as to subparagraph (i), repeats and relies upon the matters pleaded at subparagraph 13(f) above;
 - (A) admits the sale of the Property under the Gujarat Contract was part of the overall proposed settlement of the Proceedings;
 - (B) admits that only \$10m of the proceeds of the settlement of the Proceedings was allocated to the contract for sale of the Property;
 - (C) otherwise repeats and relies on paragraph 34(a) of the 5FASOC;
- (ii) denies subparagraph (ii) as untrue;

- (iii) as to subparagraph (iii), admits the matters alleged;
- (ba) as to subparagraph (ba):
 - (i) admits subparagraphs (i), (ii), (iii), (v) and (vi);
 - (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
 - (iii) denies subparagraph (iv) as untrue because LMIM as RE of the FMIF and/or PTAL had no such authority;
 - (iv) as to subparagraph (vii), denies that LMIM as trustee of the MPF was entitled to or would have taken the steps alleged therein because the directors or LMIM would not have caused LMIM as trustee of the MPF to take those steps, because:
 - (A) doing so would have constituted a breach of sections 601FC(1)(c) and 601FC(3) of the Act;
 - (B) there was no basis for LMIM as trustee of the MPF to sue LMIM as RE of the FMIF in the manner alleged, or at all, and in the alternative, there was no basis for LMIM as trustee of the MPF to sue LMIM as RE of the FMIF in the manner alleged where there was not (and there is not alleged by any director defendant to have been) any prior binding or enforceable agreement between LMIM as RE of the FMIF and LMIM as trustee of the MPF for LMIM as trustee for the MPF to be paid any amount if the amount that LMIM as RE for the FMIF recovered did not cover the whole of the amount owing by Bellpac to it;

Particulars

The plaintiff repeats and relies on the particulars to paragraph 30C(d)(iii) of the 5FASOC.

- (v) further as to subparagraph (viii):
 - (A) denies subparagraph (A) on the basis that, in the premises pleaded at subparagraphs (i) to (iv) hereof, LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF and the true position is as pleaded at paragraphs 45AA or 45AB of the 5FASOC;
 - (B) denies subparagraph (B) on the basis that:
 - (1) in the premises pleaded at subparagraphs (i) to (iii) hereof, LMIM would not have caused or permitted LMIM as RE of the FMIF to be exposed to the risks alleged; and

(2) 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:

(i) 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

(a) The Assigned Loans were assigned on or about 28 August 2008 for approximately \$33,513,345.00.

(b) As to March 2010, the balance of those loans was approximately \$31m.

(c) As at 31 December 2010, the balance of those loans was approximately \$20.2m.

(ii) An assignment of debt/management fee receivable of \$5.1m, 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) admits subparagraph (C) but says that LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in subparagraphs (i) to (iv) above;

(b) as to subparagraph (b):

(i) ~~as to subparagraph (i), repeats and relies upon its response above to paragraph 28 of the Defence;~~

(ii) joins issue with subparagraph (ii);

(iii) as to subparagraph (iii), repeats and relies upon its responses to paragraphs 34(ba) and 30C(m) above; denies that the agreement of LMIM as trustee of the MPF was required as alleged for the reasons pleaded at subparagraph 13(f) above and further;

~~(A) as to subparagraph (A), admits the matters alleged but says that LMIM as RE of the FMIF held a registered mortgage over the relevant property with first ranking priority;~~

~~(B) denies subparagraph (B) as untrue and says that the sale of the Property pursuant to the Gujarat Contract was part of a series of arrangements in relation to the settlement of the Proceedings;~~

~~(C) as to subparagraph (C):~~

~~(1) admits that LMIM as trustee of the MPF was a party to the Bellary Proceedings;~~

~~(2) otherwise denies subparagraph (C) as untrue and repeats and relies upon the matters pleaded at paragraphs 10 and 13(f) above;~~

~~(D) does not admit as to subparagraph (D):~~

~~(1) admits that Allens had possession of the certificate of title for the Property;~~

~~(2) 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 allegation;~~

~~(E) repeats and relies upon its response above to paragraph 30C(g) to 30C(m) of the Defence;~~

(c) as to subparagraph (c):

(i) joins issue with subparagraph (i);

(ii) as to subparagraph (ii):

(A) joins issue with the allegation that the sixth defendant gave adequate considerations to the matters referred to;

(B) ~~does not admit~~ denies as untrue that there was any understanding between LMIM's directors that MPF's contribution to funding the Proceedings would be recognised as alleged, or that the sixth defendant had regard to any such understanding as there was no such understanding, for the reasons pleaded at paragraph 13(i) above;

(iii) ~~as to subparagraph (iii), denies that LMIM as trustee of the MPF had any such entitlement as alleged because it did not;~~

(d) as to subparagraph (d):

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

(ii) as to subparagraph (ii), admits that the fact that LMIM as trustee of the MPF was a registered mortgagee with second priority did not impair its ability to theoretically act as a litigation funder, but denies that LMIM as trustee of the MPF entered into any form of litigation funding agreement or arrangement prior to funding the Proceedings or that it could have advanced its own interests contrary to, or in opposition to, itself as RE of the FMIF;

- (e) ~~joins issue with~~ as to subparagraph (e):
- (i) as to subparagraph (i):
 - (A) denies that the Allens Advice was the advice referred to at subparagraph 34(e) of the 35FASOC;
 - (B) does not admit that the sixth defendant understood the Allens Advice to be such advice on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) admits subparagraph (ii) but says that the sixth defendant also independently read the advice and denies that the sixth defendant therefore wholly relied on the alleged "Monaghan Advice" or that the sixth defendant was entitled to rely on the alleged "Monaghan Advice" without giving independent consideration to the Allens Advice;
 - (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) as to subparagraph (iv), repeats and relies upon its responses above to subparagraph 30H(1) of the Defence;
- (f) as to subparagraph (f):
- (i) as to subparagraph (i), admits that there was no legal impediment to LMIM as trustee of the MPF being treated as if it were an arm's-length litigation funder if there was such an arrangement, but denies that there was any such arrangement for the reasons pleaded in paragraphs 34(a)(i) and (ii), (b)(ia) ~~and (ii)~~ and (c)(i), ~~(ii)~~ and (iii) of the 35FASOC;
 - (ii) denies subparagraph (ii) on the basis that it was appropriate to seek such advice in the circumstances pleaded in paragraphs 34(a)(i) and (ii), (b)(ia) ~~and (ii)~~ and (c)(i), ~~(ii)~~ and (iii) of the 35FASOC;
 - (iii) ~~otherwise does not admit~~ denies as untrue that there was any understanding between LMIM's directors that MPF's contribution to funding the Proceedings would be recognised as there was no such understanding as alleged for the reasons pleaded at paragraph 13(i) above;
 - (iv) as to subparagraph (iii):
 - (A) denies it was "clearly in the interests of the FMIF" for LMIM as trustee of the MPF to be paid the Proceeds Split because it was to the detriment of LMIM as RE of the FMIF ~~and not required in order to effect settlement of the Proceedings for the reasons pleaded in the 35FASOC~~ and the plaintiff repeats and relies upon the matters pleaded at paragraph ~~13(f)~~ 18(ba) above;
 - (B) denies subparagraph (A) for the reasons pleaded at paragraph ~~13(f)(vii)(B)~~ 18(ba)(vi)(B) above;
 - (C) ~~does not admit~~ denies subparagraph (B) as untrue on the basis that there was no such understanding as alleged, having made reasonable

~~enquiries, it remains uncertain as to the truth or falsity of the allegation;~~

- (D) denies subparagraph (C) for the reasons pleaded at paragraph ~~13(f)~~ 18(ba) above;
- (v) as to subparagraph (iv), denies the advice which LMIM did seek and receive was adequate for the reasons pleaded at paragraph 30C of the ~~35~~FASOC;
- (g) as to subparagraph (g)(ii):
 - (i) as to subparagraph (A), admits that it was appropriate for the sixth defendant to take the Allens Advice and the WMS Report into consideration but denies that it was sufficient for the sixth defendant to do so because the Allens Advice and the WMS Advice had the characteristics pleaded at paragraph 30C of the ~~35~~FASOC and the first to sixth defendants' decision-making had the deficiencies pleaded at paragraph 34 of the ~~35~~FASOC; and
 - (ii) denies subparagraph (B) for the reasons pleaded at paragraph 34 of the ~~35~~FASOC; and
- (h) as to subparagraph (h), repeats and relies upon the matters pleaded at subparagraphs (aa) to (g) above;
- (i) is not required to plead to subparagraph (i);
- (j) as to subparagraph (j):
 - (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;
 - (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;
 - (iii) as to subparagraph (iii), repeats and relies upon its responses above so subparagraph 30H(1) of the Defence;
 - (iv) denies subparagraph (iv) on the basis that, in light of the deficiencies in the Allens Advice pleaded in the ~~35~~FASOC, it was not reasonable for the sixth defendant to execute the Deed Poll or cause the proceeds split to occur.

19. As to paragraphs 35 and 36 of the Defence, the plaintiff:

- (a) denies that the amount paid to LMIM as trustee of the MPF is appropriately categorised or defined as a "Litigation Funding Fee" because it is not;
- (b) does not admit subparagraph 35(b), on the basis that, having made reasonable enquiries, ~~he~~ it remains uncertain as to the date on which the documents referred to therein were in fact executed;
- (c) admits subparagraphs 35(c) and (d);
- (d) as to subparagraph 35(e):

- (i) admits that by letter dated 21 June 2011 (**Direction Letter**) Allens, on behalf of LMIM as RE for the FMIF, directed that funds payable to PTAL pursuant to the Gujarat Contract and the Deed of Release be paid in accordance with the Direction Letter;
- (ii) says that the Direction Letter provided for cheques to be drawn and paid as follows:

Wollongong Council	\$291,106.31;
Sydney Water	\$3,278.24
Office of State Revenue	\$99,487.50;
LMIM ATF LM Managed Performance Fund	\$13,601,649.61;
PTAL ATF LM First Mortgage Income Fund	\$25,260,206.41;
PTAL ATF LM First Mortgage Income Fund	\$4,055,572.81;
Harris Friedman Lawyers Trust Account	\$1,300,000.00;
Brian James Gillard CMA Gujarat PTAL Settlement	\$5,000,000.00;
Brian James Gillard CMA Gujarat PTAL Settlement	\$500,000.00;

- (iii) says further that the cheques provided at settlement on 21 June 2011 included:
 - (A) a cheque made payable to PTAL ATF LM First Mortgage Income Fund in the amount of \$25,268,459.01;
 - (B) a further cheque made payable to PTAL ATF LM First Mortgage Income Fund in the amount of \$4,055,864.92; and
 - (C) a cheque made payable to LMIM ATF LM Managed Performance Fund in the amount of \$13,606,093.32;
- (iv) denies that the Direction Letter directed Gujarat to draw a cheque in the amount set out in paragraph 35(f)(i) of the Defence because it is untrue by reason of the matters pleaded in sub-paragraphs (d)(i), (ii) and (iii) above;
- (e) as to subparagraph 35(f):
 - (i) admits LMIM as trustee for the MPF received the amounts set out in subparagraphs 35(f)(i) and (ii) of the Defence;
 - (ii) but says that on or about 29 June 2011, an amount of \$4,545.94 was refunded by LMIM as trustee for the MPF to Gujarat for an overpayment made on settlement;
 - (iii) denies that the amount received by LMIM as trustee of the MPF is appropriately categorised or defined as a "Litigation Funding Fee" because it is not;

- (f) admits subparagraph 35(g);
 - (g) denies subparagraph 35(h) on the basis there was no "Litigation Funding Fee" payable as alleged.
20. As to paragraph 37 of the Defence, the plaintiff:
- (a) ~~denies does not admit~~ the matters alleged at subparagraph (a) as they are untrue because there was no understanding as alleged for the reasons pleaded at paragraph 13(i) above;
 - (b) as to subparagraph (b), repeats and relies upon the matters pleaded at paragraph 30C of the ~~35~~FASOC;
 - (c) as to subparagraph (c), repeats and relies upon the matters pleaded herein in response to paragraphs 30C ~~(e) and (m)~~, 18(ba) and 37A of the Defence;
 - ~~(d) admits subparagraph (d);~~
 - (e) does not admit subparagraph (e) on the basis it is not clear what "accounts" are being referred to therein, and having made reasonable enquiries, ~~he~~ it remains uncertain as to the truth or falsity of the allegation;
 - (f) as to subparagraph (f):
 - (i) admits that LMIM as RE of the FMIF directed part of the Gujarat Settlement Payment to LMIM as trustee of the MPF as it similarly directed other parts of the Gujarat Settlement Payment to another six parties; but
 - (ii) denies that LMIM as RE of the FMIF was entitled to direct the payment pleaded therein for the reasons pleaded in paragraphs 37 and 37A of the ~~35~~FASOC;
 - (g) as to subparagraph (g):
 - (i) admits that, 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;
 - (ii) denies as untrue that there was a need for LMIM as trustee of the MPF to agree to the overall settlement of the Proceedings for the reasons pleaded at subparagraph 13(f) above;
 - (h) as to subparagraph (h):
 - (i) admits subparagraph (i);
 - (ii) denies subparagraph (ii) on the basis that the balance of the funds paid on settlement of the Proceedings were payable to LMIM as RE of the FMIF, both because of the terms of the Deed of Priority and because of the obligation on LMIM to comply with section 601FC(1)(c) of the Act;
 - (iii) denies subparagraph (iii) on the basis that such a direction would have been, and was, a breach of LMIM's duties under section 601FC(1)(b) or (c) of the Act;

- (i) denies subparagraph (i) on the basis that the true position is as pleaded at paragraph 37 of the 35FASOC.

21. As to paragraph 37A of the Defence, the plaintiff:

- (a) denies the matters alleged at subparagraph (a) for the reasons pleaded above in response to paragraphs 30C(m) and 34 of the Defence;

- (b) as to subparagraph (b):

- (i) denies that there was any “Litigation Funding Fee” as that term is described in the Defence;

- (ia) does not admit the existence of the Monaghan Advice or the Monaghan Oral Advice 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 appropriate for the sixth defendant to rely merely on the WMS Report and the Allens Advice because those advices had the deficiencies pleaded at paragraph 30C of the 35FASOC;

- (iii) denies that there was any reasonable basis for an “after the event” calculation of a rate to be paid to LMIM as trustee of the MPF “properly to protect the interests of both the FMIF and the MPF” and says the Settlement payment should have been accounted for in the manner pleaded at paragraphs 37 and 37A of the 35FASOC;

- (iv) denies that cl 29 of the Constitution of the FMIF made it reasonable for the first to sixth defendants to reach the conclusion alleged;

- (c) as to subparagraph (c):

- (i) denies that it was reasonable for the sixth defendant to reach the conclusions alleged because:

- ~~(A) the proposed settlement of the Proceedings did not require the consent of LMIM as trustee of the MPF for the reasons pleaded at paragraph 13(f) above;~~

- (B) the Proceeds Split was not fair to FMIF because the Proceeds Split was to the detriment of LMIM as RE of the FMIF and the plaintiff repeats and relies upon the matters pleaded at paragraph ~~13(f)~~ 18(ba) above;

- (C) the Proceeds Split was not in the best interests of FMIF’s members because it was to the detriment of FMIF’s members and the plaintiff repeats and relies upon the matters pleaded at paragraph ~~13(f)~~ 18(ba) above;

- (D) the Proceeds Split was excessive and unnecessary;

- (E) LMIM as trustee of the MPF was not in an analogous position to a litigation funder at all because it had funded the Proceedings as registered mortgagee with second priority under the Deed of Priority;

- (ii) otherwise ~~does not admit~~ denies that there was any such understanding between the directors of LMIM as alleged as it is untrue because there was no such understanding for the reasons pleaded at paragraph 13(i) above;
- (d) as to subparagraph (d), denies that the sixth defendant gave adequate consideration to the matters referred to, for the reasons pleaded at paragraph 37A of the ~~35~~35FASOC, and further:
 - (i) denies that LMIM as trustee of the MPF was entitled to be paid any "Litigation Funding Fee" because it was not;
 - (ii) denies does not admit that there was any such understanding between the directors of LMIM as alleged as it is untrue because there was no such understanding for the reasons pleaded at paragraph 13(i) above;
 - (iii) says it was not in the best interests of FMIF's members and it was unlikely that LMIM as trustee of the MPF would sue LMIM as RE of the FMIF as alleged where the former had no entitlement to any split of the settlement proceeds; and
 - (iv) says the Proceeds Split caused detriment to LMIM as RE of the FMIF because it reduced the amount recovered by it from the settlement of the Proceedings;
 - (v) as to subparagraph (v):
 - (A) admits that the WMS Report opined that a split of 35% in favour of the MPF was reasonable;
 - (B) says that the WMS Report was not legal advice;
 - (vi) denies subparagraph (vi) as untrue for the reasons pleaded in the 35FASOC and says further that, even if the matters alleged were true, LMIM was still obliged pursuant to section 601FC(1)(b) and (c) to pay the whole of the proceeds of settlement of the Proceedings to LMIM as RE of the FMIF;
- (e) as to subparagraph (e):
 - (i) ~~does not admit~~ denies as untrue that there was any such understanding between the directors of LMIM as there was no such understanding as alleged for the reasons pleaded at paragraph 13(i) above;
 - (ii) says the Settlement payment should have been accounted for in the manner pleaded at paragraphs 37 and 37A of the ~~35~~35FASOC.

22. — As to paragraph 38(b) of the Defence, the plaintiff:

- (a) — ~~denies that the duties were owed solely to LMIM without regard to its role as RE of the FMIF because those duties were owed to LMIM and to LMIM as RE of the FMIF;~~
- (b) — ~~admits that the statutory duties of officers of a responsible entity of a registered scheme are prescribed in s 601FD of the Act; but~~
- (c) — ~~says that the duties are not mutually exclusive.~~

23. — As to paragraph 39(e) of the Defence, the plaintiff:

- (a) — ~~says that it is pleaded at paragraph 39(a) of the 2FASOC that the first to sixth defendants' breach of duty, as was reasonably foreseeable, caused harm to the interests of LMIM as RE of the FMIF;~~
- (b) — as to subparagraph (i):
 - (i) ~~admits the matters alleged at subparagraph (i); but~~
 - (ii) ~~says that the matters alleged are not responsive to paragraph 39 of the 2FASOC;~~
- (c) — as to subparagraph (ii):
 - (i) ~~denies subparagraph (A) for the reasons pleaded at paragraph 13(f) above;~~
 - (ii) ~~does not admit subparagraph (B) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;~~
 - (iii) ~~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;~~
 - (iv) ~~denies subparagraph (D) as untrue.~~

23AA. As to paragraph 44, the plaintiff:

- (a) adopts the admission therein;
- (b) 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

- (i) 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".
- (c) 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;
- (d) says that clause 29.2 of the Constitution of the FMIF did not exclude the obligations under s601FD(1)(b) and (c) of the Corporations Act 2001.

23A. The plaintiff denies paragraph 45 of the Defence for the reasons pleaded above in response to paragraph 37A and 44 of the Defence.

23AB. As to paragraph 45AA the plaintiff:

- (a) as to subparagraph (a), repeats and relies on its responses to paragraphs 34(ba) and 30C(m) above;
- (b) as to subparagraphs (b) and (c):
 - (i) does not admit that it would be in breach of LMIM's duties as trustee of the MPF on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) says, if taking those steps would have been a breach of LMIM's duties as trustee of the MPF:
 - (A) 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;
 - (B) 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;
- (c) as to the first subparagraph (d), the plaintiff:
 - (i) admits the matters alleged;
 - (ii) but says that LMIM would not have withheld its consent or cooperation to the settlement of the Proceedings in a way which prioritised the interests of LMIM as trustee of the MPF over the interests of members of the FMIF for the reasons pleaded in paragraph 18(ba) above;
- (d) as to the second paragraph (d) repeats and relies on its response to paragraph 45AA of the first defendant's fourth further amended defence to the 5FASOC;
- (e) denies subparagraph (e) for the reasons pleaded in paragraph (b) and (c) above;
- (f) as to subparagraph (f), denies clause 29 of the FMIF Constitution had the effect alleged for the reasons pleaded in paragraph 23AA above.

23AC. The plaintiff denies paragraph 45AB of the Defence for the reasons pleaded above in response to paragraph 45AA of the Defence.

23B. As to ~~The plaintiff denies~~ paragraph 45A of the Defence the plaintiff:

- (aa) adopts the admission in (aa);
- (a) denies subparagraph (a) for the reasons pleaded above in response to paragraphs 37 and 37A, and 45AA of the Defence.

23C. As to paragraph 46A of the Defence, the plaintiff:

- (a) denies there was any "Litigation Funding Fee" as alleged;

- (b) denies that the matters set out at subparagraphs (a) or (b) provide a justification for the payment of any amount to LMIM as trustee of the MPF or are appropriate amounts by which any damages pursuant to section 1317H should be reduced.

~~23D. As to paragraph 47A of the Defence, the plaintiff:~~

~~(a) denies subparagraph (a) on the basis that, on its proper construction, by execution by the directors of LMIM as RE of the FMIF, it was a party to and was intended by its directors to be bound by the Deed Poll;~~

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

~~(i) denies there was any "Litigation Funding Fee" as alleged;~~

~~(ii) otherwise adopts the admission contained therein;~~

~~(c) denies subparagraph (c) as untrue for the reasons pleaded in the 3FASOC;~~

~~(d) as to subparagraph (d), repeats and relies upon its responses above to paragraph 35 of the Defence.~~

~~23E. As to paragraph 47B of the Defence, the plaintiff:~~

~~(a) denies subparagraph (a) on the basis that, on its proper construction, by execution by the directors of LMIM as trustee of the MPF, it was a party to and was intended by its directors to be bound by the Deed Poll;~~

~~(b) denies subparagraph (b) as untrue and says that the Settlement payment formed part of the scheme property of the FMIF.~~

24. As to paragraph 55 of the Defence, the plaintiff:

(a) as to subparagraph (a):

(i) denies that the payment made to LMIM as trustee of the MPF is or was to be properly categorised as a "Litigation Funding Fee" because it was not; but

(ii) otherwise admits that the decision of the Sixth 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), 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 because:

(i) the plaintiff repeats and relies upon the matters pleaded at paragraphs 30A to 34 of the ~~35~~FASOC;

(ii) denies that there was any "Litigation Funding Fee" because the allegation is untrue as there was no such fee;

(iii) denies as untrue that the directors of LMIM "always understood at 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" as there was no such understanding as alleged for the reasons pleaded at paragraph 13(i) above;

- (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) as to subparagraphs (i) and (ii), denies the sixth defendant properly informed himself about the amount proposed to be paid to LMIM as trustee of the MPF for the reasons pleaded at paragraphs 30A to 34 of the 35FASOC and does not admit the existence of the Monaghan Advice or the Monaghan Oral Advice on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
 - (ii) as to subparagraph (iii):
 - (A) admits that the sixth defendant received advice by the emails particularised therein;
 - (B) otherwise does not admit the matters alleged on the basis that, having made reasonable enquiries, ~~he~~ it remains uncertain as to the truth or falsity of the allegations;
- (e) as to the matters alleged at subparagraph (e), denies that the Sixth Defendant rationally believed the judgment he made was in the best interests of LMIM 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 35FASOC;
- (ee) as to subparagraph (ea), repeats and relies upon its responses above to subparagraph 34(e)(iii) of the Defence;
- (f) denies the matters alleged at subparagraph (f) on the basis that, for the reasons pleaded at paragraph 37A of the 35FASOC, the decision to enter into the Deed Poll was not a decision that any reasonable person in the position of the sixth defendant would have taken;
- (g) denies the matters alleged at subparagraph (g) for the reasons pleaded at subparagraphs (a) to (f) hereof.

25. As to paragraph 56 of the Defence, the plaintiff:

- (a) as to subparagraph (a), does not admit that the sixth 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;
- (b) does not admit subparagraph (b) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;
- (c) 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;
- (ca) does not admit subparagraph (ca) on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegations;

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

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

(d) as to subparagraphs (d) and (e), denies that, having regard to all of the circumstances of the case, the sixth defendant should have relief pursuant to section 1317S(2) or section 1318(1) of the Act on the basis that, in the circumstances of this case, in particular those pleaded at paragraph 37A of the ~~35~~FASOC and the sixth defendant's knowledge and experience in the operation of LMIM, the sixth defendant should not be entitled to such relief.

26. ~~As to paragraph 57 of the Defence, the plaintiff:~~

~~(a) as to subparagraph (a), does not admit that the sixth defendant acted in good faith in relying on the Allens Advice or the WMS Report on the basis that, having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation;~~

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

~~(i) admits that the sixth defendant made enquiries of Mr Monaghan by the emails particularised therein;~~

~~(ii) otherwise does not admit that the sixth defendant made the independent assessment as alleged, whether at all or whether to a sufficient degree having regard to the sixth defendant's knowledge of LMIM and the complexity and structure of the operations of LMIM, on the basis that having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.~~

27. ~~As to paragraph 58 of the Defence, the plaintiff does not admit the matters alleged on the basis of the matters pleaded at paragraph 18(d) above and on the basis that having made reasonable enquiries, it remains uncertain as to the truth or falsity of the allegation.~~

28. Save as aforesaid, the Plaintiff joins issue with the matters pleaded in the Defence.

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

Signed:



Description: Solicitors for the Plaintiff

Dated: 15 May 2018 ~~12 March 2019~~ 4 April 2019