SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS 11461/20

Applicant:	**LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
	AND
First Respondent:	**PETER CHARLES DRAKE**
	AND
Second Respondent:	**LISA MAREE DARCY**
	AND
Third Respondent:	**EGHARD VAN DER HOVEN**
	AND
Fourth Respondent:	**FRANCENE MAREE MULDER**
	AND
Fifth Respondent:	**SIMON JEREMY TICKNER**

CERTIFICATE OF EXHIBIT

INDEX TO EXHIBITS

VOLUME 3 OF 5

Exhibits "**SC-14**" to "**SC-17**" to the affidavit of **SCOTT COUPER** sworn at Brisbane on this 31st day of January 2020.

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SC-14	Plaintiff's closing submissions	518-597
SC-15	First Defendant's closing submissions	598-674
SC-16	Second Defendant's closing submissions	675-703
SC-17	Third and Fourth Defendant's closing submissions	704-799

.....
Deponent

.....
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"SC-14"

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 & ORS**

PLAINTIFF'S SUBMISSIONS

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INTRODUCTION

1. The plaintiff's primary case turns on the proper construction of section 601FD(1)(c) of the *Corporations Act 2001* ("**the Act**"). The plaintiff submits that the section provided a clear answer to the position of conflict confronting the directors of LMIM in relation to the payment of the settlement proceeds from the "**Bellpac proceeding**".

2. The plaintiff's primary case is an application of *ASIC v Lewski* (2018) 132 ACSR 403 at [70] – [73].

3. Money had been advanced by both LMIM as RE of the FMIF (the plaintiff, a registered managed investment scheme) and LMIM as trustee of the MPF (the eighth defendant, an unregistered managed investment scheme). A dispute arose between LMIM and Bellpac. The settlement sum ultimately obtained in relation to the Bellpac Proceedings was insufficient to discharge both debts. The directors of LMIM were faced with a conflict of interest, as between the FMIF and the MPF.

4. Section 601FD(1)(c) of the Act provided in unequivocal terms that the directors were required to give priority to the interests of members of the FMIF. By paying $15,546,147.85 of a $45m settlement to the MPF ("**the proceeds split**"), the directors breached that duty.

5. Once that breach is established, causation and quantification of loss are established. The plaintiff could have proceeded with the settlement and had strong incentives to do so. The plaintiff submits that none of the various arguments raised by the defendants justified the proceeds split in the face of that provision. Therefore, the plaintiff's primary position is that this case reduces to the proper application of section 601FD(1)(c) of the Act. It could not have been in the best interests of members of the FMIF for $15.5m of their money to be paid to another fund when there was no obligation to do so.

6. If the Court is against the plaintiff on the primary case, the alternative case based on section 601FD(1)(b) of the Act raises the following substantive issues:

   (a) whether the conduct of the defendants fell below the standard of care required in the circumstances of the transaction; and

   (b) whether there was any understanding among the directors which may have excused their breach and which may justify excusal from liability under section 1317S of the Act.

7. The director defendants' evidence regarding the alleged "understanding", which was the basis of their decision to undertake the proceeds split, was unreliable. Their evidence of the understanding was lacking in any detail, inconsistent with each other and, overall, uncompelling. Such an understanding is contrary to the documents existing up to the directors deciding to commission the WMS Report.

8. The inconsistencies between the Deed Poll and the directors' true knowledge indicate that insufficient consideration was given to the proposed proceeds split by each of the directors.

9. The court should find that what in fact happened is that the directors had an understanding, better described as an expectation, from July 2009 that the Bellpac Proceedings would result in a return of some substantial amount to the MPF. However, the "understanding" recorded in the Deed Poll was something different which arose, at the earliest, in late 2010, triggered by the prospect of the MPF being substantially out of pocket as part of any resolution of the Bellpac litigation.

10. That explains the references to an "understanding" in the Allens Advice and the Deed Poll. The directors probably had an "expectation" of the MPF receiving something of substance as a result of the Bellpac Proceeding, but that was different to the "understanding" which the WMS Report, the Allens Advice and the Deed Poll relied upon.

11. There was no binding "understanding" or agreement which entitled LMIM as trustee of the MPF to the proceeds split. The best evidence of this fact is the contemporaneous documents.

12. It follows that, in conducting the proceeds split based on the reasoning set out in the Deed Poll, the director defendants did not exercise a reasonable degree of care.

BACKGROUND FACTS

Parties

Plaintiff

13. By order of Justice Dalton made on 21 August 2013, Mr Whyte was appointed as receiver of the property of the FMIF. The order granted him the powers set out in section 420 of the Act and expressly authorised him to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM necessary for the winding up of the FMIF.[1]

14. The Defendants admit Mr Whyte's standing to bring this proceeding claiming compensation for alleged breaches of section 601FD of the Act.

Seventh and Eighth Defendants

15. By order made on 28 April 2016 (**CD 93**), the liquidators and the solicitors for the seventh defendant were excused from further appearance. The plaintiff does not seek relief against the seventh defendant.

16. The plaintiff settled its claim against the eighth defendant. As a consequence, the need for relief against the seventh defendant was removed.

Director defendants

17. The fifth defendant, Mr O'Sullivan, has not been served. No relief is sought against him.

18. The trial therefore proceeds against the first, second, third, fourth and sixth defendants.

19. Each of those individuals had been a director of LMIM for some time before the critical events of late 2010 to mid-2011:[2]

    (a) the first defendant, Mr Drake since 31 January 1997;

    (b) the second defendant, Ms Darcy since 12 September 2003;

    (c) the third defendant, Mr van der Hoven since 22 June 2006;

    (d) the fourth defendant, Ms Mulder since 22 June 2006; and

    (e) the sixth defendant, Mr Tickner since 18 September 2008.

---

1 Paragraph 3 of the 5FASOC. The order is not an exhibit but appears in the trial database as FMIF.400.001.0064.

2 Paragraph 2 of the 5FASOC admitted in each defence.

Underlying transactions leading to the payment of the settlement sum

20. The 5FASOC from paragraphs 5 to 30 pleads the loans, loan amendments and settlement documents which predated the receipt of the Bellpac proceeding settlement payment. The pleaded documents are all in evidence (Exhibits 49-87).

Underlying loans

21. PTAL as custodian of LMIM as RE of the FMIF advanced money to Bellpac pursuant to a loan agreement dated 10 March 2003 ("**the FMIF Bellpac Loan Agreement**").[3] As security, PTAL took the "**PTAL Mortgage**"[4] and the "**PTAL Charge**".[5]

22. The FMIF Bellpac Loan Agreement was varied over time, but those variations are immaterial to this case.

23. LMIM as trustee of the MPF advanced money to Bellpac pursuant to a loan agreement dated 23 June 2006 ("**the MPF Loan Agreement**").[6] As security, LMIM took the "**MPF Mortgage**"[7] and the "**MPF Charge**".[8]

PDS statements

24. Exhibit 1[9] is the FMIF Product Disclosure Statement dated 10 April 2008.

25. It relevantly stated:

    (a) at [FMIF.500.001.9688_0017]:

> "Related Party Finance
>
> The Manager is the Responsible Entity of the LM Managed Performance Fund. From time to time the LM Managed Performance Fund advances loans by way of second mortgages to borrowers who have first mortgage advances from the Fund. At 31 October 2008 there are 8 such loans by the LM Managed Performance Fund in the total amount of $28,556,297. In these instances the Fund enters into Priority Deeds with the borrower as part of normal loan documentation procedures. The LM Managed Performance Fund generates fees, charges and interest rates all of which are paid by the borrower."

    (b) the same matters appear at page [FMIF.500.001.9688_0051].

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3 Exhibit 49 FMIF.300.002.2039
4 Exhibit 50 FMIF.013.003.0092 and exhibit 52 FMIF.015.002.0036
5 Exhibit 53 FMIF.0400.005.0002
6 Exhibit 64 FMIF006.001.0031
7 Exhibit 65 FMIF.500.014.1392
8 Exhibit 66 FMIF.500.008.4991
9 FMIF.500.001.9688

Constitution of the FMIF

26. The Constitution of the FMIF (Exhibit 118)[10] provided at clause 29:

> "29.1 **Subject to the Law**, nothing in this Constitution restricts the RE (or its associates) from:
> (a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);
> (b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or
> (c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.
> 29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law." (emphasis added)

27. That clause does not grant permission for the RE (or its directors) to breach its statutory duties.

28. The defendants' defences relevantly omit the words "Subject to the Law", which is defined as the "Corporations Act 2001 and the Corporations Regulations".

29. Therefore, on its face, the clause does not alter the effect of the statutory provisions. In any event, the clause could not alter the statutory provisions since LMIM as RE of the FMIF could not contract out of the obligations at sections 601FC and 601FD of the Act.

30. The defendants rely upon this clause as informing the statutory obligations under ss 601FC and 601FD. In particular, it is anticipated that the defendants will submit that cl 29 is relevant to an assessment of what is in the best interest of the members of the scheme. Clause 29 is not of any relevance to an assessment of what is in the best interests of the members of the scheme. Clause 29, to the extent to which the Act allows, authorises LMIM as RE to act in a number of different capacities and to enter into transactions between itself in different capacities. That is, to the extent to which the Act does not prohibit it, authorises LMIM to have acted as RE for the FMIF as well as trustee for the MPF. Clause 29 does not say anything about how the obligation of LMIM as RE for the FMIF should be performed where it does enter into transactions with itself in different capacities. All the clause does is to exclude the "inflexible rule" in equity that a fiduciary is not allowed to put himself or herself in a position where duty and interest conflict.[11] In any event, as the High Court observed in *Lewski*, Part 5.2 of the *Corporations Act* does not

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10 FMIF.100.005.7639

11 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558, referred to by the New South Wales Supreme Court of Appeal in *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at [200].

prohibit acts of an RE that puts itself in a position of conflict. Section 601FC and FD only prescribe "acts in the course of that conflict that do not give priority to the members' interests".[12]

31. It is also anticipated that the defendants will rely on the statement by the High Court in *Lewski* at [71] that "key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than 'the success or otherwise of a transaction or other course of action'". That statement cannot be seen as involving any curtailment of the fundamental obligations to act in the best interest of the members of the scheme (ie to act with undivided loyalty towards the members of the scheme). The statement by the High Court stands for the unsurprising proposition that, in determining in any given situation whether an act or transaction engaged in by the RE for a scheme is in the best interest of the members of the scheme, one has regard to the purpose and type of scheme that was being operated. For example, if the scheme had been promoted as a scheme by which the RE would lend to higher risk borrowers and obtain second or lower ranking securities for those loans, the assessment of whether the RE had acted in the best interests of the members would be assessed by reference to that intent and purpose of the scheme. Members of such a scheme could not contend that, for example, the directors of the RE had not acted in the best interests of the members of the scheme by failing to obtain first registered mortgages for any lending that it engaged in.

Other policy documents

32. Exhibit 34[13] is the FMIF Compliance Plan dated 16 March 2011 signed by each of the director defendants.[14] At page 0006, the Compliance Plan stated:

> "The compliance duties of the RE, Directors and Officers include:
>
> - to act honestly;
> - to exercise the degree of care and diligence that a reasonable person would exercise if they were in the position of the RE;
> - to act in the best interests of Investors and, if there is a Conflict between the Investors' interests and its/their own interests, give priority to the Investors' interests;
>
> [...]
>
> - to ensure that any duty of an officer under Section 601FD (1) of the Act overrides any Conflicting duty under part 2D.1 of the Act."

33. In the margin next to those statements appeared the text:

> "Corporations Act, ASIC Regulatory Guide
>
> s 601FD, RG132.12(g)"

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12 At [72].

13 FMIF.500.015.1877

14 Affidavit of Ms Darcy, paragraph 35, exhibit 262 FMIF.LMD.LAY.001.0001.

34. The Compliance Plan also detailed procedures and requirements in relation to the keeping of proper records (part 8), related party transactions (part 10) and conflict of interests (part 11).

35. Exhibit 4[15] is the FMIF Compliance Plan dated 28 November 2008.[16] It contained similar text at _0006.

36. Exhibit 5[17] is the LMIM "Conflicts Management Policy" marked as "Updated September 2009".

37. That policy notes on page 4 that directors of LMIM owe duties pursuant to sections 180, 181, 192 and 191 of the Act. On page 5, it also noted that officers of LMIM have duties under section 601FD(1) of the Act. Those duties were listed, following the terms of the provisions. The policy then provided:

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

38. The policy then set out LMIM's duties by reference to section 601FC(1) and (2) of the Act and again stated:

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

39. It also contained detailed procedures for managing conflicts of interest. Importantly it provided on page 8 under the heading "Documentation and record keeping" that:

> "Adequate records will be kept to demonstrate adherence to this policy. The following records will be kept for at least 7 years, including records showing what LM has actually done to monitor compliance with this policy:
>
> 1. conflicts identified and action taken (these records will be kept by the Risk Manager in the form of a Conflicts Register);
> 2. reports given to the Compliance Committee, the Board or the Senior Executive Committee relating to conflicts (these records will be kept by the Risk Manager in a suitable form); and
> 3. copies of written conflict disclosures given to clients or to the public (these records will usually form part of the company's general business records – eg copies of previous PDS documents – or will otherwise be kept by the Risk Manager in a suitable form)."

40. Exhibit 3[18] is a resolution of the Board of Directors, signed by Ms Darcy and Mr van der Hoven, providing an example of the usual documentation of conflicts of interest. It was in the context of

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15 FMIF.500.021.8136
16 Affidavit of Ms Darcy paragraph 35.
17 FMIF.500.005.4611
18 FMIF.500.024.2140

previous potential dealings between LMIM as RE for the FMIM and LMIM as trustee for the MPF relating to the Bellpac loans.

41. All of the defendant directors admitted that they were aware of the Compliance Plan and the Conflict Management Policy.[19] They were aware that if there was any transaction between related parties or if there was a potential conflict of interest then that risk had to be identified, considered, resolved and documented.[20]

Nature of the Bellpac Proceeding

42. In substance, the Bellpac Proceeding was an action to enforce the securities held by the FMIF and the MPF. A useful reference point is paragraph 22 (page 0034) of the Commercial List Statement at Exhibit 219[21] which referred to both the PTAL securities and the LM/MPF securities prohibiting Bellpac from dealing with its rights under certain instruments without the prior written consent of PTAL and LM. Pages 0005 and 0006 refer to the relief sought related to those allegations.

43. The proceeding was being advanced also in the name of Bellpac, to which PTAL had appointed receivers,[22] following PTAL and MPF issuing notices of exercise of power of sale to Bellpac (Exhibits 124 and 125).[23]

44. The settlement involved a sale of land to Gujarat pursuant to the exercise of those securities.

45. Although damages were claimed in the Bellpac Proceeding, any money recovered pursuant to that proceeding was still subject to the Deed of Priority and the PTAL Mortgage and the PTAL Charge.

Deed of Priority

46. PTAL, LMIM as RE of the FMIF, LMIM as trustee of the MPF and others entered into a "Deed of Priority" dated 23 June 2006 (Exhibit 2)[24] which gave the FMIF first ranking priority ahead of the MPF. That was consistent with the usual priority arrangements disclosed to investors by the PDS.

47. The relevant terms were as follows:

    (a) as to definitions:

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19 Darcy (T2-38 ln 9, T2-45 ln 10), van der Hoven, (T3-28, ln 40 and 46), Mulder (T3-34 ln 38 and T3-45 ln 2) and Tickner (T3-60 ln 16 and 19-21).

20 Darcy at T2-48 ln 14-24 sought to avoid this issue and point to Mr Monaghan, van der Hoven, (T3-29, ln 3), Mulder (T3-45 ln 8) and Tickner (T3-60 ln 25-30)

21 FMIF.300.002.2715

22 Paragraph 14 of the 5FASOC

23 Exhibit 124 FMIF.009.004.0035, Exhibit 125 FMIF.040.004.0047, also described at paragraphs 121 and 122 of Mr Tickner's affidavit.

24 FMIF.009.003.0043

First Mortgagee means:

(a) the Custodian [PTAL]; or

(b) the Responsible Entity [LMIM as RE of the FMIF];

First Mortgagee's Principal Amount means $33,800,000.00;

[...]

Interest means all interest accruing on the outstanding amount of Principal and Other Moneys owing to a Mortgagee whether capitalised or not;

[...]

Other Moneys means break costs, legal (on a full indemnity basis) or other consultants expenses, GST and all other amounts expended or incurred by a Lender under its Security with a view to protecting or maintaining or enforcing its Security and which that Lender is entitled under provisions of its Security to spend or incur;

[...]

Second Mortgagee means [other entities not relevant to this proceeding];

[...]

Third Mortgagee means LM [LMIM as trustee of the MPF];

Third Mortgagee's Principal Amount means $11,000,000.00;

[...]

(b) at clause 3:

3. Priorities

3.1 The Securities rank in the following order of priority:

(1) first priority to the First Mortgagee on the First Mortgagee's Securities over the subsequent priorities set out in this clause 3.1 for the amount specified in Item 4 [which was defined as "The First Mortgagee's Principal Amount, plus Interest, Other Moneys and Enforcement Expenses"];

(2) second priority after the distributions listed above, to the Third Mortgagee on the Third Mortgagee's Securities over the subsequent priorities set out in this clause 3.1 for the amount specified in Item 5 [which was defined as "The Third Mortgagee's Principal Amount plus Interest, Other Moneys and Enforcement Expenses"];

(3) third priority after the distributions listed above, to Austcorp and the Second Mortgagee on a parri passu basis on the Austcorp Securities and the Second Mortgagee's Securities respectively over the subsequent priorities set out in this clause 3.1 for the amount specified in Item 6;

[other subsequent ranking priorities].

3.2 Subject to any prior right in favour of any other person, all money received by a the (*sic*) Mortgagor, a Mortgagee or any Receiver appointed by a Mortgagee in respect of the Security must be applied in the order of priority referred to in clause 3.1.

(c) at clause 4:

4. Priority not affected

The priorities set out in clause 3 of this Deed operate despite:

[...]

(3) the repayment in whole or in part from time to time of any of the money secured by the Securities;"

48. The effect of those clauses was that as between LMIM as RE for FMIF and LM as trustee for the MPF, the FMIF had priority (for all of its principal, interest and costs) in respect of any monies that were payable "in respect of" the securities it had. That included moneys received in respect of enforcement of the securities.

49. Some defendants argue that the Deed of Priority has the limited effect of prioritising FMIF's mortgage only, and not its debt. The significance of that proposition is that, because the settlement sum was apportioned such that $10m was paid pursuant to the Gujarat Contract, the defendants contend that the FMIF was entitled only to $10m in priority to the MPF.

50. However, the Deed of Priority, on a commercial construction, has a broader application than that. The "amount specified in Item 4" was not limited to the value of the land over which the mortgage was registered. It was not a conditional priority arrangement. Rather, the FMIF had first priority for the amount it was owed and the MPF ranked behind it.

Settlement negotiations

51. Over time, disputes arose between PTAL, LMIM, Bellpac and others about a series of earlier agreements. That resulted in legal proceedings commenced in 2009, including what become known as the Bellpac Proceeding.[25]

52. Settlement negotiations continued over a period of time. In the early negotiations, the proposed settlement sum would have been enough to repay the FMIF facility in full and leave a substantial sum recoverable by the MPF.[26]

53. However, Bellpac drove a hard bargain. Its directors, particularly Mr Arun, seem to have been canny operators who dragged on negotiations and dragged down the settlement sum. As that occurred, with interest and other fees, the balance of the FMIF facility increased and eclipsed the proposed settlement sum. The commercial benefit to the MPF in funding the proceeding evaporated.

54. The relevant chronology of events in this respect is:

    (a) the Bellpac Proceeding commenced in July 2009 (Exhibit 130).[27] At that time, the total owing to the FMIF and to MPF was $49.9m.[28]

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25 Paragraphs 19 to 22 of the 5FASOC.

26 This is evidenced by the email from Mr Fischer dated 6 October 2009 which explained the security valuation exceeded the loan amounts at that time – Exhibit 6, FMIF.300.002.2670. The surplus steadily reduced over time, but even as late as 10 November 2010, when there was an in principle settlement agreement, there was enough anticipated return to pay out both the FMIF Loan and the MPF Loan – Exhibit 20, FMIF.100.003.0200.

27 Exhibit 130, FMIF.009.004.0004

28 That is made up of the following amounts: $40.43m owing on the FMIF facility at Exhibit 38 (FMIF.400.001.0054), and $9.517m owing on the MPF facility at Exhibit 37 (FMIF.400.001.0058).

(b) a mediation was held in November 2010. It was described in Exhibit 20. The deal reached there contemplated a total recovery of $65.5m[29] against a total loan balance at the time of $67m. The deal contemplated a further loan agreement;

(c) advice was sought from WMS in December 2010;

(d) advice was sought from Allens in March 2011;

(e) the settlement was renegotiated in March 2011 to a cash payment of $45.5m. That fell below the total amount owing to the FMIF and would have seen the MPF recover nothing, if FMIF took the settlement proceeds in priority;

(f) the Deed Poll was executed around 14 June 2011; and

(g) the settlement moneys were received on 22 June 2011.

MPF commences funding the Bellpac Proceeding

55. The FMIF ASIC Benchmark Disclosure & Update for Investors Exhibit 18[30] records that from 3 March 2009, the FMIF stopped accepting applications for investment from any new members but that it would permit applications for existing members to roll over their investment terms. Therefore no new funds could be invested into the FMIF.

56. Paragraph 24 of the 5FASOC pleads that, from about July 2009, LMIM as trustee of the MPF funded the Bellpac Proceeding as second mortgagee.

57. That is demonstrated by the MPF loan statements at Exhibits 37 and 39 which record payments in respect of the Bellpac Proceeding, including receivers' fees and property holding costs. Interest was charged on the costs advanced.

58. The plaintiff's case is that MPF funding the Bellpac Proceedings was a logical decision for a second mortgagee to take, when the directors had formed the view the first mortgagee was not able the fund the necessary expenditure.

Sums advanced by the MPF up to the payment of the settlement sum

59. There is a minor dispute as to the amount advanced by the MPF.

60. The amount relied upon at paragraph 24(a) of the 5FASOC ($1,944,364.85) is taken from Exhibit 112[31]. That total appears at the bottom of the statement under the column "costs". It picks up costs charged to the MPF up to 7 July 2011.

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29 5FASOC para 26
30 FMIF.500.009.8033
31 FMIF.017.001.1082

61. Some defendants seek to bring into account expenses which the MPF paid after the proceeds split occurred. Those expenses are explained in the third affidavit of Ms Darcy.[32]

62. On the plaintiff's primary case (based on section 601FD(1)(c)), the amount of costs incurred is irrelevant. The FMIF was entitled to the whole of the Bellpac proceeding settlement proceeds.

63. However, if the Court finds that the MPF had an entitlement to be repaid the costs it advanced (for example, on the basis that a reasonable exercise of skill under section 601FD(1)(b) may have contemplated a reimbursement of costs) the Plaintiff accepts that the full amount advanced in respect of the Bellpac Proceeding, whether paid before or after the first tranche of settlement money was paid, should be brought into account.

64. The Plaintiff accepts those further amounts are as set out in Schedule A to Ms Darcy's Defence. Those amounts total a further $338,124.20.

65. The timing of the incurring of those costs is relevant, however.

66. As at 28 December 2010, the costs recorded in the MPF loan statement at Exhibit 112 were $1,687,509.49. The matter had settled at mediation (although some further negotiation was required). The further costs incurred from that date totalled $262,912.20.

67. That is, most of the litigation costs paid by the MPF (87%) had been incurred before there was any discussion of litigation funding. That is relevant to the defendants' counterfactual that, absent the MPF paying further legal costs, FMIF would not have been able to obtain the proceeds. All that was required from December 2010 was enough funding to perform the mediated settlement.

68. In that sense, the MPF received $15.5m in exchange for advancing a further $262,912.20 in costs up to July 2011.

69. As at the date of the Deed Poll on 14 June 2011, the costs recorded on the MPF loan statement at Exhibit 112 were $1,939,818.91. Very few further costs should have been anticipated by that time.

Payment of the settlement sum

70. There is a minor dispute on the pleadings as to the total amount of the Bellpac Proceeding settlement sum, from which the Proceeds Split was made.

71. The amounts received were recorded as follows:

    (a) exhibit 38 shows $29,324,323.93 received by the FMIF on 22 June 2011 and $3,611,405.51 received on 8 September 2011, totalling $32,935,729.44;

---

32 Exhibit 264 LMD.LAY.001.0232

(b) exhibit 37 shows $12,747,810.53 received on 22 June 2011. Exhibit 40 shows further sums credited to the MPF GPC loan account, being $858,282.79 on 22 June 2011 and $1,944,600.47 on 8 September 2011, totalling $15,550,693.79; and

(c) a refund of $4,545.94 was made on 29 June 2011 (Exhibit 39), which brought the total received by MPF to $15,546,147.85.

72. That establishes the amount pleaded at paragraph 35 of the 5FASOC.

PRIMARY CASE - SECTION 601FD(1)(C) OF THE CORPORATIONS ACT

Meaning of the provision

73. The plaintiff's case on the proper construction of s601FD(1)(c) is supported by the following:

(a) the reasoning of the High Court in *ASIC v Lewski*;

(b) several other authorities in relation to the provision, which among other things identify that it is informed by the fiduciary duty of loyalty;

(c) the proposition that protective legislation should be given a broad interpretation;

(d) authorities as to the related common law duty, which inform the statutory provisions; and

(e) the legislative history of the provisions.

74. The plaintiff submits that section 601FD(1)(c) means what it says. It has broad application and should be construed broadly. It has an investor protection focus. It reflects longstanding common-law rules in relation to conflicts faced by trustees.

75. It leads to the basic proposition that, where LMIM was faced with a conflict between two funds which it managed, it owed duties of undivided loyalty to each of them. Where it could not discharge its duties fully to one of them, the proper course was to prefer one, namely the FMIF, breach its duties to the other, the MPF, and face a claim for damages for that breach.

76. The provision does not have a narrow, limited or technical operation as the defendants contend.

Text of the provision

77. Section 601FC relevantly provides:

> "(1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
>
> [...]
>
> (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
>
> (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
>
> [...]

(e) not make use of information acquired through being the responsible entity in order to:

(i) gain an improper advantage for itself or another person; or

(ii) cause detriment to the members of the scheme;

[...]

(2) The responsible entity holds scheme property on trust for scheme members.

(3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1."

78. Section 601FD is in corresponding terms, but applies to officers of responsible entities: [33]

"(1) An officer of the responsible entity of a registered scheme must:

[...]

(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and

(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and

[...]

(e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme;

[...]

(2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1."

ASIC v Lewski

79. The Court (Kiefel CJ, Bell, Gageler, Keane and Edelmann JJ) held in *ASIC v Lewski* that the "loyalty duty" at s601FD(1)(c) is contravened even if the director has an honest or reasonable belief that the course of conduct is proper. Their Honours held:

"The loyalty duties

[70] Sections 601FC(1)(c) and 601FD(1)(c) each involve two separate duties of loyalty. The first is a duty to act in the best interests of the members. The second is to give priority to the members' interests if there is a conflict between the members' interests and the interests of the responsible entity. The Full Court overturned the primary judge's finding65 that both duties had been contravened by the Lodgement Resolution and the Payment Resolutions. The Full Court held that the Directors were "entitled to act in accordance with the Constitution which they honestly believed existed, and make decisions accordingly".66

[71] The Loyalty Duty requiring a director to act in the best interests of members is not purely subjective. As Bowen LJ said of the equitable progenitor from which this statutory duty was developed and adapted,67 otherwise a wholly irrational but honest director could conduct the affairs of the company by "paying away its money with both hands in a manner perfectly boná fide yet perfectly irrational".68 Although the duty is not satisfied merely by honesty, it is a duty to act in the best interests of the

33 These provisions of subsection (1) are the provisions pleaded at paragraph 44 of the 5FASOC.

members rather than a duty to secure the best outcome for members. Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than "the success or otherwise of a transaction or other course of action".69 The purpose and terms of the Trust are the existing legal purposes and terms of the Constitution, not the purpose or terms that are honestly believed to exist.

[72] The Loyalty Duty requiring a director to give priority to the members' interests in circumstances of conflict of interest is **narrower in one respect** than the equitable rule concerning conflict of interest and duty.70 **It does not proscribe acts of a director that put herself or himself in a position of conflict.71 It only proscribes acts in the course of that conflict that do not give priority to the members' interests. Nevertheless, the duty is not satisfied by an honest or reasonable belief. A contravention occurs when a director prioritises her or his own interests over those of the members, no matter how honest or reasonable the director was in doing so.**

[73] In summary, it was not sufficient for compliance with either of the Loyalty Duties that the Directors acted honestly, having regard to their belief that the Constitution had been amended. The primary judge correctly concluded that none of the Directors could reasonably have believed that it was in the best interests of the members to bring the Amendments into effect by the Lodgement Resolution or to make the accelerated Listing Fee Payments by the Payment Resolutions. His Honour also correctly concluded that the Directors should have voted against the Lodgement Resolution in order to prioritise the members' interests in having APCHL comply with the Constitution over the conflicting interest of APCHL in receiving the fees."

(emphasis added, footnotes omitted).

80. *Lewski* is not authority for a narrower application of s601FD(1)(c).

81. The reference at [72] to permitting responsible entities to find themselves in a position of conflict does not mean that responsible entities or their directors can escape liability for breaches of the duty of loyalty.[34]

82. The bolded text in paragraph [72] of *Lewski* is critical. It establishes, relevantly to this case, that:

(a) even if the alleged understanding was honestly held by the directors, it would not be a defence to the s601FD(1)(c) claim; and

(b) the proscription is against a failure to give priority to members' interests.

83. The High Court's reasoning supported Murphy J's statement of the relevant principles around s601FC(1)(c) and s601FD(1)(c) at first instance in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342:

> "**9.2.1 The meaning by reference to ss 601FC(1)(c) and 601FD(1)(c)**
>
> 462To understand the meaning of the expression I first look to the text of ss 601FC(1)(c) and 601FD(1)(c) in their context. The use of the superlative "best" in each of the provisions may be seen to require a comparison between different courses of action available to an RE, and the requirement to choose between them, including a choice between taking action and inaction. The word "best" may also be seen to set a requirement not only in relation to what must be done by an RE but also in relation to how it is done, thereby imposing standards of conduct on the RE.

34 This is also supported by the legislative history of the provision referred to below.

463It is difficult to discern the outer boundaries of the best interests duty from the text of the provisions alone. For example, the expression may be argued to indicate a requirement that the RE meet the "highest" standard rather than just a high standard. It may also be argued to set a requirement for the RE to obtain an objectively determined "best" outcome rather than requiring the best efforts of the RE. I am disinclined to such a view because such meanings may cause real difficulties for a trustee in performing his or her role. It is not clear to me how in many common circumstances the "highest" standard is to be determined let alone met, or how any requirement to achieve an objectively determined "best" outcome sits with the general law obligation on a trustee to act with care, competence and caution. The language of the statute alone does not make clear where the boundary lies and it is appropriate to consider the meaning of the term under general law.

9.2.2 The meaning under general law

464There is a presumption that where words used in a statute have already acquired a legal meaning, unless the contrary intention clearly appears from the context, prima facie the legislature is taken to have intended to use them with that meaning: *Attorney-General of NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 531 per O'Connor J.

465There can be no question that the heritage of the best interests duty is equitable. In an often quoted dictum in *Cowan v Scargill* [1985] Ch 270 at 295 Sir Robert Megarry V-C said:

> The starting point is the duty of trustee to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty ... is paramount. They must, of course, obey the law; but subject to that, they must put the interest of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries...the best interests of the beneficiaries are normally their best financial interests.

and later:

> Trustees must do the best they can for the benefit of their beneficiaries and not merely avoid harming them.

..

468Under general law the best interests duty is a reference to a trustee's duty to give undivided loyalty to the beneficiaries, which includes the duty to act in the interest of the beneficiaries, to avoid any conflict between the interests of the trustee and the interest of the beneficiaries, and to adhere to the terms of the trust. These are well established principles of the law of trusts: see *Keech v Sandford* (1726) 25 ER 223; *Re Whitely* (1886) 33 Ch D 347; *Bray v Ford* [1896] AC 44; *Boardman v Phipps* [1967] 2 AC 46; *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 43-4343; *Raby v Ridehalgh* (1855) 44 ER 41 at 43.

...

471**The duty of undivided loyalty is the fundamental duty of a trustee requiring it to solely pursue the members' interests, to eschew conflicts of interest between the members' interests and its own, and in the event of a conflict of interests to put the members' interests first.**

...

473In Scott and Ascher on Trusts the authors describe the trustee's duty of undivided loyalty as "the most fundamental duty of a trustee": Scott, Fratcher and Ascher, Scott and Ascher on Trusts, (5th ed, Wolters Kluwer Law & Business, 2007) at 1077 ("Scott and Ascher on Trusts"). The learned authors go on to note (at 1079) that:

> The duty of loyalty is, then, the fruit of the courts' efforts to regulate the behaviour of trustees when their duties as trustees require them to act in ways that may or do conflict with their own personal interests. In a nutshell, the duty of loyalty ordinarily requires trustees to avoid all transactions that involve self-dealing, as well as those that involve or might create a conflict between the trustee's fiduciary and personal interests.

...

9.2.5 Conclusion

484I conclude that the imposition of a duty to act in the best interests of the members in ss 601FC(1)(c) and 601FD(1)(c) does not extend its content beyond previously understood general law boundaries. I see the best interest duty as foundational and operating in combination with other duties. **It encompasses the fundamental duty of undivided loyalty** which in the present case required APCHL and the **Directors to use their best efforts to pursue solely the members' interests**, to act honestly and to exercise care, competence and prudence in doing so, and to eschew any conflict of interests between the members' interests and its own. **If any conflict of interests arose they were required to prefer the interests of the members to APCHL's own interests.** The duty also required APCHL to adhere to the terms of the Constitution." (emphasis added)

Other recent authorities

84. The proposition that the provisions have that effect has also been identified in:

(a) *AMP Life Ltd v AMP Capital Funds Management Ltd* (2016) 312 FLR 391 per Bathurst CJ, Meagher JA and Barrett AJA at [23]-[24]:

> "[23] Section 253E appears in Division 6 Part 2G.4 of the Corporations Act which contains provisions about voting at meetings of members of registered managed investment schemes. One of the essential characteristics of such a scheme is that it has a "responsible entity" which is an appropriately licensed public company. A responsible entity is subject to statutory duties set out in s 601FC(1). These include a duty to act honestly (s 601FC(1)(a)), a duty to exercise a particularly described degree of care and diligence (s 601FC(1)(b)) and a duty to act in the best interests of the scheme's members and, in case of conflict between its own interests and members' interests, to give priority to the latter (s 601FC(1)(c)). In addition, s 601FC(2) states that a responsible entity holds scheme property on trust for scheme members. **A responsible entity holding scheme property is, by that provision, subjected to the general law duties of a trustee (with scheme members as beneficiaries) except, no doubt, to the extent, if any, to which such fiduciary duties may be modified by the statute itself.**
>
> [24] There is thus a clear statutory preoccupation with the role of a responsible entity **as a guardian and protector of the interests and welfare of members** and, as necessary, with **subordination of any conflicting interest of the responsible entity itself.** It was with these aspects of a responsible entity's role at the forefront of thinking that s 253E was formulated." (emphasis added)

(b) *Parbery & Others v ACT Superannuation Management Pty Ltd and Others* (2010) 79 ACSR 425 per Palmer J at [33]:

> "[33] On the other hand, **beneficiaries of a group of trusts are, in law, entitled to insist that the common trustee, or common administrators or liquidators of a common trustee, treat each trust separately and act in the best interests of each trust.** The general equitable right of fiduciary loyalty in such a situation is clearly and expressly recognised in s 601FC(1)(c) of the CA, which provides that a responsible entity must act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, it must give priority to the members' interests." (emphasis added)

85. Beach J identified the following test of compliance with section 601FC in *ASIC v Avestra Asset Management Ltd (In Liq)* (2017) 348 ALR 525:

> "[183] In addition to s 601FC(2), s 601FC(1)(c) is of **foundational importance to the fiduciary obligations that are imposed on responsible entities of registered schemes under the Ch 5C framework.**

[184] The following propositions are not controversial:

(a) First, the test under the first limb is **whether the responsible entity was acting with undivided loyalty in the best interests of the members**.

(b) Second, the tests under the second limb are:

(i) Was there a conflict between the interests of the responsible entity and the interests of the members?

(ii) If so, did the responsible entity prefer the interests of the members to its own interests?

(c) Third, the expression "best interests of the members" relates to the members' interests in the particular context in which the managed investment scheme operates, and by reference to the terms of the schemes (sic) constitution, the general law and statute. Section 601FC(1)(c) **mirrors, without qualification, a trustee's equitable obligation of undivided loyalty to its beneficiaries**.

(d) Fourth, the enquiry whether the responsible entity has acted in the best interests of the members is an **objective one. It is irrelevant whether the responsible entity acted honestly or subjectively believed that it was acting in the members' best interests**.

(e) Fifth, a responsible entity is not required to actually achieve the best outcome for members. It is not required to be prescient." (emphasis added)

86. Those obligations required the directors to act with undivided loyalty to the members of FMIF and subvert the interests of LMIM, as trustee of the MPF, to the extent they conflicted with the members of FMIF. In that sense, the interests of LMIM and the interests of LMIM as trustee of the MPF are one in the same.

87. This required the directors, to the extent that it was within their power (which it was), to ensure that all of the proceeds of the Bellpac settlement were paid to FMIF. That was an objective requirement. That they may have thought there was a justification for doing otherwise is not to the point.[35]

Protective legislation should be construed broadly

88. The legislative history set out above supports the view that sections 601FC and 601FD of the Act were intended to protect investors.

89. Legislation of a remedial character "should be construed to give the fullest relief which the fair meaning of its language will allow": *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 114 ALR 355, *387*, per Gummow and Lockhard JJ in relation to s52 of the *Trade Practices Act 1974*.

90. As to the appropriateness of a broad construction of the terms of Part 5C of the Act, the Court in *ASIC v Lewski* (2018) 132 ACSR 403 at [52] said:

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35 This is a fair and logical outcome. Section 1317S exists to excuse responsible entities and directors from liability where the terms of that provision are engaged. However, in the present case, for the reasons set out below, the directors' conduct was not sufficient to engage that excusal from liability.

> "A further difficulty with the active respondents' interpretation of members' rights in a manner that does not treat them as "interests" generally is that this interpretation is contrary to the purpose of s 601GC to protect the members of the scheme. Section 601GC(1) is contained in Pt 5C.3 of the Corporations Act, which is concerned with the constitution of managed investment schemes. The responsible entity, which administers that constitution, was designed with a protective purpose. Although a responsible entity is given some power to amend the constitution, the purpose of s 601GC(1) is therefore to confine that power to circumstances that, considered reasonably, will not adversely affect the members' rights unless the members so resolve. This purpose requires the notion of members' rights to have a broad construction."

91. Further in *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 111 ACSR 1 at [669], Wigney J said:

> "There could be little doubt that the provisions in Ch 5C of the Corporations Act, and s 601FD specifically, are protective in nature. The purpose is to provide protection to members of managed investment schemes by imposing duties and responsibilities on officers of responsible entities. As Murphy J put it in *APCH* (at [526]), the "scope of the s 601FD duties must be considered in light of the vulnerabilities inherent in the position of the members as beneficiaries of a trust and (as will often be the case) the fact that the [responsible entity] holds itself out to the public and is paid as a professional trustee".

Expressions of the common law equitable obligation

92. In order to confirm that view, particularly having regard to the statement in *Avestra* that the statutory duty mirror's a trustee's common law equitable obligation of undivided loyalty, it is useful to look more broadly at cases considering conflicts of interest and what is meant when one speaks of preferring the interests of a beneficiary over those of oneself or another person. Those have historically involved solicitors placing themselves in positions of conflict of duty between two clients.

93. In *Moody v Cox and Hatt* [1917] 2 Ch 71, Lord Cozens-Hardy MR said at 81:

> "A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position take upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client 'I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side'. The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say – which would be much better – 'I cannot accept this business'. I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as a solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform."

94. In *Bristol and West Building Society v Mothew* [1998] CH 1, Millet LJ noted at 19:

> "Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his

> obligations to the other: see *Moody v Cox and Hatt* [1917] 2 Ch 71; *Commonwealth Bank of Australia v Smith* (1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule."

95. The House and Lords in *Hilton v Barker Booth & Eastwood* [2005] UKHL 5 considered a solicitor's breach of duty. The court applied *Moody v Cox*. Lord Walker said:

> "[41] **The thrust of this passage, and of all three judgments in *Moody v Cox*, is that if a solicitor puts himself in a position of having two irreconcilable duties (in that case, to his beneficiaries and to his client, Moody) it is his own fault.** If he has a personal financial interest which conflicts with his duty, he is even more obviously at fault. [...]
>
> [...]
>
> [44] Mr Gibson submitted that a solicitor who has conflicting duties to two clients may not prefer one to another. That is, I think, correct as a general rule, and it distinguishes the case of two irreconcilable duties from a conflict of duty and personal interest (where the solicitor is bound to prefer his duty to his own interest). Since he may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. But in any case the fact that he has chosen to put himself in an impossible position does not exonerate him from liability.
>
> [...]
>
> [46] [...] **It comes back to the same simple point that if a solicitor is unwise enough to undertake irreconcilable duties it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified.**"
>
> (emphasis added)

96. The law evidenced by those decisions is entirely consistent with the provisions of the Act in relation to managed investment schemes. They show what LMIM should have done when faced with the dilemma of the Bellpac settlement proceeds not being sufficient to fully discharge the FMIF debt and not permitting any payment to the MPF. That is:

    (a) sections 601FC and 601FD resolved the conflict for LMIM and its directors by specifying which "principal" was to be preferred, namely the members of the FMIF; and

    (b) the situation should have been seen as reasonably orthodox. LMIM should have caused the entirety of the settlement proceeds to be paid to FMIF and then faced a potential claim by the MPF (brought by a new trustee) for breach of LMIM's duties to the MPF as trustee, if that conduct constituted a breach and was not otherwise excused by the terms of the MPF Constitution.

97. The loss to the MPF may have been the circa $2m funds advanced to LMIM. That can be contrasted with the $15.5m loss which the directors caused to be suffered by the FMIF instead. They chose to prefer one principal over another, but this proceeding is a consequence of that choice. They could have faced a relatively modest potential claim for $2m by the MPF, but

instead, through a position of conflict of their own making, they face a claim for $15.5m by the FMIF.

Legislative history

98. The *Corporations Act 1989*[36] at s 1069 provided covenants which were required to be included in a collective investment scheme's deed between the manager of the scheme and the scheme's trustee or representative, including:

(a) that the trustee will not agree to a transaction involving an "associate" of the manager unless the trustee believes that the transaction is in the best interests of investors;

(b) that the trustee will "exercise due diligence and vigilance in carrying out his, her or its functions and duties and in protecting [the investors'] rights and interests".

99. Those covenants reflected, in substance, the duties now codified at subsections 601FD(1)(c) and (b) of the Act respectively. They were broad duties reflecting common law fiduciary duties imposed on trustees.

100. The Australian Law Reform Commission and the Companies and Securities Advisory Committee's "*Collective Investments: other people's money*" (*Collective Investments: Other People's Money* [1993] ALRC 65) considered the adequacy of the law then existing as to the duties of a manager of a scheme.[37]

101. Paragraph 11 of the Summary stated:

> "The law must be changed to promote a culture of compliance among scheme operators. The first step is to make each scheme have a single, clearly identified entity responsible to investors and to public authorities for running the scheme. The split in responsibility presently prescribed by the law should cease. The scheme operator should have a clear set of obligations, prescribed by law, that it owes directly to the investors in the scheme. These would include the obligation to act **honestly in all matters concerning the scheme and to prefer the interests of the investors to its own interests in all matters concerning the scheme.**" (emphasis added)

102. At 10.8, the report addressed the prospect of a conflict of duty as follows:

> "**Duty to act in the interests of investors.** Investors in collective investment schemes rely heavily on the operator to act in their bests interests. Nevertheless, there will often be a potential for conflict between their interests and those of the operator. This may arise over the fees and charges payable to the operator or the use of the scheme property for dealings with parties related to the operator. DP 53 proposed that the law should impose on operators a duty to avoid conflicts of interest. A number of submissions argued that this proposal was neither realistic nor desirable. Conflicts of interest between scheme operators and investors are inevitable. The Review has concluded that the appropriate formulation of the test is that operators must prefer the interests of investors over their own interests where any conflicts arise. **The Review recommends that the Corporations Law should impose an obligation on the operator of a collective investment scheme to exercise its powers and perform**

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36 http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/num_act/ca1989172/

37 Reference can be had to the Commission's report to confirm that the meaning of s 601FC and 601FD is the ordinary meaning conveyed by the text : s 15AB(2)(b) *Acts Interpretation s Act* 1901 (Cth).

> **its duties as operator in the best interests of investors rather than in its own, or anyone else's interests, if that interest is not identical to the interests of the scheme investors.** This duty should be complemented by specific rules for related party transactions."
>
> (emphasis added)

103. Later, when dealing with separate obligations on directors, the report stated:

> "10.16 **Imposing duties on officers.** Officers of a scheme operator should pay close attention to the interests of the investors in the schemes operated by that company. The should prefer the company's interests to their own and prefer the investors' interests to the company's. Under the general law, the directors of the company owe fiduciary obligations to the company as a whole. The Review considers that investors should have obligations owed to them by the officers of the operator. Investors should be able to take action against the officers to enforce those rights directly, without first proceeding against the company. The nature of the rights should be modelled on the Corporations Law s 232. The precise form of the recommendations follows the provisions in the Corporations Law s 232, so that officers will not face additional kinds of liability under the proposal.
>
> 10.17 **Conflict between duties to the operator and duties to investors.** Officers of scheme operators will continue to owe to the operator the duties set out in the Corporations Law s 232. They will, consequently, owe duties both to the operator and to investors. Where any conflict arises, the latter duty should prevail. The Review recommends that this should be expressly provided for in the Corporations Law, and that officers should be given statutory protection from claims by the operator or its shareholders arising from any loss they suffered in consequence of officers complying with their paramount duties to investors.
>
> [...]
>
> 10.19 **Duty to exercise reasonable care and diligence.** The Review recommends that officers of scheme operators should, in exercising their powers and discharging their duties in respect of the scheme, exercise the degree of care and diligence that a reasonable person in a like position would exercise in similar circumstances.
>
> 10.20 **Duty to act in the interests of investors.** The Review recommends that the Corporations Law should impose on officers of scheme operators the duty to act in the interests of investors and not in the interests of themselves, the operator **or any other person** where those interests are not identical to those of investors." (emphasis added)

104. It can therefore be seen that the intention underlying these provisions was strong and broad, rather than narrow and limited, protection of investors.

105. Later, the explanatory memorandum[38] to what became the *Managed Investments Act 1998* (Cth):

(a) said in relation to the connection between the Bill and the ALRC report referred to above:

> "1.1 This Bill represents the Government's response to the recommendations made by the Australian Law Reform Commission and the Companies and Securities Advisory Committee ("the Review") in Report No 65, entitled Collective Investments: Other People's Money, and the Final Report of the Financial System Inquiry (in particular, recommendation 89).
>
> [...]
>
> 1.5 The Bill proposes amendments to the Corporations Law for a new regime for the regulation of managed investment schemes, implementing many of the Review's recommendations. The new regime will be set out in Chapter 5C of the Corporations Law."

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38 Reference can be had to the Explanatory Memorandum to confirm that the meaning of s 601FC and 601FD is the ordinary meaning conveyed by the text: s 15AB(2)(e) *Acts Interpretation s Act* 1901(Cth).

(b) provided in relation to the duties to be imposed on responsible entities:

> "8.8 The responsible entity of a managed investment scheme will be subject to extensive statutory duties (**proposed section 601FC**). The duties will reflect both the fundamental duties of a fiduciary, as well as certain of the duties currently imposed on the management company and trustee under the covenant provisions of Division 5 of Part 7.12 of the Law. These include the duties: to act honestly (**proposed paragraph 601FC(1)(a)**); to exercise the appropriate degree of skill, care and diligence (**proposed paragraph 601FC(1)(b)**); to act in the best interests of the members (**proposed paragraph 601FC(1)(c)**); to treat members of the same class equally and all members fairly (**proposed paragraph 601FC(1)(d)**); and to not make improper use of scheme information (**proposed paragraph 601FC(1)(e)**).
>
> [...]
>
> 8.13 The responsible entity will also be under a duty to hold scheme property on trust for scheme members (**proposed subsection 601FC(2)**). The responsible entity may, however, choose to engage a custodian to hold the scheme property. Even in that event, the responsible entity will remain liable to the scheme members for any losses that arise from the activities of the custodian.
>
> 8.14 The duties imposed on the responsible entity by proposed subsection 601FC(1) and (2) will override any conflicting duty an officer or employee of the responsible entity has under section 232 of the Law (**proposed subsection 601FC(3)**). "

(c) provided in relation to the duties to be imposed on officers of responsible entities

> "8.18 The duties of officers of a responsible entity will reflect, in part, the duties owed by the responsible entity. These include the duties: to act honestly; to exercise the appropriate degree of skill, care and diligence; to act in the best interests of the members; and to not make improper use of their position or scheme information to gain an advantage for themselves or other persons, or to cause a detriment to scheme members (**proposed paragraphs 601FD(1)(a) to (e)**).
>
> [...]
>
> 8.20 The duties imposed by proposed subsection 601FD(1) will override any conflicting duty an officer of the responsible entity has under section 232 of the Law (**proposed subsection 601FD(2)**)."

106. The Act incorporated the provisions of the *Managed Investments Act 1998* (Cth), including Part 5C. It is worth noting the comments regarding this Part in the explanatory memorandum[39] of the *Corporations Bill*:

> "[6.1] The Bill will correct a number of anomalies within the existing Corporations Law. These amendments will not make any substantive changes to the law.
>
> ...
>
> Part 5C.1
>
> [6.20] Bill clauses 601FC(3) and 601FE(2) will be amended to provide that the following duties prevail over any duties that an officer of the responsible entity might have under Bill Part 2D.1:
>
> - The duties that the responsible entity has as trustee of the scheme's assets; and
>
> - The duties that an officer of a responsible entity has not to use their position improperly"

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39 Ibid.

107. That is important because the defendants seem to rely on section 601FC(3) (but without reference to authority) as establishing that section 601FC(1)(c) has only limited application to the specific situation of conflicts of duties between:

(a) investors in the managed investment scheme, on the one hand; and

(b) Part 2D duties owed by a director to the company, on the other hand.

108. That is, they contend the section would not apply to a conflict between duties owed to investors in a managed investment scheme and a trustee of a separate trust.[40] That interpretation of section 601FC is contrary to the legislative intent and the plain ordinary meaning of the provision. It construes too narrowly the circumstances in which the members' interests should be given priority. It is unlikely that the statute would set out a duty which was more limited that the corresponding common law fiduciary duty of loyalty.

109. The legislative intention is that sections 601FC and 601FD mean what they say. Those provisions were responsive to the ALRC's recommendation that responsible entities must act in the best interests of investors rather than in their own, or anyone else's interests. That reflects an undivided duty of loyalty.

Narrower construction advanced by the defendants

110. The defendants advance a narrower construction of sections 601FC(1)(c) and 601FD(1)(c), namely that those provisions relate only to conflicts of interest between the scheme (its members) and the responsibility entity and does not apply to conflicts of interest between two separate schemes.

111. That is a distinction without difference. Such an argument treats MPF as a separate legal entity (which it is not) and ignores the role of LMIM as trustee of the MPF.

112. The further deficiencies with that approach are:

(a) it is not supported by authority. The statement of Palmer J extracted above from *Parbery* addressed that very question. It involved a case where a company was an RE for 12 different schemes. The question for the Court was how administration costs should be shared amongst the different schemes. His Honour confirmed that the obligation to act in the best interest of the members of a scheme where there was a conflict of interest extends to where the conflict is between the interests of members of a scheme and the interest of the RE in performing its obligation to members in another scheme;[41]

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40 Another difficulty with this narrow construction contended by the defendants is that it would treat the MPF as a separate legal entity from the trustee, LMIM.

41 *Parbery* at [33]

(b) it is not supported by the text of the provisions. Such a construction would give section 601FD(1)(c) scant work to do;

(c) it is unlikely that the statutory provision would set out a lower duty on responsible entities, which are trustees, than the existing common law duties of trustees; and

(d) if accepted, it would lead to the perverse and unlikely outcome that a RE of a MIS would in fact be able to prioritise its own interests over the interests of members of the MIS, despite standing in a trustee relationship to the MIS.

113. Another version of the defendants' argument is that section 601FD(1)(c) applies only to the narrow situation of a conflict between:

(a) on the one hand, duties owed to the managed investment scheme under Chapter 5C of the Act; and

(b) Part 2D.1 duties owed by directors to a company.

114. That would mean that the duty of undivided loyalty to FMIF would not apply where the conflict was with the beneficiaries of an unregistered managed investment scheme.

115. Such a construction is inherently unlikely and should be rejected for the same reasons.

116. To the extent the defendants reply upon section 601FD(2) as justifying a narrower construction of section 601FC(1)(c), the submission should not be accepted. The true effect of s601FD(2) is to protect directors from claims by shareholders that they breached their duties to the company by complying with their section 601FC(1)(c) duty to the scheme members.[42]

Application to the facts / causation

117. The director defendants were under a broad and paramount duty to prefer the interests of members of the FMIF to the interests of LMIM as trustee of the MPF.

118. Whether that duty was breached was an objective test. The explanations given by the director defendants as to why they considered the proceeds split to be acceptable are not to the point. Those matters are relevant to sections 601FC(1)(b) and s1317S of the Act, but not to a claim for breach of section 601FD(1)(c).

119. The Bellpac settlement proceeds were "scheme property"[43] in that:

(a) clause 7 of the Deed of Release (Exhibit 85)[44] provided:

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42 See the ALRC Report 65 at 10.17
43 Paragraph 37 of the 5FASOC
44 FMIF.003.003.0198

> "Gujarat shall pay to PTAL the settlement sum of $35.5 million (exclusive of any GST) by way of bank cheque simultaneously with the execution and delivery of this Deed."

(b) the Gujarat Contract (Exhibit 87)[45] provided for the sum of $10m to also be paid to PTAL as custodian of the FMIF.

120. That is, even after the Deed Poll was signed (14 June 2011), LMIM acknowledged by the Deed of Release and the Gujarat Contract (22 June 2011) that the proceeds of settlement were payable to PTAL.

121. Indeed, the logic underlying the "proceeds split" and obtaining the WMS Report, obtaining the Allens Advice and entering into the Deed Poll must have been a recognition by the directors that, absent a positive decision to undertake a proceeds split, the FMIF would have received the whole of the proceeds.

122. Further, the Deed Poll (being a deed between the directors in the form of an acknowledgement, to which neither of LMIM as RE of the FMIF nor LMIM as trustee of the MPF was a party) could not have changed property from being scheme property to not being scheme property. If Mr Tickner's argument was accepted that the Deed Poll could make the Settlement payment no longer scheme property of the FMIF, it would logically follow that directors of a managed investment scheme could divert property of a managed investment scheme to another person, without exposure to liability, by an internal arrangement between themselves.

123. One cannot change rights to property by independent thought.

124. In any event, the FMIF had priority over the MPF pursuant to the Deed of Priority referred to above. The FMIF had also been pitched to prospective investors as a first mortgage fund.[46] The MPF was pitched as a higher returning fund with higher levels of risk.[47]

125. Once the funds were received by LMIM, faced with claims on the funds by both the FMIF and the MPF, even if the Deed of Priority did not resolve the matter, LMIM was faced with a conflict between its duties to both funds. There were insufficient proceeds to fully discharge the FMIF facility. Any payment to the MPF would require FMIF to take a reduction in its recovery.

126. LMIM and its directors owed duties to investors. Those were investors who had been furnished with a product disclosure statement referring to the FMIF having first priority.

127. LMIM and its directors were required to choose whether to make the FMIF or the MPF shoulder the burden of their decision to cause MPF to fund the proceeding without any guaranteed outcome. That was a simple dilemma with the answer provided by statute. Indeed, it was a

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45 FMIF.003.001.0001

46 See the text of the PDS extracted at paragraph 25 above.

47 Paragraph 39 of the first affidavit of Ms Darcy.

statute recognised in the Compliance Plans which the directors had signed in 2008 (Exhibit 4)[48] and again in March 2011 Exhibit 24,[49] around the time the Allens Advice was received and shortly before the settlement proceeds were received.

128. That meant that LMIM and the directors might face a possible claim one day by the MPF. However, they owed statutory and equitable obligations of undivided loyalty to the FMIF (as they owed equitable obligations to the MPF). They could not avoid the consequences of that conflict by breaching their duties to one or both.

129. As it transpired, the directors did more than breach their duty to the FMIF by reimbursing the MPF for the funds advanced. They went much further and provided the MPF with a premium of $13.5m on top of the circa $2m expended in costs.

130. Had they conformed with their duties, the directors would have caused the whole of the settlement proceeds to be paid to the FMIF and would have faced the risk of a claim by the MPF (under a different trustee) for its calculation of loss and damage. The director defendants were wrong to "share the loss" or seek to avoid a claim by the MPF by transferring funds away from the FMIF.

Contention that LMIM as RE of the FMIF was exposed to a claim by the MPF

131. The Defendants allege that the proceeds split was in fact in the best interests of FMIF's members, as it was likely that LMIM as trustee of the MPF would have been entitled to sue LMIM as RE of the FMIF if the MPF did not receive a fair proportion of the Gross Settlement Sum.[50]

132. There are three difficulties with that argument.

133. The first is that the MPF's claim would be against LMIM for breach of duty as trustee, not against LMIM as RE of the FMIF. The relevant breach would have been breach of trust by LMIM as trustee of the MPF in permitting MPF's funds to be used for FMIF's advantage without any advantage accruing to the MPF.

134. The second is that it fails to take into account the history of the funding from July 2009 onwards. For most of the period of the funding, and during the period through which most of the money was advanced and spent, there appeared to be enough available in terms of settlement moneys to see the FMIF repaid in full and allow a significant surplus to be recovered by the MPF. That was the commercial sense which Mr Monaghan referred to in mid-August 2010 when the idea of a formalised arrangement was first raised. It was only when the deal needed to be renegotiated downwards to $45.5m in March 2011 that MPF faced the prospect of zero recovery.

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48 FMIF.500.021.8136

49 FMIF.500.015.1877

50 See, for example, para 39(c)(iv) of the Second Defendant's Defence.

135. The third is that the argument seems to proceed on the premise that the members of MPF would actually have a claim against LMIM as RE of the FMIF as a result of the alleged understanding. For MPF's members to have a claim they would need to identify an enforceable agreement, or potentially a promissory estoppel, between LMIM as RE of the FMIF and LMIM as trustee of the MPF which was breached and which would support legal proceedings.

136. Most defendants by their defences admit there was no such enforceable agreement.[51]

137. The first defendant does not press the argument that the alleged "understanding" was legally binding.

138. The Deed Poll at Recital I records that the FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation.

139. There was clearly no estoppel. The directors could not have misled themselves. No director attempts to plead or prove by their affidavits a genuine estoppel argument by LMIM against itself in another capacity.

140. Further, a person cannot enter into an enforceable contract with itself. The rule was discussed by McMurdo J (as he then was) in *Leximed Pty Ltd v Morgan* [2016] 2 Qd R 442 at [21]-[23]. In that case, a company in its capacity as trustee for one trust purported to enter into a partnership agreement with itself in its capacity as trustee for another trust.

141. A submission was made to his Honour that "although, as a general rule, a party cannot contract with itself, there is "compelling authority" for the validity of a contract such as this, where a trustee acting in one capacity enters into a contract with itself in another capacity": see [24].

142. His Honour considered the authorities and certain statutory provisions in some detail: see [24]-[32]. His Honour considered that, section 59 of the *Trusts Act 1973* (Qld) apart, a contract purportedly made by a trustee with itself would be invalid: see [33]. He observed that section 59 of that Act may remove the basis for the rule and therefore exclude it, but found that it was not necessary to express a concluded view on the question: see [33]-[34].

143. In *Minister Administering National Parks & Wildlife Act 1974 v Halloran & Ors* [2004] NSWCA 118 at [54] (not considered on appeal), Bryson JA said:

> "Transactions in which Pacinette in its own interest dealt with the Pacinette Property Trust, or with itself in the capacity of the trustee of the Pacinette Property Trust, involve conceptual difficulties which cannot be resolved. The documents relating to these transactions speak as if there were dealings between two persons, Pacinette in its own interest and Pacinette as trustee of the Pacinette Property Trust; there can be no contractual relationship in that form, whether for the issue of ordinary units or for their redemption in consideration of the purchase of real property. A trustee cannot contractually deal with itself so as to sell trust

51 The admissions are to paragraph 30C(d)(iii) of the 5FASOC. Darcy Defence paragraph 28(g)(i), van der Hoven Defence paragraph 31(f)(iv)(A), Mulder Defence paragraph 31(f)(iv)(A), Tickner Defence paragraph 30C(m)(i).

> property to itself in some capacity other than as trustee; the closest approximation to such a transaction which conceptually can take place is that a trustee can discharge itself from a trust obligation in respect of a property, but only if it has authority under the constitution of the trust or in some other way to do so. Such events are commonly referred to as self-dealing but this use of language is not entirely accurate. On the false assumption that a trustee in its personal capacity and in its trustee capacity are different persons see *Suncorp Insurance and Finance v. Commissioner of Stamp Duties* [1997] QCA 225; [1998] 2 Qd R 285 at 305-306 (Davies JA)". (emphasis added)

144. And in *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285 at 306, Davies JA said:

> "Step two and the description of it in the case stated appear to be based on the false assumption that Suncorp in its personal and trustee capacities are different persons. The reality is, of course, that it remained one person and that one person cannot pay money or transfer property to itself. It is unnecessary to determine what, if any, effect step two had." (emphasis added)

145. Edelman J, writing extra-judicially in 2013[52] (that is, before the decision in *Leximed*), cited *Halloran* and stated that section 59's equivalents "do not mean that a trustee can enter contracts with himself or herself".

146. It was the view of the Queensland Law Reform Commission when it recommended s 59 that where it applied it would remove the "slowly vanishing rule of practice that in legal proceedings a party may not appear on both sides of the record, ie may not appear both as plaintiff and defendant in the same action".[53] That rule sometimes created difficulties, the example given by the Commission being "where a person, who is an (or the only) executor or trustee of an estate, is also a beneficiary and wishes in that character to enforce a claim against the estate". The case referred to by the Commission was *Rubin v McNamara*, where one of three executors wished to claim against the estate that certain chattels belonged to her personally.[54]

147. Ford and Lee take the view that s 59 "falls short of treating the trust estate as a separate entity", "does not expressly provide that a trustee may make a contract with herself or himself or dispose of property to herself or himself or that certain conduct on the trustee's part will constitute a wrong against herself or himself", and does not "expressly provide that a person can owe equitable obligations to herself or himself".[55]

148. The proper view is that section 59 only effects a procedural change consequent upon substantive changes effected by other reforming legislation such as ss 14, 50 and 54 of the *Property Law Act*. As Ford and Lee put it:[56]

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52 Edelman J, 'Understanding the "Self Dealing" Rule in Equity' (Paper presented to the Society of Trusts and Estates Practitioners, 15 May 2013).

53 QLRC Report No 8, p 46.

54 [1969] QWN 18

55 Ford and Lee, [1.6410].

56 Ford and Lee, [1.6410].

> "It would be possible for a court to interpret the provision as going to procedure only, so that where under a statute a trustee was empowered to enter a legal transaction with herself or himself which involved possible litigation the trustee's common law inability to be both plaintiff and defendant would not inhibit litigation. An example would occur where legislation had authorised a trustee to dispose of property to herself or himself and there were implied covenants attached to the disposition which later give rise to a justiciable issue."

149. The contentions of the first defendant that the understanding amounted to an assignment in equity or gave rise to a constructive trust fare no better.

150. As to an assignment in equity, in addition to the difficulties already identified in relation to self-dealing, any assignment would be of a future equitable chose (an expectancy), namely proceeds of litigation that could come into existence in the future. Equity treated an assignment of a future equitable chose as an agreement to assign the thing once it came into existence which it would enforce if the assignee provided consideration.

151. Of such an assignment, Lord Macnaughten in *Tailby v. Official Receiver* (1888) 13 App.Cas. 523 at 543 observed:

> "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity **as a contract binding on the conscience of the assignor** and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." (emphasis added)

152. And Dixon J. stated that the "essential elements" of such an equitable assignment in *Palette Shoes Pty Ltd v. Krohn* (1937) 58 C.L.R. 1 at 27:

> "As the subject to be made over does not exist, the matter rests primarily in contract. Because value has been given on the one side, **the conscience of the other party is bound** when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him." (emphasis added)

153. Both these statements emphasise the fundamental difficulty with an equitable assignment between LMIM as RE for the FMIF and LMIM as trustee for the MPF. An equitable assignment assumes that there is an agreement between two different people and that because value has been provided by one party the conscience of another is bound when the future property comes into existence to recognise the interest of the first party. An equitable assignment of future property cannot arise where the purported assignment is between one person but in different capacities. There can be no agreement and the person whose conscience is bound cannot be the same person who provided the consideration.

154. For similar reasons, it is difficult to see how a constructive trust could be said to arise. It is not apparent the basis on which it is contended that such a trust could arise. The first defendant's defence is devoid of any proper plea of facts that could give rise to a constructive trust.

Conclusion on section 601FC(1)(c)

155. It follows from the above that the director defendants breached section 601FD(1)(c) by effecting the proceeds split.

156. The whole of the Bellpac Proceeding settlement proceeds were the scheme property of LMIM as RE of the FMIF and should have been retained by it.

157. For the reasons that will be addressed in detail below under the heading "Causation", the FMIF therefore suffered loss in the amount of the improper payment, being $15,546,147.85, and is entitled to compensation from the director defendants, jointly and severally, pursuant to section 1317H of the Act, in that amount plus interest plus costs.

NO UNDERSTANDING

158. Before turning to the claim under section 601FD(1)(b), it is useful to address the defendants' case that there was an "understanding" between the directors, or held by each of them, which justified the proceeds split.

159. The directors allege there was an "understanding" that the MPF would be paid an unspecified amount of any sum recovered in the Bellpac Proceedings. That is relied upon:

(a) as a basis justifying the decision to make the proceeds split at all (such an understanding being referred to in the Allens Advice and the Deed Poll);

(b) as part of an argument that LMIM was bound to make the proceeds split;

(c) to justify their conduct for the purposes of the claim against them pursuant to section 601FD(1)(b) of the Act; and

(d) to support the claim for relief from liability under section 1317S of the Act.

160. The director defendants do not allege the existence of any written arrangement, or any written record of an arrangement. They admit the plaintiff's plea at paragraph 30C(d)(iii) that:

> "there was no binding express prior arrangement for LMIM as trustee to be paid any amount if the amount that LMIM as RE of the FMIF recovered did not cover the whole of the amount owing by Bellpac to it".

161. Rather, they contend there was an unwritten (and potentially unspoken) expectation or assumption that the MPF would receive a fair return for its contribution of legal fees.

162. The understanding is pleaded as follows:

(a) at paragraph 24(h) of Mr Drake's Defence, that the MPF's funding of the Bellpac Proceeding was provided:

> "on the understanding of LMIM's directors that the MPF's contribution to funding the Proceedings would be recognised on the basis that it would receive more than a mere

> reimbursement of, and interest on, its contributions but rather, that the MPF would receive a share of the proceeds resulting from the Proceedings"; (emphasis added)

(b) at paragraph 29(f)(ii) and 38(a) of Ms Darcy's defence:

> "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" (emphasis added)

(c) at paragraph 22(b)(ii) of Mr van der Hoven's defence, the slightly lesser allegation:

> "It is the third defendant's understanding that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings" (emphasis added)

(d) at paragraph 22(b)(ii) of Ms Mulder's defence, a similarly narrower case about the understanding:

> "It is the fourth defendant's understanding that the MPF's funding contribution was provided on the basis that it would receive more than mere reimbursement of and interest on its contributions and, rather, that the MPF would receive a share of the proceeds resulting from the Proceedings"; (emphasis added)

(e) at paragraph 30(k)(ii) of Mr Tickner's defence, the broader case again:

> "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"; (emphasis added)

(f) and at 30C(m)(B) of Mr Tickner's defence, a slightly more detailed version of the same basic allegation:

> "LMIM's directors always understood that if the Proceedings did not result in full recovery of the FMIF Bellpac loan and the MPF Bellpac loan, then the MPF's contribution to funding the Proceedings would be recognised by providing the MPF with a share of the proceeds which resulted from the Proceedings [...]". (emphasis added)

163. Mr Tickner's defence then particularises the communications referring to the quantum of MPF's potential share, but the earliest is dated 21 October 2010, 16 months after MPF's funding commenced.

164. There was, however, no such "understanding" as alleged. That can be seen from the following:

(a) the pleaded cases about the understanding, on their face, do not disclose any binding arrangement which would have contractually committed LMIM to make the proceeds split;

(b) emails between some of the directors and Mr Monaghan expressly disavowed the existence of any such understanding;

(c) had such an understanding been regarded by the directors as in any way enforceable, it would have been documented (particularly because, as the director defendant's

acknowledged, such an arrangement would have been treated by them as a related party transaction and also potentially give rise to a conflict of interest[57]);

(d) such an understanding is difficult to reconcile with the debt created by the "Assigned Loans", by which the MPF was creditor and the FMIF was debtor;

(e) the monies advanced by MPF to fund the litigation were in fact drawn down against the MPF Bellpac Loan to increase the indebtedness of Bellpac under the MPF mortgage and was accruing interest;

(f) the existence of such an understanding is not necessary to justify the directors' decision from 2009 to cause the MPF as second mortgagee to fund the Bellpac Proceeding. That was a rational decision, given the prospect of the FMIF as first mortgagee being paid out in full, with any surplus flowing to the MPF;

(g) the existence of such an understanding is inconsistent with statements made by LMIM in product disclosure statements;

(h) a vague "arrangement" to the effect that the MPF would recover a proportion of any sum recovered could have seen it take the role of a de facto first mortgagee, in priority to the FMIF, an unlikely commercial arrangement;

(i) the defendants cannot point to evidence of the directors informing the FMIF's auditors of any such understanding until after the Allens Advice was received;

(j) the defendants cannot point to evidence of the directors informing Deutsche Bank of any such understanding; and

(k) the defendants cannot point to any such understanding in a large body of documents, such as committee meetings, Bellpac litigation update emails and administrative correspondence around the payment of litigation costs. One would expect there to be some mention of an understanding in those documents if such an understanding existed.

165. Rather, the director defendants seem to have conflated two concepts. There was probably an "understanding" (in the sense of an expectation, but not an enforceable agreement) from 2009 to early 2011 that the MPF as second mortgagee would recover something substantial from the Bellpac Proceeding once the FMIF as first mortgagee was paid out. However, that was not an "understanding" of the kind now alleged by the defendants. That was possibly the "understanding" the directors had in mind when signing the Deed Poll. However, the evidence does not support the proposition there was an "understanding" held by all of the directors

[57] See references in footnote 19 above.

throughout the period 2009 to 2011 that the MPF would receive an additional premium akin to a litigation funding premium regardless of whether the FMIF was paid out.

166. Each of those matters is developed below.

167. The director defendants justify the proceeds split as having been undertaken with due care and skill because it was in performance of their alleged understanding. As such, a finding that there was no understanding as alleged must be fatal to the director defendants' cases in relation to section 601FD(1)(b) and section 1317S of the Act. It would remove the justification they rely upon in making the proceeds split and in the amount that they did.

168. As the Allens Advice and Deed Poll were premised on the existence of the broader "understanding" as pleaded, for the purposes of section 601FD(1)(b), in the absence of any understanding, the decision to make the proceeds split in reliance on the Allens Advice and the content of the Deed Poll could not have been the result of the exercise of due care and skill.

Pleaded case

169. The pleaded "understanding" set out in the defences was, even if made good on the evidence, vague and uncertain.

170. There was no express, binding arrangement.

171. Although that should be the end of the matter, even if some form of non-binding understanding was considered by the directors, the purported understanding as pleaded did not identify the amount of the share that would flow to the MPF.

172. The fact that the WMS Report was sought at all in relation to reasonable percentage allocations evidences that there was no understanding on the essential term of the amount of the share or the way it was to be calculated.

173. Further, it would be unenforceable in any event, as it amounted to a purported agreement between LMIM and itself in two different trustee capacities.

174. Importantly:

(a) none of the defendant directors gave evidence that they believed that the understanding had any legal consequence (to the contrary, their evidence was to the effect that if it did they would have treated it as a related party transaction and a potential conflict of interest which would have engaged the Compliance Plan and Conflict Management Policy);

(b) despite (a):

(i) they never turned their mind to whether they could pay MPF no money from the Bellpac Settlement or enough to reimburse the monies advanced by MPF to fund the litigation;

(ii) they never took any steps to cause legal advice to be obtained from Allens or any other legal firm as to whether they could pay MPF no money from the Bellpac Settlement or enough to reimburse the monies advanced by MPF to fund the litigation

175. The defendant directors had been directors of LMIM for many years. It was a sophisticated billion-dollar business. One does not have to be a lawyer to realise that you should not pay away $15.5 million of scheme money, on the basis that that is an amount a litigation funder would have received if in fact it had funded the litigation, where you are not aware of any legal obligation to pay such an amount of money.

Express references in the documents to lack of understanding in emails

176. The email correspondence in evidence to which the defendants rely in their affidavits is inconsistent with the existence of an understanding of the kind pleaded in the defences.

177. A significant rates arrears balance of $279,027.87 had built up with respect to the Bellpac Property by 16 August 2010. LMIM, by Mr Adrien Armes, negotiated an instalment arrangement with the council.

178. Mr Armes notified Mr Ticker, Mr Monaghan and others of that instalment arrangement by email dated 16 August 2010 (Exhibit 12).[58]

179. Mr Tickner then forwarded that email to Mr Fischer and Ms Darcy on 17 August 2010 (Exhibit 12):[59]

> "Grant
>
> This is for payment of outstanding rates for Bellpac.
>
> As MPF is funding the ongoing costs of the action against Gujarat I presume we should consider MPF funding this cost.
>
> Have we documented an agreement between MIF and MPF for the litigation funding? If not I think we should formalise as soon as practicable.
>
> Simon"

180. That email appears to be the first reference in the material to *potentially* documenting *an* arrangement. Mr Ticker does not suggest they document "the" arrangement or any existing arrangement.

181. This email was also sent more than a year after the MPF commenced funding the Bellpac Proceeding.

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58 FMIF.200.009.8909

59 FMIF.200.009.8909

182. That email demonstrates knowledge by Mr Tickner that MPF was funding the legal costs, but that is not the same thing as a belief or understanding there was an arrangement as to what MPF was to receive in return for doing so.

183. On 18 August 2010, Mr Fischer then wrote to Mr Tickner, copied to Ms Darcy, Mr Monaghan and Ms Chalmers (Exhibit 13):[60]

> "Hi Simon – I don't think we do have an agreement on lit funding.
>
> I have copied David to see if we can draw up for the file."

184. Mr Monaghan responded on 20 August 2010 (Exhibit 14):[61]

> "Grant and Simon
>
> I am not sure that an agreement is necessary. As I understand it MPF is funding the various proceedings at present because as second mortgagee it has the most interest in achieving a good outcome. I think that is sufficient justification for it to continue to provide funding at this time."

185. That email reflects the plaintiff's case. The MPF had a rational, commercial reason up to and beyond that point to fund the Bellpac Proceeding as second mortgagee.

186. That seems to strongly demonstrate that there was no such understanding among the directors, because, if there was one, someone would have mentioned it by this stage.

187. Mr Tickner and Ms Darcy, as the directors who appear to be the most involved with the Bellpac proceedings, would have been expected to take steps to correct Mr Monaghan's understanding of the funding arrangement. The fact that they failed to do so is only explainable on the basis that there was no such understanding.

188. It is particularly noteworthy that Mr Monaghan had that view given the efforts the directors go to in order to paint Mr Monaghan as the person responsible for the Bellpac loans. The directors refer in their affidavits to the trust and confidence they reposed in Mr Monaghan in relation to legal matters.[62] He was also the person they say was responsible for risk and compliance issues around the loans. An arrangement or understanding around litigation funding was precisely the sort of thing a reasonable director would have mentioned to Mr Monaghan, if one existed.

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60 FMIF.100.003.2182

61 FMIF.100.004.9878

62 Affidavit of Ms Darcy from paragraph 52, paragraph 116 of Mr van der Hoven's affidavit, from paragraph 80 of Ms Mulder's affidavit, paragraphs 33, 144 and 153 of the affidavit of Mr Tickner

189. On 30 August 2010, in response to an email trail about a revised rates instalment plan payment of the first instalment from MPF had been authorised, Mr Tickner emailed Mr Monaghan (Exhibit 17)[63] asking:

> "David
>
> Can we amend any agreement we have in place for MPF to assist with litigation costs on Bellpac to also cover Statutory Charges as per payment to be made below."

190. Mr Monaghan replied on 31 August 2010 (Exhibit 17)[64]:

> "Simon
>
> **There is no agreement in place. I do not believe that an agreement is necessary, as it is simply a situation of MPF as the second mortgagee, who has the most to lose, paying legal costs, and in this case council rates. I do not think it requires an agreement. It will be a proper cost for MPF to add to its debt. It will rank behind MIF's debt.**
>
> Let me know if you had any particular purpose in mind for an agreement." (emphasis added)

191. Mr Tickner then replied a few minutes later:

> "David
>
> One of the reasons for an agreement may be to satisfy DB that FMIF is not required to pay outstanding sums as their facility requires FMIF to ensure all such charges are up to date. **A formal agreement would make that easier.** Would there be any disadvantage in having it documented?" (emphasis added)

192. It was not suggested in that email response by Mr Tickner that there was an existing agreement or understanding in place or that the reason for the agreement would be to detail what it was that MPF was getting in return for advancing the funds to fund the Bellpac litigation.

193. Mr Tickner's evidence that, despite receipt of this email from Mr Monaghan, he had the understanding he alleges, should not be accepted. This was the second occasion that he was told by Mr Monaghan, the company's solicitor and the person who Mr Tickner gave evidence was the main person running the recovery of the Bellpac Loans and the Bellpac litigation, that there was no agreement about the funding of the litigation by MPF and that there did not need to be one because MPF was just funding the litigation as second ranked mortgagee. It is not credible that, if Mr Tickner had the understanding he alleges, he would not correct Mr Monaghan's mistaken belief as to the funding arrangements.

194. Mr Tickner gave as a reason why he did not correct Mr Monaghan's understanding that it was a funding issue and Mr Monaghan was not involved in such matters[65]. But the email correspondence before the Court reveals that, whenever any issue was being raised about funding

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63 FMIF.100.003.2096
64 FMIF.100.003.2096
65 T3-74 ln 18-24

of the Bellpac litigation, Mr Monaghan was intimately involved and was generally the person who Mr Tickner and Ms Darcy turned to discuss such matters.

195. The earliest date on which it appears documenting an arrangement for the distribution of settlement funds was discussed was on 21 October 2010 (Exhibit 19)[66]. Mr Monaghan referred to a settlement deal structure which might have barely allowed both the FMIF Loan and the MPF Loan to be paid out. Mr Tickner replied:

> "Thanks David
>
> We can discuss this in detail at our meeting next Tuesday as we will also need to contemplate how any settlement is attributable to each fund.
>
> Simon"

196. That is a forward-looking possibility, not a reference to any existing understanding which the MPF could have used to force the FMIF to pay over money. There is still no reference to MPF having a share of the proceeds (let alone a percentage share) of the Bellpac litigation.

197. On 10 November 2010, Mr Monaghan notified the directors that a conditional settlement of the Bellpac litigation had been achieved, which would see the Bellpac Property sold to Gujarat for $65m plus GST over 7 years, against a current debt of $67m.[67]

198. That current debt was the total of both the FMIF and the MPF facilities.

199. Therefore, it can be seen that the discussions about a split of the settlement proceeds between the funds coincided neatly with the point in negotiations at which there was no longer enough settlement proceeds to pay out both the FMIF Loan and the Bellpac Loan.

200. As it transpired, that deal was not followed through and further negotiations were required to secure a settlement at a substantially lower return.

201. To that end, on 11 November 2010, Ms Chalmers emailed Mr Tickner and Ms Darcy (Exhibit 21):[68]

> "Dear Simon and Lisa
>
> I understand the Directors/ Grant have been in some discussion on MPF writing off some of its second mortgage loans either in part or in full.
>
> When you decide for certain what you are going to do (or if you want to have a meeting with any of us to talk it through) I would like to make sure that people who work on these files know what is happening and why, have some input if need be and we can ensure that CC/ files/ conflict register etc are updated/noted as the case may be. From the point of view of education for the whole department I think it would be worthwhile for everyone to hear the logics etc.
>
> **There are some loans where the MPF loan may be being asked to make payments or accommodations in relation to the asset (where FMIF is the 1st) and I think that people can fall into the trap where they forget that the FMIF and MPF need to be treated**

66 FMIF.100.003.0603
67 See Exhibit 88 - FMIF.200.003.5819
68 FMIF.200.014.2195

> **independently and without regard to the other. There are a couple loans below, where if MPF were an independent 2nd mortgagee and being asked to make payments and/or make concessions, MPF might feel that it was throwing good money after bad or alternately it might want "something in return".**
>
> I was thinking too that as Carolyn is trying to put conflicts training into place in the near future (early December I think) some of these loans could be good topics for conversation at the PAM session.
>
> The loans that I have immediate concerns with are:
>
> Green Square - FMIF (1st) and MPF (2nd) - possible write off?
>
> Lot 111 - - FMIF (1st) and MPF (2nd) - possible write off?
>
> Greystanes - FMIF (1st) and MPF (2nd) - possible write off?
>
> Glendenning - FMIF (1st) and MPF (2nd) - possible write off?
>
> Northshore - - FMIF (1st) and MPF (2nd) - MPF's position on funding?
>
> Kingopen - - FMIF (1st) and MPF (2nd) - - MPF's position on funding?
>
> **Bellpac - FMIF (1st) and MPF (2nd) - holding pending the Gujarat settlement being bedded down**." (emphasis added)

202. Ms Darcy and Mr Tickner did not respond to the effect that Ms Chalmers' concerns so far as Bellpac was concerned were unfounded as it had been addressed by the understanding that was then in place. It is not credible that two directors, so heavily involved in the Bellpac litigation, would have had the understanding they say they did and not take steps to correct Ms Chalmers about the position with funding. The absence of any reference to the matter by email is evidence that there was no such correction.

203. On 12 November 2010, Mr Monaghan emailed Ms Darcy (Exhibit 22):[69]

> "Lisa
>
> Can you please authorise a draw for $20K from MPF on Bellpac to pay GT and allow the title deeds to be released by Allens. I spoke with Grant about this before he went and he said it would be OK but I didn't receive this email before he went so hence I am asking you."

204. Ms Darcy replied later that day:

> "Ps **we should think about an agreement between mpf and mif** in particular who funds coalfields amount Lisa Darcy LMIM Ltd" (emphasis added)

205. The "coalfields amount" was a payment of $1.3m to Coalfields (NSW) Pty Ltd which LMIM would need to fund to permit settlement to occur, on that deal structure.[70]

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69 FMIF.100.003.0107

70 As it ultimately transpired, the $1.3m payable to Coalfields was paid from the proceeds paid by Gujarat. That can be seen from Exhibit 322.

206. This seems to have been the first time Ms Darcy mentioned an arrangement between FMIF and MPF, and she did so in terms of a possible future agreement. There was no suggestion in the email that it was the documentation of an existing arrangement or understanding.

207. On 22 November 2010, on the same issue, Mr Monaghan emailed Mr van der Hoven, copied to Ms Darcy (Exhibit 23):[71]

> "Eghard
>
> Just letting you know in advance about a cash requirement. We are going to need to pay $1.3M to Coalfields in order to secure removal of their caveats so we can sell the Bellpac land to Gujarat. This will be required when settlement occurs, which looks like being in about mid-December.
>
> I assume FMIF will not have the capacity to make such a payment, so presumably this money will need to come from MPF.
>
> We will not get any cash from Gujarat until one month after settlement, when we will get $1M, and then 6 months after settlement, when we get another $14.5M. Then there will be seven annual instalments of approx $7M each commencing on 1 December 2014. We are yet to determine how these funds will be split between FMIF and MPF.
>
> [...]"

208. Ms Darcy replied:

> "Read my mind - we need to think about some form of agreement between the two funds - also this may go some way **to justify conflicts etc.**,"

209. Therefore, from this point, in late November 2010, Ms Darcy recognised the existence of a conflict between the two funds in the event that the MPF paid further money which would not be recoverable, since the proposed settlement sum from Gujarat would fully pay out the FMIF but only partly pay out the MPF.[72]

210. Also, on 22 November 2010, Mr Tickner emailed Mr van der Hoven and Ms Darcy (Exhibit 24):[73]

> "It would be advantageous for MPF to incur the debt as well as fund the payment. It has already contributed to all the costs of the legal proceedings which has allowed this positive outcome from mediation. In return for this MPF can make a commercial agreement with FMIF regarding the breakdown between the Fund's of the settlement"

211. Mr Tickner again refers to a possible future agreement and does not suggest there already exists any historical arrangement.

If there was an understanding, it would have been documented

212. Mr van der Hoven, Ms Mulder and Mr Tickner conceded that:

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71 FMIF.100.002.9889

72 This recognition should be contrasted with the statement in the Deed Poll that there was not, in fact, any such conflict.

73 FMIF.100.002.9885

(a) the understanding suggested by them was important as it had the potential to reduce the return from the realisation of the loans and securities that LMIM as RE for the FMIF had in relation to the Bellpac loans; [74]

(b) if they had thought this understanding was in any way legally enforceable or had any legal consequence to the effect that MPF would receive a share of the proceeds of the Bellpac litigation in return for funding that litigation, they would have treated the transaction as a related party transaction and a transaction involving a potential conflict of interest to which the Compliance Plan and Rick Management Policy would have applied.[75] and

(c) despite that, they took no steps to comply with the procedures in the Compliance Plan and the Risk Management Policy, document the understanding, inform the member investors of the FMIF of the transaction or have the matters considered by the Risk Management Committee or the board of directors at a board meeting.[76]

213. Ms Darcy was more difficult. She accepted the understanding would have been a related party transaction.[77] When asked about whether that required documentation said she relied upon Mr Monaghan.[78] The issue was put to her at T2-44 ln 1 to T2-45 ln 12 but Ms Darcy did not squarely answer the questions.

Inconsistent with the Assigned Loans

214. There is a further difficulty.

215. It would have been illogical, as at July 2009, for the FMIF to have entered into an arrangement with the MPF which would see the MPF recover an unspecified, but potentially significant, proportion of the proceeds of settlement of the Bellpac Proceedings in exchange for payment of legal fees, where those fees were anticipated to be around $1m (Exhibit 95).[79]

216. Exhibit 116 is a spreadsheet which identifies the balance of the Assigned Loans debt over time.

217. As at 8 July 2009, MPF owed FMIF $36,315,280.58 and on that date paid $1.4m over. It paid another $1,133,434,70 on 10 July 2009, $831,282.29 on 16 July 2009 and $571,687.44 on 20 July 2009.

218. The MPF plainly had the funds available to meet the costs because it in fact paid the costs.

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74 Van der Hoven T3-30 ln 10, Mulder T3-45 ln 24, Tickner T3-63 ln 6

75 Darcy at T2-49 ln 39-45 that the understanding was a related party transaction. Ms Darcy when asked about whether that required documentation said she relied upon Mr Monaghan – T2-555 ln 6 to 16. Van der Hoven at T3-30 at ln26-38 as to the understanding being a related party transaction. Mulder at T3-45 ln 4 to 8 and T3-46 ln 6-13. Tickner T3-65 ln 18

76 Darcy at T2-55 ln 6 to 16, van der Hoven T3-30 ln 43-45, Mulder T3-46 ln 39-47

77 T2-49 ln 39-45

78 T2-55 ln 6 to 16

79 FMIF.200.014.1488

219. The funds required to meet the costs of the Bellpac proceedings over time could have been raised by the FMIF calling on the MPF to advance the funds required over time. Alternatively, an arrangement could have been entered into whereby the amounts advanced by MPF could have been credited against the monies owing by MPF to the FMIF.

Alternative, rational explanation for funding

220. It is not necessary for the director defendants to attempt to justify MPF funding the Bellpac proceeding from July 2009 on the basis of the alleged "understanding".

221. The directors' affidavits refer to FMIF's strained financial position. The Bellpac Proceeding seemed likely to yield enough to repay the FMIF and see a substantial surplus paid to the MPF until the final stage of negotiations around March 2011.

222. The plaintiff does not criticise the directors for causing the MPF to fund the Bellpac Proceeding as second mortgagee.

223. That position led to a reasonable "understanding" or, better put, an "expectation" that the MPF would receive a share of the proceeds of settlement of the Bellpac Proceeding without the need for any arrangement which prevented the FMIF from being paid out in full – that is, without the need for any "proceeds split" which required the FMIF to share some of the proceeds with the MPF. That was the only "understanding" held by any of the directors as to the distribution of the proceeds of settlement, if there was any understanding at all.

224. The evidence, as set out above, does not establish, and in fact contradicts, the possibility that there was another understanding that MPF would be reimbursed, and given some unidentified surplus from the proceeds of settlement, regardless of how much was recovered or when.

Inconsistent with public disclosure

225. The FMIF was a first mortgage fund. It was called the "First Mortgage Income Fund".

226. The PDS for the FMIF (Exhibit 1)[80], as set out above,[81] refers to the FMIF engaging in related party finance transactions but on the basis that the FMIF was first mortgagee.

227. The directors do not attempt to explain their departure from that arrangement.

Unlikely commercial arrangement

228. Given the FMIF was a first mortgage fund and the MPF was an unregistered scheme with a broader investment mandate for higher risk, higher return second mortgage lending, putting in

80 FMIF.500.001.9688

81 See paragraph [25] above.

place an unspecified "proceeds split" at a time there was enough prospective return to pay out the FMIF is an unlikely commercial arrangement.

229. If the FMIF was always going to share some of the proceeds of settlement, depending on what the proceeds split turned out to be, that could see the MPF effectively leapfrog into the position of a first ranking lender and potentially recover a higher, or equal proportion of its loan (after the proceeds split) than would the FMIF.

230. As at July 2009, the loan balances were:

(a) for the FMIF, based on Exhibit 38[82] as at 28 June 2009: $40,436,263.86;

(b) for the MPF, based on Exhibit 37[83] as at 28 June 2009: $9,517,027.01.

231. A split of 65/35 of, say, $45m would have seen:

(a) the FMIF recover $29,250,000; and

(b) the MPF recover $15,750,000.

232. Such an arrangement would stand entirely at odds with the funds' respective priority positions and would have seen MPF, as second mortgagee, engaging in a profit-making exercise on top of full recovery of its loan.

233. There is also no rational explanation for why the MPF needed to recover $15.5m on an investment over less than two years of around $2m.

234. The directors could have, alternatively, sought a loan by the FMIF from the MPF for the costs of the Bellpac Proceeding. The FMIF could have likely obtained terms better than repayment of eight times the amount advanced.

235. As it happened, the proceeds split saw the funds recover the following proportions of their loans:

(a) FMIF on a debt of $52,480,469.12 as first registered mortgagee received $32,935,729.44, a **62.75%** recovery;[84]

(b) MPF on a debt of $16,014,688.53 as second ranked mortgagee received $15,546,147.85, a **97%** recovery.[85]

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82 FMIF.400.001.0054
83 FMIF.400.001.0058
84 Exhibit 111 FMIF.017.001.1078
85 Exhibit 112 FMIF.017.001.1082

No explanation to auditors

236. There is no suggestion from the defendants that they informed the auditors, Ernst & Young[86], of this alleged "understanding" until just before it occurred.

237. That is particularly unusual given the scrutiny being placed on the FMIF's finances. That the directors had agreed to pay away an unspecified amount of a large settlement payment to the MPF would have been a matter of interest for any auditor.

238. It may be inferred that the directors would have informed the auditors of such an arrangement or understanding if it existed.

No explanation to Deutsche Bank as incoming financier

239. There is similarly no explanation offered by the defendants of the alleged arrangement or understanding to the Deutsche Bank until shortly before the payment occurred.

Body of documents inconsistent with an understanding

240. The defendants have tendered numerous documents produced during the course of Bellpac proceedings and related to the funding of the Bellpac proceedings. However, those documents do not refer to the existence of any such understanding.

241. The Defendants do not point to contemporaneous documents which evidence the existence of an "understanding" between the directors of the kind alleged in the Defences.

242. For example, the defendants have referred to membership of committees of LMIM, but cannot point to minutes of meetings which refer to any such understanding.

243. The only minutes which seem to come close are those dated 19 July 2010 (Exhibit 11)[87] which provide:

> 14.7.10 Litigation in train. FMIF and MPF conflict issues still need to be considered and possibly an agreement between the 2 x Funds on strategies for the best way forward.

244. The minutes refer to "possibly an agreement on strategies". It does not suggest there is already an agreement. [88] There is no reference to a share of proceeds having been received.

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86 Exhibit 1, page 0045, final paragraph, refers to EY being the RE auditors and the compliance plan auditors.

87 FMIF.200.001.9275

88 That may be compared with the minutes of the meeting of 18 November 2009 at Exhibit 9 (FMIF.200.009.9235) which refer to the Bellpac loan being subject to litigation but make no mention of any understanding as to litigation funding.

245. Similarly, the defendants rely on updates which they received from Mr Monaghan about the progress of the Bellpac Proceeding. However, they do not point to one which refers to such an arrangement or understanding about a proceeds split.

246. That is noteworthy given the references to the high cost of the Bellpac Proceeding.

247. A Strategy Paper produced by Allens dated around 10 June 2009 (Exhibit 282)[89] contained a cost estimate of between $200,000 and $325,000 for the Bellpac Proceeding.

248. On 6 July 2009, Mr Monaghan sent an email to the directors (Exhibit 7)[90] providing a lengthy explanation of the Bellpac litigation and the prospect of it costing circa $1m in fees, but there was no reference to how those fees would be funded.

249. This does not seem to have provoked a comment from the directors about any arrangement for the repayment of costs incurred by MPF in advancing the proceeding.

250. The email of 29 July 2009 at Exhibit 8[91] which contemplated legal fees of $2m also did not result in the understanding being mentioned.

251. There was similarly no comment after the email of 6 October 2009 at Exhibit 6,[92] in which Mr Fischer referred to loan balances at the time of $60.3m and a working valuation of $60.5m inclusive of GST.

Administrative payment correspondence

252. The directors also point to administrative correspondence around the payment of the costs of the Bellpac Proceeding.

253. However, the directors cannot point to any emails prior to inconsistent email exchange identified above in relation to those payments which refers to any arrangement or understanding of the type they plead.

Drawdown on the Bellpac Loans

254. A further inconsistency with the understanding is that the monies advanced by MPF to fund the litigation were being drawn down against the MPF Bellpac Loan and LMIM was charging interest on those further drawdowns.[93] It has not been explained how it would ever have been appropriate for LMIM as trustee for the MPF to drawdown the Bellpac loans and charge interest on those drawdowns to Bellpac in circumstances where the monies were being used to fund effectively a speculative litigation funding arrangement the result of which could (on the defendant's case)

89 FMIF.050.004.0039
90 FMIF.200.014.1488
91 FMIF.200.009.5397
92 FMIF.300.002.2670

result in MPF in fact getting back more money that Bellpac in fact owed MPF. It can be seen from the figures detailed above that Bellpac, despite being second ranked mortgagee, almost recovered all of the monies owing to it. If the ultimate settlement of the Bellpac litigation had been at a figure that had originally been struck (ie $65 million), MPF would in fact have received $22.75 million, a $6.65m profit. It is not credible that LMIM would have been drawing down the Bellpac loan and charging interest if the understanding existed. A much more likely scenario is that, as Mr Monaghan explained, that MPF was funding the litigation simply as second mortgagee.

Evidence of the witnesses / what really happened

255. Mr Drake elected not to give evidence. It can be inferred that his evidence would not have assisted his case that there was an understanding.

256. Despite contending that there was an understanding, Ms Darcy could not give any detail of any discussions of any understanding prior to late 2010. Her evidence at the public examination was to the opposite effect (Exhibit 265). In that examination, when shown the email exchange between Mr Tickner and Mr Monaghan discussed in August, some 15 months after monies commenced to be advanced, she confirmed that "There wasn't an agreement ... at that point in time, because of the reasons David's given" (ie that MPF was funding simply as a second mortgagee).

257. Mr van der Hoven could not recall the detail of any discussions about the understanding. He gave evidence that he was not intimately involved in the funding ([221]) as it was something decided by Tickner and Darcy ([268]). The most likely explanation is that Mr van der Hoven only became aware of something resembling the understanding in December 2010 when copied in on emails to WMS providing instructions.

258. Ms Mulder was the witness most convinced there was an understanding from July 2009. Yet she was the person least connected to what was going on. Her certainty cannot be reconciled with the Monaghan correspondence. She cannot be believed.

259. For the reasons detailed above, Mt Tickner's evidence of the understanding can also not be accepted. It is entirely at odds with the documents created at the time.

260. The true state of affairs is as pleaded at paragraph 33 of the 5FASOC, namely that, when the MPF started funding the Bellpac Proceeding, there was no consideration, expectation or understanding that MPF was to receive a share of any proceeds recovered by the litigation as a litigation funder.

261. The Court should find that there was no understanding as alleged by any of the directors.

262. Rather, if there was any expectation, it was the typical, orthodox expectation of a second mortgagee with adequate security that there would be enough for a surplus to be paid to the MPF after the FMIF was paid out in full.

263. There is no document put forward by any party which, prior to late 2010, suggests the existence of an understanding that a share of any settlement of the Bellpac Proceeding would be paid over to the MPF if that left the FMIF short in its recovery.

264. Rather, that only became an issue once it emerged that the settlement sum recovered might not be enough to repay the FMIF in full, such that the MPF would have been left with no return. The idea of litigation funding only came much later as Ms Darcy explains at paragraph 194 of her affidavit. She gave evidence that "once a shortfall was identified, it was important that there be some way in which the risk that MPF undertook in funding the proceeds was recognised". It was that realisation (which arose after most of the monies had been advanced by MPF for the Bellpac litigation) that led to the directors contemplating MPF getting a share of the proceeds from the litigation.

265. Further, it is not pleaded that the understanding was an understanding that MPF should receive a share of the proceeds that was equivalent to what a commercial litigation funder might receive. The directors did not give any evidence of any discussion prior to December 2010 about MPF being treated as if it was a commercial litigation funder, nor is there any document before that time that refers to MPF being treated as if it was a commercial litigation funder. That is not surprising as Ms Darcy, Mr van der Hoven, Ms Mulder and Mr Tickner all conceded that they had no personal experience of commercial litigation funders prior to dealing with WMS. Further, the funding by MPF of the Bellpac litigation was fundamentally different to a commercial litigation funder. LMIM as trustee for the MPF was a party to the litigation. It stood to benefit from the litigation if it succeeded (in addition to the suggested understanding) and was already exposed for costs as a co-applicant with PTAL. The legal costs expended were the costs incurred from LMIM in litigation in both capacities, as RE for the FMIF and as trustee for the MPF.

266. There was, therefore, no understanding between the defendant directors that MPF would be reimbursed and receive a surplus from the settlement proceeds of the Bellpac proceedings of the kind alleged. The director defendants cannot rely on the existence of any such understanding to argue they acted with care and diligence for the purposes of section 601FD(1)(b) or to argue they should be excused from liability under section 1317S.

SECONDARY CASE – SECTION 601FD(1)(B) OF THE CORPORATIONS ACT

267. This is advanced as the secondary case in the event the Court is against the plaintiff on its case in relation to section 601FC(1)(c) of the Act.

268. In summary, the following factors support the conclusion that the directors failed to exercise the requisite degree of care and skill in undertaking the proceeds split:

(a) a high degree of care and skill was required, because LMIM was a professional funds manager undertaking a payment of $15.5m in respect of which a registered managed investment scheme (the FMIF) had a claim. Any documentation surrounding the proceeds split needed to be carefully considered;

(b) the directors did not exercise care when considering and executing the Deed Poll, in that some of the considerations set out in the Deed Poll were clearly untrue (*Category 1: Expert Advice* and *Category 6: The Central Question*)[94];

(c) the proceeds split was premised on an undocumented, unclear "understanding" which the directors should have realised was not a sufficient justification to pay $15.5m away from a registered managed investment scheme. The directors could not have reasonably considered that "understanding" required something to be paid to the MPF. The directors can therefore be shown not to have reasonably considered the issue from the perspective of the FMIF (*Category 5: Different Interests* and *Category 6: The Central Question*);

(d) to the extent that the proceeds split was sought to be justified by the WMS Report, the directors ought to have realised that:

(i) LMIM as trustee of the MPF could not reasonably be considered to be, or to be equivalent to, an arms-length litigation funder (*Category 4: Litigation Funding Analogy*);

(ii) the WMS Report did not provide advice about the management of conflicts or related party transactions (*Category 1: Expert Advice* and *Category 6: The Central Question*);

(e) to the extent the proceeds split is sought to be justified by the Allens Advice, the directors ought to have realised that the Allens Advice did not provide unconditional endorsement, from a legal perspective, of the proposed proceeds split. It was highly qualified. The advice was clear that it assumed the two very things that were critical to any proceeds split from the perspective of the FMIF: that there was in fact a need to reach an agreement with the MPF for a payment equivalent to a litigation funder fee and that that payment of such a fee was in the best interests of the FMIF. The evidence does not support a finding that those qualifications or considerations were taken into account. Further, the Allens Advice sought to justify the proposal to make a payment to the MPF. It did not consider the

94 Adopting the categorisation employed by the Third and Fourth Defendants of the allegations of negligence.

transaction from the point of view of the FMIF. The directors were right to seek advice, but the advice obtained was not a sufficient basis for a decision of this kind (*Category 1: Expert Advice* and *Category 6: The Central Question*);

(f) LMIM operated in different capacities but it was one company with the same directors. The directors erroneously treated LMIM as two different entities (as opposed to one entity acting in different capacities) (*Category 3: Non-Essentiality* and *Category 6: The Central Question*);

(g) the directors were dealing with a fund promoted and operated as a first mortgage fund on the one hand, and a fund promoted and operated as a second mortgage fund on the other. They were parties to a Deed of Priority which regulated their priority. The Bellpac Proceeding was, in substance, a proceeding to enforce their securities in relation to the FMIF Bellpac Loan and the MPF Bellpac Loan. The basic priority position between the funds was clear (*Category 2: Priorities* and *Category 6: The Central Question*);

(h) rather, the directors proceeded on the basis they could abrogate their duties to Mr Monaghan, an explanation that cannot be accepted because:

(i) Mr Monaghan by his communications made it clear the directors needed to rely on their own enquiries and make their own judgment;

(ii) the directors recognised they in fact had personal responsibility for decisions of this kind;

(iii) if the directors truly had an understanding of the kind alleged, they would have informed Mr Monaghan of it, but they did not. Rather, they suggested around late 2010 that an agreement be made along the lines of a litigation funding agreement. *(Category 1: Expert Advice* and *Category 6: The Central Question*).

Principles

269. Section 601FD(1)(b) provides:

> "(1) An officer of the responsible entity of a registered scheme must:
>
> [...]
>
> (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position;
>
> [...]"

270. That calls for an evaluative and qualitative judgment of the defendants' conduct to assess whether the conduct met the degree of care and skill that a reasonable person would exercise if they were in the defendants' position.

271. In *Australian Securities and Investments Commission (ASIC) v Avestra Asset Management Ltd (In Liq)* (2017) 348 ALR 525 Beach J adopted the explanation of the relevant principles cited by Barrett AJA in *Re Macquarie Investment Management* (2016) 115 ACSR 368 [70]-[86],

> "[187] In *Re Macquarie Investment Management* (2016) 115 ACSR 368; [2016] NSWSC 1184, Barrett AJA accepted the following propositions which I also accept:
>
> (a) The duty of a responsible entity under s 601FC(1)(b) is to exercise care and diligence in exercising its powers and duties and carrying out its duties as the responsible entity of the relevant scheme. Those powers and duties include the power to invest the scheme property and the responsibility to do so pursuant to the mandate of the scheme, subject to the Act.
>
> (b) Section 601FC(1)(b) is cast in similar terms to the duty of care and diligence of a director of a corporation contained in s 180(1). Accordingly, authorities on s 180(1) may be relevant in terms of the standard of care and diligence required, although the position of a responsible entity is not identical to that of a company director.
>
> (c) By requiring the responsible entity to exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position, s 601FC(1)(b) sets out an objective test to measure the reasonableness of the actions taken by the responsible entity in exercising its powers and carrying out its duties (similarly to s 180(1)).
>
> (d) In determining the scope of the duty of care and diligence, and whether there has been a breach of that duty, it is important to have regard to the circumstances of the responsible entity's position and the scheme, including the type of scheme, the provisions of its constitution, the size and nature of its operations, the functions to be performed, the experience or skills of the responsible entity and the circumstances of the specific case.
>
> (e) Similarly to the standard of care imposed by the law of negligence, it may be appropriate to refer to the principles developed under the law of professional negligence in determining the content of the duty.
>
> (f) The scope and content of the duty are heavily influenced by the purpose of the particular power being exercised or duty being carried out, and the known reliance and vulnerability of those dependent on the carrying out of the duty. This is particularly relevant to the placing at risk of the scheme property of a registered scheme.
>
> (g) As a general matter, and subject to the terms of the scheme, a responsible entity is expected to exercise a degree of restraint, as compared with the duty of a company director to display entrepreneurial flair. In exercising its power of investment, a responsible entity is subject to a requirement of caution (*Australian Securities Commission v AS Nominees* Ltd (1995) 62 FCR 504, 516–18 per Finn J).
>
> (h) Nonetheless, the exercise of prudence and caution must be considered through the prism of the particular registered scheme in question, having regard to its constitution and particular investment mandate, and the profile of the accepted risks and potential returns the subject of the investments that may be undertaken pursuant to the scheme. A responsible entity is not required to eschew a high-risk investment strategy where that is the nature of the scheme that has been marketed to investors. Rather, a responsible entity is required to implement the advertised strategy prudently.
>
> (i) Whilst a responsible entity is entitled to place reliance on others, including advisers, there is a core and irreducible requirement of diligence."

272. The standard of care under section 601FD may be higher than the standard required by section 180(1). This is because a director of a responsible entity acts as a professional trustee with particular skill and knowledge, and is held out in that way to the public and paid accordingly.[95]

Level of care of a professional funds manager

273. The FMIF Bellpac loan was one of the FMIF's largest assets.[96]

274. The proceeds split involved a substantial amount of money.

275. LMIM was a professional funds manager. As the responsible entity of a registered managed investment scheme, it was an AFSL licensee and had implemented various policies recognising its obligations in dealing with other people's money, including:

(a) Compliance Plans;

(b) a conflict management policy; and

(c) Disclosure to investors in the form of a formal PDS.

276. The proceeds split occurred at a time of scrutiny of LMIM's operations by Deutsche Bank.[97] Ms Mulder explained how investors were anxious. Ms Mulder referred to spending much of her time dealing with investor concerns.[98] Mr van der Hoven's role was concerned with cashflows,[99] which for the FMIF were constrained once the fund was closed to new investments and redemptions.

277. LMIM was operating as the trustee of both of the trusts affected by the proceeds split.

278. The directors recognised that they had important obligations in their roles.

279. Ms Darcy had identified that the question of a proceeds split was sufficiently important that the WMS Report was not enough and that legal advice was also appropriate. Advice was sought from Allens, being a top-tier firm of high standing.

280. In those circumstances, the directors ought to have treated the proceeds split as a matter requiring a high degree of care, such that it was necessary for them to carefully review any formal document provided to them in relation to the proposal and exercise their own judgment about it.

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95 *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 [536].

96 Paragraph 93 of Ms Darcy's first affidavit LMD.LAY.001.0001

97 Paragraphs 116, 254, 255, 256 and 257 of Ms Darcy's first affidavit LMD.LAY.001.0001

98 Paragraph 100 of Ms Mulder's affidavit FMM.LAY.001.0001 at 0018

99 Paragraphs 29, 30 and 43 of Mr van der Hoven's affidavit EVH.LAY.001.0006

Deed Poll

281. The Deed Poll is undated, but it was executed by all directors by 14 June 2011.[100]

282. It was not a long document.

283. The Deed Poll purported to recite that:

(a) at Recital H:

> "Shortly after LM commenced the [Bellpac] litigation, redemptions from the FMIF were frozen which resulted in no new funds flowing in from investors and an obligation to remit borrower's payments to LM's former funder, the Commonwealth Bank. FMIF was in the position of being unable to provide funding for the litigation and of being unable to satisfy any adverse costs orders that might have been made against LM. Accordingly, the MPF has contributed the majority of the funding for the litigation (and certain other actions designed to recover funds from Gujarat or put pressure on it) amounting to approximately 91% of the total funding (the FMIF has contributed the remaining 9%)."

(b) at Recital I:

> "The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation **however it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation**."

The timing and enforceability of such an understanding was not addressed. Nor was the fact that MPF was in fact a co-applicant in the proceedings (with the benefits and detriments that that entailed) and that it was no part of the understanding that the share to be received by MPF being assessed as if it was an arms-length commercial litigation funder;

(c) at clause 2.1:

> "The Directors gave careful consideration to:-
>
> (a) the circumstances that are described in the Background to this Deed;
>
> (b) possible conflicts that may arise as a result of the Settlement Proposals flowing from LM preferring the interest of one of the Relevant Funds against the other;
>
> (c) procedures in the Constitution, the Trust Deed and the Compliance Plans (and any other procedures that are in place) in respect of conflicts of interest;
>
> (d) general law and statutory duties that relate to directors under the Corporations Act 2001;
>
> (e) the issues raised by and the considerations suggested in the ASIC Regulatory Guide 76 [...]"

A reference to FMIF's rights is notably absent;

(d) at clause 3.1:

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100 FMIF.008.001.0125 is the covering letter from LMIM to Monaghan Lawyers with the fully executed Deed Poll.

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

(a) **the interests of LM as RE of FMIF do not conflict with its duties as trustee of the MPF** and LM will not obtain an unauthorised profit from either of the Relevant Funds if the Settlement Proposals were to proceed.

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

[...]

(h) **the Settlement Proposals are in the best interests of each Relevant Fund's members**.

(j) LM as trustee of the MPF will comply with its general law fiduciary duties as a trustee if it agrees to the Settlement Proposals pursuant to which MPF will be obliged to release its security over the Bellpac Land.

(k) **LM as RE of the FMIF will comply with its general law fiduciary duties as RE if it agrees to the Settlement Proposals**.

(l) the acceptance of the Settlement Proposals [that is, both the Bellpac settlement and the proceeds split] **will have no negative effect on either of the Relevant Funds' financial positions or performance that is not balanced by sufficient positive effects** such that the terms of the Settlement Proposals are not unreasonable in the circumstances if the parties were dealing at arm's length.

[...]"

(emphasis added)

Evidence as to execution of the Deed Poll

284. The directors did not plead, but some have now given evidence of, a meeting at which the Deed Poll was signed.

285. The evidence does not suggest much care was taken in considering the matters raised in the Deed Poll. No corrections were made. There was no minute of the meeting.

Defects in the Deed Poll – matters which were plainly incorrect

No conflict

286. The statement at clause 3.1 that there was no conflict is plainly wrong. The Allens Advice was entitled "Conflict issues". It concluded that there was a conflict.

287. Earlier emails between the directors had also referred to the conflict.

288. If there was no conflict, one may ask rhetorically, what was the purpose of the advice and the Deed Poll? If the answer is that the Deed Poll was entered into merely for audit purposes, that suggests little real consideration of the merits of the decision.

289. Further, the Deed Poll refers to having taken advice, but does not cite the Allens Advice specifically. The fact that the Deed Poll stated a matter which was fundamentally inconsistent with the content and reason for being of the Allens Advice suggests that the content of the Allens Advice was not in front of mind when the directors signed the Deed Poll.

290. If the directors read the Deed Poll with care, they would have noticed this issue and it may be inferred there would be some evidence of the issue being raised.

No litigation funding experience

291. Clause 3.1(m) refers to the directors drawing on their experience of commercial litigation funding.

292. None of them had any such experience.[101]

293. If the directors read the Deed Poll with care, they would have noticed this issue and it may be inferred there would be some evidence of the issue being raised.

Defects in the Deed Poll – matters evidencing a lack of consideration of the FMIF's perspective

294. There was no reference to the directors having considered whether FMIF had the right to insist on it retaining the whole of the settlement proceeds or all of the proceeds other than an amount to reimburse the amounts advanced by MPF to fund the litigation.

295. If the defendants maintain that the Deed Poll accurately sets out the matters they took into account, it must follow that the directors failed to consider the issue from the point of view of the FMIF's rights.

296. Similarly, it must follow, as pleaded at paragraph 32A of the 5FASOC, that the directors did not have regard to the duties referred to in sections 601FC or 601FD of the Act when they signed the Deed Poll, even though they acknowledged in cross-examination that they were aware in general terms of the duty of loyalty and the duty to act in the FMIF's best interests.

No express, binding arrangement

297. The Deed Poll recognised the absence of a formal agreement to split the settlement proceeds and refers to an "understanding of LM's directors".

298. There was no such understanding for the reasons identified above. The directors made no reasonable effort to investigate or consider that proposition. Had they done so, they must have necessarily come to the conclusion there was no such understanding which *required* the proceeds split to be made.

299. Further, the Deed Poll did not address the question, assuming there was an understanding as recited in the Deed Poll, whether it was required that they treat the funding by MPF as being equivalent to an arms-length commercial litigation funder arrangement. The understanding recited in the Deed Poll did not refer to any understanding that MPF would be treated as if it was an arms commercial litigation funder.

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101 Darcy T2-96 ln 41, van der Hoven T3-39 ln 45, Mulder T3-50 ln 25, Tickner T3-81 ln 1-2

LMIM would not oppose its own deal

300. Clause 3.1(b) goes further than the Allens Advice did.

301. The Allens Advice (Exhibit 35)[102] at paragraph 25 suggested the MPF's participation may be necessary to pay the Coalfields money. That was said at a time when the prospective deal involved a loan without the payment of cash from Gujarat. By the time of the Deed Poll the deal had changed and was now a cash settlement. The Coalfields money could be paid from the Bellpac proceeds, which is in fact what happened, as can be seen from the cheque directions at settlement (Exhibit 322).[103]

302. So far as MPF is concerned, the directors of LMIM would not have opposed their own deal. They would not have commercially pressured themselves. The MPF would not have prevented the settlement.

303. Even if the directors were contemplating applying commercial pressure to themselves, the Deed Poll does not address the amount that may be necessary to secure the agreement of MPF. For example, there was no apparent consideration of whether repayment of the funds advanced would be sufficient to satisfy MPF. There was no reference in the Deed Poll, and no reference in the defendants' evidence, to any consideration as to whether circa $15.5m was the true price of the MPF's hypothetical agreement. The only basis for the payment of the $15.5m was the understanding which the evidence reveals did not exist and, even if it did, did not extend to MPF receiving an amount equivalent to a commercial litigation funder.

FMIF had priority over the MPF

304. The Deed Poll made no reference to the Deed of Priority, to the fact that the FMIF was typically a first mortgage fund and the MPF was typically a second mortgage fund or to the statements made in the PDS to the effect that the FMIF had priority arrangements with the MPF in relation to borrowers to whom each fund had made loans.

305. Even if there was a technical legal argument that the Deed of Priority did not apply to the settlement, the Deed of Priority and the position of FMIF as a first mortgage fund had been important elements of disclosure to investors. If the directors exercised care in reviewing the Deed Poll, when considering an arrangement between a registered first mortgage fund and an

102 FMIF.100.003.6995
103 FMIF.200.014.3531

unregistered second mortgage fund, one would expect them to have considered whether the Deed of Priority and past disclosures to investors were relevant.

306. The effect of the proceeds split was to give the MPF a high level of recovery of its debt and the FMIF a lower level of recovery of its debt.

307. The directors did not make any enquiries about the respective loan balances at the time of the proceeds split.[104] As noted above, the effect on the relative recoveries of the funds was stark. The MPF received almost total recovery (ie akin to a first mortgagee's position) and the FMIF received around half recovery (ie more akin to a second mortgagee's position).

308. One may assume it was a coincidence that the 35% proceeds split nearly matched the MPF loan balance. However, the Deed Poll does not evidence consideration of the position from the perspective of the FMIF.

Advances being booked against the MPF loan account

309. The Deed Poll did not address the fact that advances of legal costs had been recorded as advances under the MPF loan agreement. Therefore, the Deed Poll does not evidence that the directors had any regard for the way in which the funds had been accounted for to that point.

No express recognition of ss601FC and 601FD

310. The Deed Poll made a bland reference to having given careful consideration to "general law and statutory duties that relate to directors under the Corporations Act" but without evidencing having actually grappled with those requirements.

311. The Deed Poll did not expressly refer to sections 601FC or 601FD.

312. Given those matters were expressly referred to in the Allens Advice, the absence of reference to the particular provisions is evidence that the directors did not specifically have regard to them when entering into the Deed Poll and putting the proceeds split into effect.

Other issues

313. If the Director Defendants had actually read and considered the conflicts policy, one would expect that the Deed Poll would explicitly refer to it. Instead, clause 2.1(c) referred generically to "any other procedures that are in place" "in respect of conflicts of interest".

314. Similarly, had the Director Defendants carefully considered the terms of the Allens Advice, one would expect a specific reference to the advice by name. Instead, there was a generic reference to advice having been taken.

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104 Darcy T2-97 ln 26 ("I don't recall"), van der Hoven T3-40 ln 7 ("I can't recall if I did or didn't"), Mulder T3-50 ln 36-28 ("Whilst I may not have made any direct enquiries …"), Tickner T3-82 ln 38-39 ("I can't recall a specific enquiry")

315. It is remarkable that each of these matters slipped by each of the directors. They now give evidence of a meeting at which the Deed Poll was discussed, but none identified any problems or suggested any amendments.

316. Clause 3.1(h) does not attempt to explain how diverting 35% of the Gross Settlement Sum away from the FMIF was in the best interests of the FMIF's members.

317. It is entirely unclear what the statement at clause 3.1(l) means. The "positive effects" on the FMIF are not identified.[105]

318. Such a collective, unanimous consideration of the conflict issues also sits uneasily with the statement in the Allens Advice that the directors must make "their own independent assessment" of the relevant matters.

319. The Deed Poll concluded with the following, self-serving, operative provision at clause 4.1:

> "In reaching their decisions, the Directors have:-
>
> (a) acted honestly;
>
> (b) acted in the best interests of the members of the relevant schemes; and
>
> (c) complied with the relevant schemes' compliance plans."

320. That is not evidence that they in fact did so, when the evidence of their conduct demonstrates a grave lack of reasonable care.

Unclear "understanding"

321. It is common ground that the "understanding" was not an express, binding prior arrangement and there was no particular proportion in contemplation until the WMS Report was sought.

322. Directors of a professional funds manager need not be expected to have legal training sufficient to form a view on the legal enforceability of a transaction. However, even if there was a broad or vague "understanding" that the MPF would receive "something", that was not a sufficient basis for a professional funds manager to divert $15.5m of FMIF scheme property to another fund.

323. The directors ought to have appreciated, on reading the WMS Report, the Allens Advice and the Deed Poll, that each was premised on there being an understanding and that those documents did not in fact advise that such an understanding existed.

324. The directors did not seek legal advice whether there was a binding understanding or arrangement which required the proceeds split.

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105 A potential positive effect might have been not being sued by the MPF in the future to recover, at least, the legal fees spent – that is, the argument raised by the Priority Defence. However, no such actual benefit or risk is identified in the Deed Poll.

325. It was up to the directors to independently consider whether the understanding in fact justified a payment at all. They proceeded on the assumption that it did, but did not exercise care in forming a view about that matter.

WMS Report

326. Advice was sought from WMS on 6 December 2010 [FMIF.100.002.9133] however that firm was not in a position to provide legal advice on which the directors could rely in seeking to resolve their conflict position.

327. The WMS Report was concerned with the narrow, commercial question of what percentage split might be justifiable.

328. The fact that WMS was engaged to report on what an appropriate proceeds split would be confirms that there was no understanding between the directors as to what MPF would receive or how any payment was to be calculated.

Allens Advice

329. The Allens Advice was a highly qualified checklist of matters which the directors needed to take into account in making their own decision. It did not offer an opinion, without more, that the proceeds split was acceptable.

330. One does not require legal training to appreciate that. An advice in relation to a proposed $15.5m conflict transaction, given to a professional trustee, warranted close scrutiny. This was not a "tick the box" issue, in respect of which the mere seeking of advice would be enough. The Allens Advice warranted a level of consideration commensurate with the issue it addressed. A reading of the Allens Advice with that level of care would have demonstrated the shortcomings and the need to give independent consideration to the issues raised.

331. In particular, the Allens Advice set out a checklist of items to consider, but in doing so identified inconsistent obligations but offered no way to reconcile that inconsistency. Critically, it identified the obligation on LMIM to act in the bests interests of both the FMIF and MPF but did not explain how paying $15.5 to the MPF would be in the best interests of members of the FMIF.

<u>Instructions and assumptions</u>

332. The Allens Advice was the product of the instructions provided.

333. Mr Monaghan's instructions to Allens were in the following terms (Exhibit 33)[106]:

> "John
> As discussed, I attach:

106 FMIF.200.012.6633

> 1. My original email to Aaron Lavell of WMS setting out the facts and attaching relevant documents;
>
> 2. An email from Aaron attaching his final report (his report is expressed to be "final", however the transaction has not yet settled, so to that extent it is still draft and is likely to require amendment as Gujarat is now proposing to vary the settlement terms by purchasing the Bellpac land for cash rather than paying for it over time);
>
> 3. An email from Lisa Darcy to Gujarat, sent today, setting out the broad terms of the proposed cash purchase of the Bellpac land by Gujarat.
>
> Please note that Alf Pappalardo and Bruce Wacker are acting in relation to documenting the settlement with Gujarat. Draft documents have been prepared, but these will need to be amended to reflect the proposed cash purchase, should that proceed.
>
> I am seeking an advice confirming that the proposed split of proceeds between the funds is legally acceptable given that LM is in a position of conflict, being the trustee of both the FMIF and the MPF. I am happy to discuss the scope of the required advice with you further.
>
> [...]"
>
> (emphasis added)

334. The broad language "legally acceptable" should be noted.

335. That presupposes a decision to perform the proceeds split. That is a very different question to asking whether the FMIF would be obliged to participate in such an arrangement.

336. The instructions to WMS, which were also used as instructions to Allens, were not directed to legal advice. They were instructions to a firm of accountants about what percentage of a proceeds split might be within market rates.

337. A number of matters were missing from those instructions, which also infected the Allens Advice and the Deed Poll.

No express, binding arrangement

338. It is admitted that there was no binding, express prior arrangement for LMIM as trustee of the MPF to be paid any amount if the amount that LMIM as RE of the FMIF recovered did not cover the whole of the amount owing by Bellpac to it.[107]

LMIM would not oppose its own deal

339. The instructions did not state, as was the case, that LMIM as trustee of the MPF would not withhold their consent to the settlement.[108] The reality of the case was that LMIM was acting in dual capacities. It was never going to commercially pressure itself.

FMIF had priority over the MPF

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107 5FASOC para 30C(d)(iii) The admissions are to paragraph 30C(d)(iii) of the 5FASOC. Darcy Defence paragraph 28(g)(i), van der Hoven Defence paragraph 31(f)(iv)(A), Mulder Defence paragraph 31(f)(iv)(A), Tickner Defence paragraph 30C(m)(i).

108 5FASOC para 30C(b)(ii).

340. The instructions similarly did not state that the deed of priority granted the FMIF first priority over the MPF. Even leaving aside the prioritisation of members' interests pursuant to sections 601FC(1)(c) and 601FD(1)(c), a pre-set priority arrangement between the funds was plainly relevant to ascertaining the rights between them. The absence of reference to the deed of priority in the instructions suggests that the deed of priority was overlooked.

Advances being booked against the MPF loan account

341. The instructions did not state the fact that the Bellpac Proceeding was being funded by the MPF as second mortgagee. That is apparent from the MPF loan statements referring to the expenses as advances to Bellpac (Exhibit 39).[109] The payments were not treated as advances to the FMIF.

342. This is strong evidence why this was not a litigation funding arrangement. On the defendants' case, the MPF is having its cake and eating it too, getting interest on the expenses plus also getting a litigation funding return uplift.

No recognition of ss601FC and 601FD

343. The instructions did not mention section 601FC(1)(c) or LMIM's conflict management policy, which referred to that provision. LMIM's conflict policy would have been a key document in the case of any advice as to how to resolve conflicts.[110]

No recognition of statements in PDS or the usual priority position between the funds

344. As noted above, the FMIF was a "first mortgage" fund and that position had been formally represented to investors by the PDS (Exhibit 1).[111]

Instructions were to justify MPF's gain, rather than consider FMIF's position

345. Critically, the instructions did not consider or seek to promote the FMIF's position. The instructions did not ask about FMIF's rights to keep the whole of the settlement sum or the whole of the settlement sum less an amount sufficient to reimburse MPF the money it had advanced to fund the Bellpac litigation. Rather, the instructions foreshadowed that a decision to distribute a share of the settlement proceeds to MPF had already been made.

Hypothetical only

346. The advice was necessarily hypothetical because, as the Defendants identify, the settlement documents with Gujarat in relation to the Bellpac Proceeding were not yet in existence and the terms of any eventual settlement were still around three months from being agreed.[112]

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109 FMIF.100.001.0891

110 If the Statement of Claim is amended, these circumstances should be emphasised.

111 FMIF.500.005.5794

112 See also paragraph 30C(a) of the 5FASOC.

347. Therefore, the Allens Advice could not have been regarded as conclusive of the directors' duties in relation to the settlement deal which was in fact concluded.

348. The Allens Advice (Exhibit 35)[113] contains a great deal of information, but little in the way of clear advice. In places it makes statements which appear to be at odds with the conclusion that it would be "legally acceptable" to proceed with the proposed arrangement. Indeed, the Allens Advice does not clearly come to any such conclusion, but rather sets out a number of matters which the directors should take into account and, subject to satisfaction of those matters, the proposed transaction could be deemed "legally acceptable".

Content of the Allens Advice

349. The Allens Advice is not difficult to comprehend. It would not take legal training to appreciate that the Allens Advice is so heavily qualified that it did not, in truth, provide an opinion that the Proceeds Split was legally acceptable. Rather, it provided a list of matters which the directors would need to take into account in forming their own view as to whether the Proceeds Split was prudent.

350. The conclusion of the advice was that the split was legally acceptable "subject to" a number of conditions and assumptions, critically that there was a need to split the proceeds between FMIF and MPF and that the proposed split between FMIF and MPF was in the best interests of FMIF, and that the directors had to form their own judgment about such matters. In other words, the advice did not answer the question of whether the proposed split was in the best interests of the FMIF, but rather assumed that it was and called on the directors to make their own judgment. It was also clear that the advice never explained:

(a) how it was in the best interests of FMIF to pay over $15.5 million otherwise due to FMIF as 1st mortgagee where there was no legally enforceable obligation that bound FMIF to pay any monies to MPF from the Bellpac Settlement; and

(b) how as directors of LMIM they could be acting in the best interests of the FMIF by withholding agreement to settle the Bellpac litigation in their capacity as trustee of the MPF.

351. The Advice relevantly opined:

(a) at [9]:

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

(b) at [15] that the firm's brief was as follows:

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113 FMIF.100.003.6995

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

(c) at [16], gave the heavily qualified opinion:

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

(d) at [16](d):

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

(e) at [16](e):

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

(f) at [16](f):

> "The directors of the RE must comply with their general law and statutory duties under the Corporations Act (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed)";

(g) at [25]:

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

It is difficult to see how providing 35% of a settlement sum to another entity would be in the best interests of members of the FMIF. There is no analysis in the Allens Advice as to whether, or why, providing 35% of the proceeds to the MPF would be in the best interests of members of the FMIF. There is also no analysis of whether there could be any such agreement or enforceable commitment between LMIM and itself in different capacities;

(h) at [27]:

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

This is a very curious statement. How could it be that giving MPF a large sum of money for past consideration would be in the best interests of FMIF's members and not for the purpose of benefitting members of the MPF? In any event, the Allens Advice does not analyse how such a theoretical situation might prevail on the facts of the case.

(i) at [35]:

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

This statement disregards section 601FC(1)(c) of the Act. The statement sits uneasily with the references elsewhere in the Allens Advice to the effect of that provision. The statement also seems inconsistent with what appears at paragraph [25].

(j) at [37]:

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

This statement is obviously inconsistent and incompatible with what appears at paragraph [27].

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

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

It is difficult to see how any proceeds split could be in the best interests of members of the FMIF absent any analysis in the Allens Advice as to why a proceeds split in favour of the MPF may be in the interests of members of the FMIF. This statement is also at odds with paragraph [35] of the advice.

(l) at [54]:

> "The RE will also need to review the FMIF's compliance plan and ensure that any specific procedures set out in the compliance plan to manage conflicts of interest are followed. We have not reviewed the terms of the compliance plan."

(m) at [55]:

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

It is difficult to see how the proceeds split could involve anything other than putting one fund's interests ahead of the other, at least to an extent.

(n) at [57]:

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

It is not apparent that LMIM did this.

(o) at [62] set out, among other things, the terms of section 601FD(1)(c) of the Act.

(p) at [63]:

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

The advice did not go on to elaborate on what those duties would have been.

(q) at [69](c):

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

352. Paragraph 30H of the 5FASOC is therefore made good. The Allens advice did not reach any unqualified conclusions as to whether payment of the proceeds of settlement to MPF could be justified.

353. The Allens Advice recognised the obvious conflict faced by LMIM, given its duties to both LMIM and the MPF.

354. The Allens Advice set out a number of matters which the directors of LMIM would need to take into account in determining whether to cause part of the settlement proceeds to be paid to the MPF.

355. The Allens Advice referred to the need for LMIM to act in the best interests of members of the FMIF, but did not explain how paying circa $15m to another fund, ranking behind it in priority, which fund had paid less than $2m in costs, would be consistent with that obligation. That was a matter which the directors were left to resolve.

356. Although the Allens Advice noted sections 601FC and 601FD, it also stated that the directors would need to avoid putting the interests of the FMIF ahead of the interests of the MPF. That would suggest an irresolvable conflict, if both funds had to be preferred and neither could be disadvantaged.

357. Again, the use of the term "vice versa" at paragraph [56] suggested that there was an equal balancing exercising between the two funds. How that fits with statutory duties and duties of a trustee was not explained. Importantly, the Allens Advice did not explain how paying 35% of the

settlement proceeds to the MPF would be consistent with the obligation not to put the interests of the MPF ahead of the FMIF. Again, that was a matter which the directors were left to resolve.

358. The Allens Advice was also premised on there being a need for the MPF to be paid something. Paragraph 9 recorded that there was an understanding, which fell short of a "formal agreement", that the MPF would take a share of the proceeds recovered. As submitted above, there was in fact no such understanding among the directors.

359. The Allens Advice contained inconsistencies, which should have been readily apparent to a director reading the Allens Advice with a level of care commensurate with paying $15.5m to a related unregistered managed investment scheme, when that money was subject to a claim by the registered investment scheme. Those consistencies are as between paragraphs [25] and [35] and between paragraphs [27] and [37], respectively.

360. The Allens Advice referred to the Compliance Plan. The Allens Advice in substance invited the directors to review the Compliance Plan for themselves. However, none of them gave evidence that they did so. Had they done so, they would have been confronted with the content of the duties at sections 601FC(1)(c) and 601FD(1)(c) of the Act which priorities the interests of members of the FMIF (Exhibit 34[114] at 0006).

361. That cannot be reconciled with the stated obligation to prefer the interests of the MPF.

362. The Allens Advice at [57] stated that LMIM would need to ensure that it followed any procedures or policies established in accordance with s912A(1)(aa) of the Act for managing conflicts of interests, but did not state how the proceeds split could be reconciled with any such obligations. That left it to the directors to enquire whether that was satisfied.

363. Paragraph [63] of the Allens Advice reasonably suggested that the effect of section 601FD(2) of the Act may have been to impose fiduciary duties on LMIM to act in the best interests of FMIF. That left it to the directors to consider that possibility.

364. Finally, the Allens Advice expressly stated at [50] that the directors must make "their own independent assessment" of the relevant matters and that they must give "careful judgment".

365. Therefore, the plaintiff's conclusion at paragraph 30H(k) of the 5FASOC is made good: the Allens Advice did not, when properly construed, reach an opinion that the proposed transaction was "legally acceptable". In fact, it identified a number of relevant issues and invited the directors' to consider those issues for themselves.

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114 FMIF.500.015.1877

Defendants' lack of proper consideration of the Allens Advice

366. Each defendant pleaded that they read the Allens Advice[115]

367. However, their evidence was not clear on that point and suggested that, to the extent they read the advice, they only did so briefly and in the same meeting at which they signed the Deed Poll, unamended, in the form prepared by Mr Monaghan.

368. This was not a run-of-the-mill advice on a run-of-the-mill issue. The proposed proceeds split was a major decision.

369. It was not Allens' role to do the directors' jobs for them. The mere act of taking advice from a reputable national law firm was not a substitute for the exercise of care and skill in relation to a substantial transaction.

370. Alternatively, the directors may submit that the Allens Advice was sought and the Deed Poll was executed merely for audit reasons. If that was the purpose, that may explain the apparent lack of care in reading the Allens Advice or engaging with the Deed Poll. If such a low level of care was exercised, that was not commensurate with the level of care and skill required in relation to a payment of $15m away from a registered managed investment scheme.

371. The above criticisms of the Allens Advice support the contention that acting on this advice failed to meet the standard required by section 601FD(1)(b). The Director Defendants seem to have failed to have appreciated the inconsistencies in the advice and the fact that the advice was so heavily qualified that it did not in fact provide support for their conduct. Rather it called on the directors to address for themselves a number of critical matters. Indeed, it twice mentioned the statutory duty of undivided loyalty at sections 601FC(1)(c) and 601FD(1)(c) which ought to have alerted the Director Defendants of the need to carefully consider for themselves what was meant by acting in the best interests of members of the FMIF.

372. The Defence of the Second Defendant therefore goes too far in suggesting that Allens' conclusion was that they were not aware of any reason why splitting the settlement proceeds between the two funds in the way suggested by the WMS Report would breach any legal duty. Rather, the Allens Advice was conditioned on a number of critical assumptions which it called for the directors to determine themselves and pointed out numerous issues which the directors needed to take into account. If the Second Defendant, or other Defendants, took the Allens Advice as a "green light" for the proceeds split without further addressing the critical assumptions that it made, questioning the inconsistencies in the advice or reviewing the conflicts policy, they did not take reasonable care and skill in considering the advice.

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115 Drake Defence paragraph 34(i)(i), Darcy Defence paragraph 35(g)(i), van der Hoven Defence paragraph 38(i), Mulder Defence paragraph 38(i), Tickner Defence paragraph 37A(b).

373. Merely commissioning "an advice" and going through the motions of following it was not enough. Simply relying on Mr Monaghan stating "it's ok" was not enough in relation to a decision to pay over $15.5m to one fund over another. That decision affected the rights of members of the FMIF and beneficiaries of the MPF in a material way and required careful consideration.

374. The fact that the Allens Advice was provided by a top-tier national law firm with knowledge of the matter did not reduce the directors' duty to read and critically think about the advice provided.

375. It is also clear that the directors:

(a) never considered, nor took any steps to cause LMIM as RE for the FMIF to obtain advice as to, whether LMIM as RE of the FMIF and LMIM as trustee for the MPF could have received all of the sums due as part of the settlement of the Bellpac proceedings without having a split of the proceeds of that settlement between FMIF and MPF; and

(b) never considered, nor took any steps to cause LMIM as RE for the FMIF to obtain advice as to, whether LMIM as RE of the FMIF and LMIM as trustee for the MPF could have received all of the sums due as part of the settlement of the Bellpac proceedings other than an amount to reimburse MPF for the contribution it made it made to the funding of the Proceedings.[116]

LMIM acting in different capacities

376. The directors had the power to cause LMIM to enter into the Deed of Release and the Deed of Settlement and Release, and to refrain from preventing the settlement of the Bellpac Proceedings.

377. The practical reality was that the same corporation, with the same directors, was acting as both RE and trustee. The idea that LMIM as RE of the FMIF and LMIM as trustee of the MPF "both had to agree" is wrong.

378. Although LMIM was acting contemporaneously in different capacities, LMIM could not have commercially pressured itself. Once LMIM decided to proceed with the settlement of the Bellpac Proceeding, although it was trustee to both the FMIF and the MPF, it was able to give releases binding on both the FMIF and the MPF.

Priority position

379. As noted above, the FMIF was operated as a first mortgage income fund and had the benefit of a Deed of Priority. There is no evidence that the directors considered whether the FMIF could insist on that priority position. The directors maintain that the Deed Poll set out the factors they

116 Darcy T2-96 ln 19-24, van der Hoven T3-40 ln 40-41 and T3-41ln 29-33, Mulder T3-50 ln 40 to T3-51 ln 7, Tickner T3-82 ln 41 to T3-83 ln 8

relied upon. If that is so, on their own evidence, they did not take into account the relevance of FMIF's prioritised position.

Reliance on Mr Monaghan

380. The directors in their affidavits referred to reliance on Mr Monaghan in relation to risk or compliance matters.

381. The directors did not seek to examine Mr Monaghan to support or verify their positions.

382. The defendants raised the "understanding" issue and bore the onus of proving it. They have fallen well short of discharging that onus.

Causation

383. Had the directors acted in accordance with their duties, they would have taken the steps pleaded at paragraph 45AA, or alternatively 45AB, of the 5FASOC.

384. That is, they would have caused LMIM to enter into the same settlement transaction but there would have been no proceeds split and all of the settlement proceeds would have been received by PTAL as custodian for the FMIF.

385. The matters particularised at paragraph 45AA support the plaintiff's case:

(a) as a matter of logic, had the defendants complied with their duties of loyalty and due care, they would have caused LMIM as RE of the FMIF to enter into the Deed of Release, the Deed of Settlement and Release and the Gujarat Contract because doing provided the only realistic opportunity to recover money in relation to the FMIF Bellpac Loan. In so doing, the directors also had the power to grant releases in respect of MPF's position in that litigation;

(b) the Deed of Priority supported that position;

(c) Bellpac was in default under the FMIF Bellpac Loan[117] and was in liquidation. [118]

(d) as pleaded at paragraph 24 of the 5FASOC, the MPF had been funding the Bellpac proceedings as second mortgagee. Related to that, there was no "understanding" of the type alleged by the directors.

386. Therefore, had the directors complied with their duties under sections 601FD(1)(b) and 601FD(1)(c) they would have acted in a way which promoted and advanced the position of the

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117 The PTAL and MPF Notices of Exercise of Power of Sale are at Exhibit 124 FMIF.009.004.0035, Exhibit 125 FMIF.040.004.0047, also described at paragraphs 121 and 122 of Mr Tickner's affidavit.

118 Paragraph 16 of the 5FASOC is admitted by all Defendants.

FMIF over all other persons, including over and above the interests of themselves, LMIM in its own capacity and LMIM as trustee of the MPF.

387. This was not a case of a negotiation with an independent third party where a compromise might be required to reach a deal. Therefore, this case did not raise any argument about the difference between acting in the *best interests* for the scheme and achieving the *best outcome* of the scheme. The directors also controlled the notional counterparty, LMIM as trustee of the MPF, and were therefore able to control the outcome.

388. Accordingly, the directors would have, in accordance with their duties, caused the whole of the proceeds of the Bellpac proceedings (which were "scheme property") to be paid to the FMIF. When required to choose between which fund to prefer, they would have preferred the FMIF over the MPF.

389. They would not have been exposed to any claim for breach of Part 2D.1 directors duties for taking that course: s601FD(2).

390. They would have then potentially faced the prospect of a claim by the MPF for breach of trust, however clause 18.1 limited that exposure.

391. Clause 18.1 of the MPF Constitution provided:

> "**Indemnity and Liability**
>
> 18.1 The following clauses apply to the extent permitted by law:
>
> (a) The Manager is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:
>
> (i) otherwise than in accordance with this Constitution and its duties; and
>
> (ii) without a belief held in good faith that it was acting in accordance with its Constitution or its duties.
>
> In any case the liability of the Manager in relation to the Scheme is limited to the Scheme Property, from which the Manager is entitled to be, and is in fact, indemnified.
>
> (b) In particular, the Manager is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:
>
> (i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the Manager;
>
> (ii) it acted as required by Law; or
>
> (iii) it relied in good faith upon any signature, marking or documents."

392. By reason of clause 18.1(b)(ii) of the MPF Constitution, had LMIM as trustee of the MPF acceded to the Deed of Release and the Deed of Settlement and Release and settled the Bellpac Proceedings and permitted the whole of the Bellpac Proceedings proceeds of settlement to be paid to the FMIF, that would have constituted acting "as required by Law". LMIM as trustee of

the MPF may not have been liable to the members of the MPF for the consequences of that decision.

393. That highlights an important distinction between this case and *ASIC v Drake* [2016] FCA 1552.

394. That was not a s601FC/601FD case. Rather, ASIC put its case on the basis that it needed to prove a breach of trust by LMIM as trustee.[119]

395. That made the exclusion of liability at clause 18.1 of the MPF Constitution relevant.

396. However, the plaintiff's case in this proceeding does not rely on there being a breach of trust by the trustee of the MPF. This case concerns the conduct of the directors with respect to the FMIF.

Quantum

397. The plaintiff submits that had the directors exercised reasonable care and skill as directors of LMIM as RE of the FMIF, they would have secured the whole of the Bellpac Proceedings settlement proceeds for the FMIF.[120] They had the power to do so, as the RE of the FMIF was one in the same company as the trustee of the MPF.

398. On that basis, the loss suffered by the FMIF was the full amount of the Settlement payment of $15,546,147.85.

399. However, the Court may find that a reasonable exercise of skill on behalf of the directors might have seen LMIM as RE of the FMIF reimburse the MPF for the money it advanced.

400. That is a matter for the defendants to justify as a matter of reducing the quantum of the claim against them.

401. There was a dispute in the pleadings and on the evidence as to the full amount which the MPF loaned in relation to the Bellpac Proceedings.

402. The plaintiff relies on the following to calculate the total amount of costs paid by the MPF up to settlement on 22 June 2011:

(a) Exhibit 112[121] is the loan statement referred to in the 5FASOC which shows total costs incurred up to 7 July 2011 as $1,950,421.69;

(b) Ms Darcy gives evidence in her third affidavit of $414,585.71 being expended up to 7 July 2011 on other recovery actions, such as the bond litigation and the guarantor litigation;

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119 Paragraphs [250] and [255]
120 Paragraph 45AA of the 5FASOC
121 FMIF.017.001.1082

(c) therefore, the amount contributed by the MPF to the costs of the Bellpac Proceeding was the difference between those amounts, being $1,535,835.98.

403. As to the appropriate commercial rate of interest which might have been allowed, that is again a matter for the defendants to establish as it goes to the possible reduction of the amount payable by them. However, the ASIC Benchmark Disclosure document at Exhibit 18[122] refers to Deutsche Bank charging 15% interest to LMIM as RE of the FMIF. That figure could be adopted as a reasonable commercial rate.

SECTION 1317S DEFENCE

Principles – s1317S relief

404. In *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430, Middleton J noted that s 1317S involves three stages of inquiry:[123]

(a) whether the applicant for relief has acted honestly;

(b) whether, having regard to all the circumstances, the applicant ought fairly to be excused;

(c) whether the applicant should be relieved from liability wholly or in part, and if partly, to what extent.

405. It is for the defendants to satisfy the Court under each of the limbs of section 1317S.[124]

406. The first requirement of honesty requires more than a mere absence of dishonesty. It must be that the person acted "without moral turpitude," that is:

(a) without deceit or conscious impropriety;

(b) without intention to gain an improper benefit or advantage; and

(c) without carelessness or imprudence that negates the performance of the duty in question."

407. In *Hall v Poolman* (2007) 65 ACSR 123, Palmer J said at [325]:

> "In my view, when considering whether a person has acted honestly for the purposes of a defence under ss 1317S(2)(b)(i) or 1318 of the CA, the court should be concerned only with the question whether the person has acted honestly in the ordinary meaning of that term, that is, whether the person has acted without deceit or conscious impropriety, without intent to gain improper benefit or advantage for himself, herself or for another, and without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all has been to carry out the duties and obligations of his or her office imposed by the Corporations Act or the general law. A failure to consider the interests of the company as a whole, or more particularly the interests of creditors, may be of such a high degree as to demonstrate failure to act honestly in this sense. However, if failure to consider the interests of the company as a whole, including the interests of its creditors, does not

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122 FMIF.500.009.8033

123 *ASIC v Healey* (2011) 196 FCR 430; [2011] FCA 1003, 441 [84].

124 *Dominium Insurance Company of Australia Limited (in liquidation) v Finn* (1989) 7 ACLC 25, 33–34; *Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (receivers and managers appointed) (in liquidation)* [2014] FCA 1308 [68].

rise to such a high degree but is the result of error of judgment, no finding of failure to act honestly should be made, but the failure must be taken into account as one of the circumstances of the case to which the court must have regard under ss 1317S(2)(b)(ii) and 1318 of the CA."

408. An example of where a director was found to have acted honestly on the **first** factor but failed on the **second** factor was in *ASIC v Flugge (No 2)* [2017] VSC 117.

> "[64] Although I do not find that Mr Flugge acted dishonestly, the breach of duty was serious and had serious adverse consequences. His conduct was a significant departure of the conduct required of a director. It was not a minor or accidental breach of duties that could be excused, particularly having regard to the circumstances of the appointment of Mr Flugge. The payment of the inland transportation fees was unusual. The payments arose in any area where AWB had to be particularly careful as wheat was being exported to Iraq under the OFFP, that modified the existing sanction regime. The payments warranted a trip to Iraq by the CEO, Mr Rogers, with Mr Hogan. The complaint conveyed to Mr Flugge went to the propriety of AWB's actions and had led to the UN raising the matter, via Mr Nicholas, with Mr Flugge, who was the chairman of the board.
>
> [65] The evidence did not establish why Mr Flugge did not make the inquiries that he ought. His conduct in not doing so seems at odds with his standard of conduct that is borne witness to in the many fine character references tendered on his behalf. ASIC pressed that Mr Flugge has not offered an explanation for his failure to carry out his duties and suggests that that somehow must tell against him. As I have said, I made no findings as to his state of mind.
>
> [66] I consider that the breach of duty was serious. In the scale of breaches it was certainly not egregious, but it was not the sort of breach for which a director, knowing what Mr Flugge knew, should be excused."

409. Evaluation of the second and third requirements can involve consideration of: [125]

(a) the nature of the applicant's "appointment" or office;

(b) whether the applicant was paid for undertaking the contravening conduct;

(c) whether the conduct was in accordance with some established practice;

(d) whether the applicant obtained and followed competent advice before committing the contravening act;

(e) the seriousness of the contravention, which includes the importance of the provision contravened in terms of public policy, the degree of flagrancy of the contravention, and the consequences of the contravention in terms of harm to others;

(f) impropriety such as deceptiveness or personal gain; and

(g) the presence or absence of contrition by the applicant.

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125 *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452 [868]-[873]; *Australian Securities and Investment Comission v Healey* (2011) 196 FCR 430, 442 [89]; *Australian Securities and Investments Commission v Vines* (2005) 65 NSWLR 281; [2005] NSWSC 1349, 293-295 [51]-[57].

410. Substantive findings rejecting an application for s 1317S relief were set out in *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452. There, the applicants for relief occupied senior positions in the responsible entity, a matter which Wigney J emphasised in denying relief.

> "[878] In any event, even if it appeared that Mr Sullivan acted honestly, the circumstances of the case all militate against the finding that Mr Sullivan ought fairly to be excused. He held a very senior position in the responsible entity of a managed investment scheme. His departures from the required standards of care, diligence and reasonableness were significant and serious. Section 601FD of the Corporations Act is an extremely important provision in terms of public policy. It is plainly intended to protect vulnerable members of managed investment schemes. Mr Sullivan's contraventions of s 601FD were serious, flagrant and resulted in serious and significant consequences to the Fund and its members. Mr Sullivan has shown no contrition whatsoever. He has strenuously contested these proceedings at every stage and has gone so far as to give untruthful evidence to exonerate himself."

411. The reasoning in relation to the claims for relief by Mr Donaldson and Mr Swan are useful to consider, because those directors' conduct in turning a blind eye to aspects of the transaction in question was analogous to the conduct of the directors in the present case in uncritically treating the Allens Advice as permitting the proceeds split.

412. The relevant passage of *Sullivan* was as follows:

> **"Mr Donaldson**
>
> 884 The circumstances of Mr Donaldson's case are different and more difficult.
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> 885 The first question is whether Mr Donaldson acted honestly.
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> 886 The main issue for Mr Donaldson in terms of his honesty concerns the contravention arising from his approval of the backdated loan proposal dated 9 August 2006. As explained in detail earlier, Mr Donaldson's evidence concerning the circumstances and his state of mind when he approved this proposal was unsatisfactory. He was unable to give a rational or plausible explanation for why he signed the proposal in circumstances where it was obviously backdated. His evidence that he gave the contents of the proposal no close scrutiny, let alone independent or considered analysis, and therefore did not notice the obvious discrepancies and issues in the proposal, was equally problematic and lacked credibility.
>
> 887 For the reasons given earlier, the most likely scenario, and the most plausible inference, was that Mr Donaldson knew that there were issues concerning the AGA facility and this proposal in particular. For whatever reason, however, he was prepared to turn a blind eye to those issues without giving the proposal any proper analysis and without even attempting to ensure that the proposal and the extension of the AGA facility complied with City Pacific's policies and procedures or was in the best interests of the Fund or its members.
>
> 888 This involved moral turpitude to the point where it cannot be accepted that Mr Donaldson acted honestly. At the very least it involved such a serious departure from the standards required of Mr Donaldson as a senior officer of City Pacific that it negated the performance of his duties.
>
> 889 In those circumstances, Mr Donaldson is not entitled to relief under s 1317S or s 1318 of the Corporations Act.
>
> 890 In any event, when regard is had to all the circumstances, it cannot be accepted that Mr Donaldson ought fairly to be excused from his liability. For the reasons already given, Mr Donaldson's conduct involved a serious and significant departure from the statutory standard of care and diligence that he was required to observe. The contravention was serious having regard to the importance of s 601FD of the Corporations Act in protecting vulnerable

members of statutory schemes. The potential and actual consequences of Mr Donaldson's contraventions were equally serious. This was a very large increase or extension to the AGA facility. The potential for loss to the Fund was large.

891 Finally, it is not accepted that Mr Donaldson displayed any real signs of contrition. It is not accepted that he gave a full, frank or honest account of the circumstances in which he approved the December 2006 proposal.

892 For those reasons, Mr Donaldson should not be excused or relieved of his liability arising from his contravention.

Mr Swan

893 Virtually the same findings and conclusions apply to Mr Swan.

894 As was the case with Mr Donaldson, it is not accepted that Mr Swan gave a full, frank or honest account of the circumstances in which he came to sign and approve the loan proposal dated 9 August 2006. It was implausible that a person with Mr Swan's qualifications and experience would, as he effectively claimed, give this significant proposal no independent or considered scrutiny or analysis, or would not notice the many discrepancies and issues with the proposal itself. Even though he wrote the words "ratified" and the date 11 January 2007 on the December 2006 proposal when he signed it, his explanation for that, and why he did not cross out the date 9 August 2006, was unconvincing.

895 As with Mr Donaldson, the most likely scenario, and the most plausible and probable inference, was that Mr Swan knew that there were issues with the AGA facility and this proposal in particular. Rather than independently and carefully analysing the proposal, and taking steps to ensure that it complied with City Pacific's policies and procedures, he turned a blind eye to the issues and discrepancies, and simply signed the proposal. His conduct in so doing involved significant moral turpitude. So significant was his departure from the required standards of care and diligence that it cannot be concluded that he acted honestly.

896 The circumstances of Mr Swan's case are also such that it cannot be concluded that he ought fairly to be excused. Mr Swan's conduct, on any view, fell well short of the standards of care and diligence that he was required to meet in all the circumstances. His contravention of s 601FD of the Corporations Act was serious and involved significant potential and actual consequences for the Fund. It cannot be accepted that Mr Swan was at all contrite.

897 In all the circumstances, it cannot be accepted that Mr Swan ought fairly to be excused and relieved of liability in relation to his contravention."

413. In *Morley v Australian Securities and Investments Commission (No 2)* [2011] NSWCA 110, the Court, in a unanimous judgment, rejected Mr Morley's application for relief under s 1317S. Relevant factors included the "potentially serious consequences" for the company (JHIL), and relevant stakeholders; his senior position in JHIL; and the fact that JHIL was a "major public company".

"51 For reasons which will be apparent, we consider that Mr Morley's conduct giving rise to the cash flow analysis contravention, even if explained as negligence and an honest mistake, involved a high degree of departure from the care and diligence required by s 180(1) of the Act. It had potentially serious consequences for JHIL. Proceeding with the separation proposal and establishment of the Foundation was a major step for JHIL, and one of great importance to investors and to asbestos claimants.

52 Mr Morley was a senior executive in JHIL, a major public company. Although we have found that he acted honestly, it does not appear to us that he ought fairly to be excused, or that he should be relieved from liability for the contravention. Proper corporate governance and business activity depend on business leaders adhering to standards not only of honesty but also of care and diligence, and a failure of the nature and seriousness of that of Mr Morley is not in our view one which can properly be excused. It should be subject to whatever may be an appropriate penalty, by disqualification order or pecuniary penalty, in fulfilment of the

protective purpose (including personal and general deterrence) of exercise of the powers under s 206C of the Act."

414. In *Clarke v Great Southern Finance Pty Ltd* [2014] VSC 516, Croft J considered that the defendants would be entitled to relief under s 1317S on the basis of the directors' reliance on due diligence, consultation of expert advice and the active role they took as directors.

> "1963. In terms of the evidentiary matters relied upon by the third parties in support of their contention that Mews and Patrikeos should be excused under these provisions, I can do no better than to set out their submissions in this respect in support of the contention that, if found liable on any basis, the Court should excuse Mews and Patrikeos under ss 1317S and 1318 of the *Corporations Act*:
>
> > "601. As the evidence set out above demonstrates, in reading and authorising the 2005 Plantations PDS, Mr Mews and Mr Patrikeos relied on the extensive and thorough due diligence undertaken by executives and management at Great Southern. That due diligence relied on the advice of appropriate independent experts not only as to what would be said in the PDS but also with respect to the due diligence on the proposed project itself. Such expert advice came from GHD and Jaakko Poyrry. Neither Mr Mews nor Mr Patrikeos were foresters or had any experience in forestry. Accordingly, they relied on the internal forestry division at Great Southern, which also produced a report entitled 'Great Southern Plantations Limited – Plantation Growth Rates', which was included in the due diligence and verification materials for the 2005 Plantations PDS. Mr Ellis consistently produced answers to questionnaires as part of the due diligence process confirming that the 250m3 prediction was soundly based.
> >
> > 602. As well as the internal advice provided to them by Great Southern's Forestry Division, Mr Mews and Mr Patrikeos also had the benefit of seeing other independent expert reports as to bluegum plantations from Mr Quill, Dr Inions, Mr Spriggins and URS. As noted above, there is nothing in any of these reports which would have put them on inquiry that anything in the PDS was defective or that they ought to make further inquiries. Moreover, the evidence establishes that Mr Mews and Mr Patrikeos, for the purpose of their own verification of the PDS and also as members of the Audit Committee of Great Southern reviewed and considered these materials. They each gave unchallenged evidence that they relied on the Independent Forester's Report produced as part of the 2005 Plantations PDS and would not have allowed statements about yields to be in the PDS but for confirmation of them in the Independent Forester's Report.
> >
> > 603. In addition, they relied on Mr Shearwood's supervision of the due diligence process and Freehills' sign-off in respect of the due diligence process. They both gave unchallenged evidence that but for Freehills' sign off letter approving the PDS, they would not have approved the PDS. Similarly, if they were not satisfied with the independent forester's reports and due diligence on the project they would not have authorised the issue of the PDS. The evidence establishes that Mr Shearwood knew not only of the use of additional resource but also the GSEC transaction and did not consider that such matters warranted disclosure, even after Mr Mews' letter of 3 August 2005 and 21 September 2005.
> >
> > 604. The evidence also establishes that if and when Mr Mews and Mr Patrikeos were not satisfied with board proposals or the conduct of their colleagues, they did not passively sit by. As to the proposed GSEC proposal, the evidence demonstrates how active Mr Mews and Mr Patrikeos were to ensure that the board received all the proper legal and accounting advice it could before considering the proposal. In the end, they never supported it and did not vote in favour of it. In addition, when they discovered the issues concerning the AFSL in 2004 they were actively engaged with the board and advisers to ensure that such poor corporate governance practices were not repeated. In their role as members of the executive remuneration committee, they were careful to ensure that the board considered the demands of executive

> management while balancing the interests of shareholders. Their behaviour as directors was unquestionably honest and they were entitled to rely on the extensive due diligence undertaken by management and supervised by Mr Shearwood and Freehills. In addition it was not unreasonable for them to rely on the advice provided to Great Southern by many independent forestry experts and the internal foresters at Great Southern who all consistently predicted harvest yields of 250m3 per hectare over 10 years.
>
> 605. In the several instances when Mr Mews and Mr Patrikeos were concerned, they properly and responsibly sought legal advice before as to what action they should take before they did so. They also took advice as to how they should go about the action that they ultimately decided to take. [...]
>
> That evidence was not challenged."

415. The indicators in favour of relief in Clarke are absent in the present case.

416. In *ASIC v Macdonald (No. 12)*[126] seven directors were found to have breached s 180(1) of the Act by approving the release of an ASX announcement which misrepresented the financial position of the relevant company JHIL (specifically its ability to fund settlements with former employees for asbestos related injuries).

417. Five of those directors were given copies of the draft ASX announcement before approving it. Two others were not. None of the directors were granted the benefit of section 1317S or section 1318. The court stated:

> "[63] It was not just mere inadvertence, imprudence or carelessness on the part of Mr Gillfillan and Mr Koffel not to have asked for a copy of the Draft ASX Announcement. The board was being asked to consider a matter additional to the circulated board papers relating to the formation of the Foundation, a most significant event in the life of JHIL.
>
> [64] The evidence does not persuade me that Mr Gillfillan or Mr Koffel acted honestly when they failed to request a copy of the Draft ASX Announcement, failed to familiarise themselves with its terms, or failed to abstain from voting in favour of the resolution to approve its publication."

418. Therefore, the mere act of reliance on another director does not establish honesty for the purposes of s1317S. Part of the directors' breach is their failure to take adequate steps to be informed as to the management of the company.

419. In *ASIC v Healey* [2011] FCA 1003, Middleton J explained the relevance of general deterrence to applications under ss 1317S and 1318.

> "91 I do not regard the issue of general deterrence as a factor at the evaluative stage, but it is a factor at the stage of the exercise of the discretion in considering whether to grant relief from liability at all or in part. Undoubtedly, the making of the order imposing liability is discretionary and the court may take into account a wide range of factors. Logically then, if a matter is relevant to be considered by the court in deciding on the orders it will make following a contravention, that matter is relevant to be considered by the court in deciding whether to grant relief from liability in whole or in part.

126 [2009] NSWSC 714

92 It was submitted by ASIC in these proceedings (and I accept) that in approaching the exercise of discretion under ss 1317S and 1318 the Court has to be mindful of the balance which the Court of Appeal in Mo*rley v Australian Securities and Investments Commission (No 2)* (2011) 83 ACSR 620 said had to be struck:

[125] Accepting that the need for personal deterrence is low, none the less general deterrence is in our view an important consideration given the nature and significance of the cash flow analysis contravention. As well, it is necessary that relief be granted appropriate to mark significant failure in performance of the duties of a senior executive of a large public corporation and to maintain public confidence in the law's upholding of corporate standards.

[126] In a picturesque phrase, in *Re One.Tel (In liquidation); Australian Securities and Investments Commission v Rich* [2003] NSWSC 186; (2003) 44 ACSR 682 at [26] Bryson J observed that "[n]o-one should be sacrificed to the public interest". That was taken up in Beekink at [113]. Protection of the public, including by general deterrence, is at the heart of disqualification orders, and a delinquent officer against whom a disqualification order is made is not sacrificed. The phrase is a reminder that the public interest and the need to protect the public from repeated conduct or like conduct of others is balanced against the hardship to the officer. ...

93 A question has arisen as to the scope of the relief available. Sections 1317S and 1318 speak of liabilities to which a person would otherwise be subject, and a liability that might otherwise be imposed. "

420. Finally, the plaintiff notes the emphasis in the directors' evidence on their reliance on the conduct of others, particularly Mr Monaghan.

421. A director cannot, in all circumstance merely rely on the advice of other directors or third parties. The court stated in *Deputy Commissioner of Taxation v Clarke*[127]:

"[107] For present purposes it is sufficient to note that there will be circumstances in which a director will be found not to have been negligent, by failing to make inquiries or otherwise participate in the decision-making processes of the company, when that director acts in reliance on assurances from, or the conduct of, another director whom he or she has come to trust. That this is so does, in my opinion, illuminate the scope of what is capable of constituting "good reason" for purposes of the various statutory provisions in which the formulation appears. However, nothing in *Biala v Mallina Holdings* suggests that total non-participation is permissible.

[108] What constitutes breach of the standards of care and of diligence, in a particular case, will depend on a wide variety of circumstances including the precise nature of the business conducted by the company and the composition of its board. However, the case law indicates that there is a core, irreducible requirement of involvement in the management of the company.

[109] Although the standard of skill may vary in accordance with the particular skills of the director, the core, irreducible requirement of skill involves an objective test, such as "ordinary competence" (*3M Australia Pty Ltd v Kemish* (at 373) per Foster J) or "reasonable ability" (*Rema Industries & Services Pty Ltd v Coad* (1992) 7 ACSR 251 at 259, per Lockhart J). An equivalent objective test applies to the core, irreducible requirement of diligence, such as "reasonable steps to place themselves in a position to guide and monitor the management of the company", per Rogers J in *AWA Ltd v Daniels* (at 864), adopted by Clarke JA and Sheller JA on appeal in *Daniels v Anderson* (at 501)."

127 (2003) 57 NSWLR 113.

422. Among the cases cited by his Honour in the above section, the most relevant to the present dispute is *AWA Ltd v Daniels* (1992) 7 ACSR 759 at 864, which stated:

> "More recent wisdom has suggested that it is of the essence of the responsibilities of directors that they take reasonable steps to place themselves in a position to guide and monitor the management of the company: cf *Commonwealth Bank v Friedrich* (1991) 5 ASCR 115 at 187. A director is obliged to obtain at least a general understanding of the business of the company and the effect that a changing economy may have on that business. Directors should bring an informed and independent judgment to bear on the various matters that come to the board for decision."

423. By its nature, a breach of s601FD(1)(c) of the Act would not be readily amenable to excusal under s1317S. A breach of s601FD(1)(c) can occur even if the director honestly and reasonably believes the course of action to be appropriate. Therefore, it would be contrary to the purpose and proper construction of s601FD(1)(c) for a breach of it to be excusable on the basis of a reasonably held belief.

Section 1317S relief should not be granted

424. The grounds advanced by the defendants for paying $15.5 of the FMIF members' money to the MPF are:

(a) there was an understanding requiring the FMIF to make the payment; and

(b) MPF could otherwise prevent the settlement from occurring.

425. The second contention is not correct. The directors would not have pressured themselves into a different deal. The total cost of the litigation was less than $2m. By the time of the mediation in November 2010, relatively little cost would be required moving forward. The directors could have called upon money held in FMIF's accounts or receivables from MPF to pay any further costs of progressing to settlement.

426. Therefore, the existence of the alleged understanding is central to the directors' s1317S defence. If there was no understanding, the usual priority position of the FMIF having a superior right to the MPF would have prevailed, meaning that the entirety of the Bellpac proceeding settlement proceeds needed to be paid to the FMIF.

427. Excusal under s1317S is not apt for a claim for breach of s601FD(1)(c) of the Act. As noted in *Lewski* at [72], liability can attach even if the director has been honest and reasonable. It would be counterintuitive were it established that the director committed a breach of that provision which caused loss to the members of the FMIF but was then excused from that liability to pay compensation pursuant to s1317S.

428. Excusal under s1317S is not appropriate in light of the nature of the breach by the directors under s610FD(1)(b). The breach involved:

(a) $15.5 million of money being paid away from a registered managed investment scheme;

(b) conduct by directors of a professional fund manager who had been directors for many years;

(c) conduct in relation to one of its loans;

(d) conduct which preferred the position of an unregistered fund over a registered managed investment scheme;

(e) a lack of regard to relevant scheme documents, such as the Compliance Plan and Conflicts Management Policy;

(f) a failure to ask critical questions that went to the heart of whether the payment should be made, such as:

(i) whether LMIM as RE of the FMIF and LMIM as trustee for the MPF could have received all of the sums due as part of the settlement of the Bellpac proceedings without having a split of the proceeds of that settlement between FMIF and MPF or all but an amount to reimburse MPF for the contribution it made it made to the funding of the Proceedings;

(ii) whether it was appropriate to treat MPF as a commercial litigation funder;

(g) a failure to obtain legal advice on those critical questions;

(h) lack of attention to the content of legal advice which was purportedly relied upon to justify the proceeds split;

(i) lack of attention to the Deed Poll, being the document purportedly relied upon by the directors to record their justifications for the conduct;

(j) conduct for which none of the directors have shown any remorse or contrition; and

(k) conduct for which there is a real need for an order by the court which acts as a general deterrent.

429. As to the last point, it is essential that directors of REs understand and discharge properly the serious obligations cast on them when dealing with other people's money. Relief from liability for the type of behaviour of the defendant directors in this case would send the wrong message and fail to act as a deterrent to other directors of REs.

430. The director's conduct is not conduct which should be condoned by the court by an order for full or partial excusal from liability.

Damien O'Brien QC **Matthew Jones**

Counsel for the plaintiff

"SC-15"

SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: 12317 of 2014

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

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Written Submissions
On behalf of the First Defendant

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Introduction

1. The plaintiff, LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) as responsible entity of the LM First Mortgage Income Fund (**LMIM as RE for the FMIF**) is a corporation that, at all material times, was the responsible entity of a registered managed investment scheme known as the LM First Mortgage Income Fund (**FMIF**). Permanent Trustee Australia Limited (**PTAL**) was the custodian of the property of the FMIF.

2. The seventh defendant (**LMIM**) was the trustee of a fund known as the Managed Performance Fund (**MPF**).

3. The first defendant (**Mr Drake**) was a director of LMIM from 31 January 1997 to 9 January 2015.[1]

4. In this proceeding, the plaintiff as responsible entity of the FMIF alleges that the defendant directors contravened s 601FD(1)(b) or s 601FD(1)(c) of the *Corporations Act* 2001 (Cth).[2]

5. This case involves the decision by the directors of LMIM to split litigation settlement proceeds between two funds, the FMIF and the MPF.

6. The keys facts underpinning the decision are not in dispute and are as follows:

   (a) LMIM was the RE of the FMIF and the trustee of the MPF;

   (b) both funds were a party to the litigation;

   (c) the settlement of the litigation required both funds to give up valuable claims, including claims for damages against a third party;

   (d) continuing in the proceeding was of no commercial value to either fund.

7. It is the plaintiff's primary case that the directors breached their duties by failing to allocate 100% of the settlement proceeds to the FMIF.

8. The case is a documentary one. The background to the litigation, the litigation itself, the directors' considerations about the litigation and the settlement and the division of the proceeds, are all exposed in the documents. The exception is the so-called

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1 5FASOC at 2 – FMIF.PLE.013.0001 at [.0002].
2 5FASOC at 45 – FMIF.PLE.013.0001 at [.0024].

"understanding", which was the subject of cross examination, and is challenged on a factual basis by the plaintiff.

The lead up to the impugned settlement payment

9. The essence of the alleged breach of duty is that LMIM did not act in the best interests of the FMIF in approving the settlement payment. That necessarily requires a finding that some other course available would have been in the FMIF investors' best interests, but was not adopted.

10. An immediately obvious feature of the plaintiff's case is that it is of very narrow compass. The settlement decision was not made in a vacuum and its antecedent facts must be given consideration.

11. On 10 March 2003, PTAL advanced $16M of the FMIF's funds to an entity known as Bellpac Pty Ltd (**Bellpac**) on the security of a first mortgage over land (the **land**) and a company charge given by Bellpac.[3] That agreement was subsequently varied.[4]

12. On 23 June 2006, the plaintiff as trustee of the MPF advanced $6M of the MPF's funds to Bellpac on the security of a third mortgage over the land and a company charge given by Bellpac.[5] At the same time, the parties to the loans entered into a deed of priority (**Priority Deed**).[6]

13. On 22 September 2004, Bellpac agreed to sell to Gujarat and Coalfields (NSW) Pty Limited (**Coalfields**) certain assets, including the land, pursuant to a Land and Asset Sale Agreement (**LASA**).[7] The LASA was amended by a series of agreements executed on 3 December 2004 (together, the **2004 Agreements**).[8]

14. A dispute arose between Bellpac and Gujarat as to the parties' rights and obligations under the LASA and the 2004 Agreements. In April 2007, Bellpac commenced proceedings against Gujarat, and Gujarat filed a cross-claim.

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3 5FASOC at 6, 7 - FMIF.PLE.013.0001 at [.0003] – [.0004] and 4FAD of the First Defendant at 7 - PCD.PLE.005.0001 at [.0003].

4 5FASOC at 8 - FMIF.PLE.013.0001 at [.0004].

5 Ex 66 - FMIF.500.008.4491.

6 Ex 2 - FMIF.009.003.0043.

7 Ex 67 - FMIF.007.001.0001

8 An Amendment Deed (Ex 74 - FMIF.007.001.0309); a Remediation Licence Deed (Ex 75 - FMIF.007.001.0130); a Royalty Deed (Ex 76 - FMIF.005.007.0077); a Subdivision Deed (Ex 77 - FMIF.007.001.0321); an Access Licence (Ex 78 - FMIF.007.001.0106); a letter executed by Bellpac, Bounty, Gujarat and Coalfields (Ex 79 - FMIF.013.004.0039). The letter attached a report prepared by Umwelt (Australia) Pty Ltd in November 2004 and contained an agreement that the report constituted the initial Remediation Management Plan deliverable under clause 3.1(c) of the LASA.

15. Bellpac and Gujarat purported to settle those proceedings by Deed of Settlement dated 12 September 2007.[9] Other agreements were entered into in 2008, again in purported resolution of the dispute.

16. Bellpac fell into default under the loans. There was then a further dispute with Gujarat, this time involving LMIM as well as Bellpac.

17. A central aspect of the dispute in the proceedings was Gujarat's obligation to remediate the land. The remediation obligation arose out of the mining operation that Gujarat had been conducting. Once the land was remediated, it was intended to be developed by Bellpac for residential subdivision, which would have substantially increased its value.

18. However, Gujarat was asserting a right to continue to use the land for mining and refusing to remediate. Absent remediation, the land was not able to be redeveloped and was far less valuable.

19. Legal proceedings were commenced in 2009 between LMIM, Bellpac, Gujarat and Coalfields in respect of the parties' rights and obligations under the LASA, the 2004 Agreements and various settlement deeds (collectively, **the Proceedings**).

20. Initially, LMIM as trustee of the MPF was an applicant in the Proceedings. PTAL was later joined to represent the interests of the FMIF. Both LMIM and PTAL made claims for declarations intended to have the effect that Gujarat would have to follow through on its remediation obligations, and for damages against Gujarat.

21. In those proceedings, the claims of the MPF were separate and distinct from those of FMIF. In particular, for the damages claims, the loss was based upon the security position of the MPF, which was as a second ranking secured creditor.

22. The MPF funded the Proceedings throughout.

23. A mediation of the Proceedings occurred on 9 November 2010, and a non-binding Heads of Agreement was signed. For the next seven months, the parties were engaged in difficult and protracted negotiations. Gujarat was perceived by LMIM to be a difficult litigant and negotiator. It wanted all "loose ends" tied up in any settlement.[10]

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[9] Ex 80 - FMIF.007.001.0213

[10] Ex 233 - FMIF.100.005.3232

24. A more detailed description of the matters addressed above is set out in Annexure 1.

The settlement and the division of the proceeds

Settlement

25. On 21 June 2011, the plaintiff in its capacity as responsible entity of the FMIF entered into a settlement of the Proceedings. Under the terms of the settlement, $45.5M was paid to PTAL and/or the plaintiff, inter alia, for the release of the securities and claims by PTAL and the plaintiff on behalf of the FMIF. Of that sum, PTAL was to pay $1.3M to Coalfields to secure their release and removal of caveats. The settlement agreements were contained in a contract for the sale of the land by PTAL to the purchaser (**Gujarat contract**).[11] Under that contract, part of the overall amount was to be paid and a contract for the payment of the balance made with the plaintiff (**Deed of Release**).[12]

26. The Heads of Agreement had contemplated that the settlement would involve a compromise of all of the Proceedings on foot. This aspect of the settlement remained unchanged during the protracted negotiations and was reflected in the final settlement agreements.

Division of the settlement proceeds

27. In parallel with the negotiations that led to the final settlement, consideration was given to how the settlement proceeds should be split.

28. On 1 December 2010, Mr Monaghan sent an email to Ms Darcy, copied to Mr Tickner, which stated:[13]

> *"I have investigated the going rate for litigation funding. Advice from Allens is that they believe it is usually 30-35% of the recovered sum, but varies from transaction to transaction. They referred me to a reported case in which the figure was 30-45%, depending on when the recovery happened. If the recovery happened at or prior to mediation (as in our case) it was 30%. There were also other amounts charged, up to $115,000 as a fee, plus I believe the actual outlays (paid in legal costs) could also be recovered.*
>
> *In our case the settlement sum was effectively paid for the sale of the land, which must have had some value anyway, but I believe there is a good argument that the land was practically unsaleable if not sold to Gujarat, and Gujarat needed to be persuaded to buy it via the litigation. So perhaps*

[11] Ex 87 - FMIF.003.001.0001
[12] Ex 85 - FMIF.003.003.0198
[13] Ex 26 - FMIF.100.003.4665

you could say that the amount recovered was effectively the additional amount you have obtained over and above what would have been obtained from a straight sale of land (eg by auction). It is difficult to know what the latter figure would be, but I think it could be somewhere around $10M (an educated guess). On the basis I think there would be an argument that up to 30% of $40M (being the recovered amount of $50M less the value of the land assumed at $10M) could be justified. That gives you a figure of $16M.

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

29. At no time did Mr Monaghan advise any of the directors that splitting the proceeds in the manner contemplated in this email was inappropriate or impermissible.

30. On 2 December 2010, Andrew Petrik of LMIM sent an email Mr Tickner and copied to Ms Darcy, Mr van der Hoven, Mr Monaghan and Mr Drake referring to a presentation from "IMF funding" which denoted a range of litigation funding fees.[14] Mr Petrik identified the quantum of funds contributions respectively by the FMIF and the MPF and stated that *"MPF has contributed around 95% of funds for legal proceedings against Bellpac"*.

31. On 1 December 2010, Ms Darcy instructed Mr Monaghan to contact Aaron Lavell at WMS to initiate obtaining an independent accountants report.[15] The formal engagement of WMS was arranged by Mr Monaghan, in conjunction with Mr Tickner.[16]

32. On 7 March 2011, LMIM received advice from WMS as to the appropriate proportion to be paid to the plaintiff as trustee of the MPF from the litigation settlement proceeds.[17]

33. On 14 March 2011, Ms Darcy advised the directors that she had instructed Mr Monaghan to seek further advice on the proposed split of funds from the settlement of the Bellpac proceedings.[18] She held concerns that the WMS advice was only accounting advice.[19]

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14 Ex 29 - FMIF.100.002.9294
15 Ex 154 - FMIF.100.003.4694
16 Ex 31 - FMIF.300.004.2881, Ex 232 - FMIF.300.004.2882, Ex 101 - FMIF.100.002.9133, Ex 102 - FMIF.100.002.9136, Ex 303 - FMIF.100.002.8821, Ex 161 - FMIF.100.003.4838; Ex 163 - FMIF.100.003.3796
17 Ex 32 - FMIF.100.003.6807.
18 Ex 104 - FMIF.300.004.3197.
19 Affidavit of Tickner at [212] - SJT.LAY.001.0001 at [.0038]

34. On 17 March 2011, Mr Monaghan instructed John Beckinsale, a partner of Allens, to proceed with the advice.[20] Having identified the need for legal advice, Mr Monaghan was tasked with instructing Allens and framing the terms of the advice sought. Mr Monaghan's instructions stated, in part (emphasis added):

> ***"Please note that Alf Pappalardo and Bruce Wacker are acting in relation to the settlement with Gujarat.***
>
> ...
>
> *I am seeking an advice confirming that the proposed split of proceeds between the funds is legally acceptable given that LM is in a position of conflict, being the trustee of both the FMIF and the MPF. I am happy to discuss the scope of the required advice with you further".*

35. On 28 March 2011, LMIM received the advice from Allens as to whether it was legally acceptable to split the balance of the proceeds between the funds by allocating 65 percent to the FMIF and 35 percent to the MPF.[21] That was in circumstances where LMIM was in a position of conflict in its capacity as responsible entity for FMIF and in its capacity as a trustee for the MPF. The advice stated, by way of summary, that *"[w]e consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants despite the RE being in a position of conflict".*[22] That opinion was expressed to be subject to a number of matters detailed in the summary.

36. On 7 April 2011, Mr Monaghan provided a copy of that advice to Ms Darcy and Mr Fischer under cover of an email which stated "*there is a lot to wade through, but the conclusion is that the transaction is okay*".[23] That summary was sent on to Mr van der Hoven and Mr Tickner.

37. On or before 14 June 2011,[24] a deed poll was executed by LMIM and each of the directors that provided for the litigation settlement proceeds to be split 65 percent to the FMIF and 35 percent to the MPF (**Deed Poll**).[25]

38. In accordance with the Proceeds Split (as that term is defined in the Deed Poll) LMIM as trustee for the MPF received the sum of $15,546,147 (**Agreed Contribution**) as

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20 Ex 33 - FMIF.200.012.6633.
21 FMIF.100.003.6992.
22 FMIF.100.003.6992 at [.6997].
23 FMIF.200.011.5748].
24 Ex 320 – FMIF.008.001.0125
25 FMIF.008.001.0126.

its share of the Gujarat Settlement Payment.[26] The amount received by the MPF is not in dispute.

The basis for the division

39. The Deed Poll records that:[27]

> *"BACKGROUND*
>
> ...
>
> *H. Shortly after LM commenced the litigation redemptions from the FMIF were frozen which resulted in no new funds flowing in from investors and an obligation to remit borrower's payments to LM's former funder, the Commonwealth Bank. FMIF was in the position of being unable to provide funding for the litigation and of being unable to satisfy any adverse costs orders that might have been made against LM. Accordingly, the MPF has contributed the majority of the funding for the litigation (and certain other actions designed to recover funds from Gujarat or put pressure on it) amounting to approximately 91% of the total funding (the FMIF has contributed the remaining 9%)*
>
> *I. The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of the proceeds recovered by the litigation*
>
> ...
>
> *3. DIRECTORS CONCLUSIONS*
>
> *3.1 After giving full and comprehensive consideration to all of the relevant issues, the Directors have concluded that:*
>
> ...
>
> *(b) there is a need for the FMIF RE to reach agreement with the MPF Trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF Trustee.*
>
> ...
>
> *(m) the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length – the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous – in giving consideration to this issue, the Directors considered the litigation funding practices in the open market.*
>
> *(n) in light of the independent expert advice as well as a report that has been prepared in accordance with RG111 and RG112 has been received the Settlement Proposals."*

[26] 4FAD at 35(e) – PCD.PLE.005.0001 at [.0038]
[27] Ex 36 - FMIF.008.001.0126 at [.0128].

40. The Deed Poll has been admitted as evidence of the truth of its contents. It therefore is evidence of:

(a) the matters considered by the directors in deciding to split the proceeds of the settlement with the MPF;

(b) (subject to matters of weight and contrary evidence) the fact of the matters set out therein.

41. There are some key matters referred to in the Deed Poll that justify the decision to split the proceeds. They are dealt with below.

The MPF was a party to the Bellpac proceedings (clause 3.1(b) of the Deed Poll)

42. It is now common ground in this proceeding that LMIM as trustee for the MPF was a party to the Bellpac proceedings. So much is clear from the court documents themselves.

43. By the time of the mediation in November 2010, claims in the Proceedings included:

(a) claims for declarations that the Settlement Deeds been entered into in breach of the MPF and FMIF charges. The charges required Bellpac to obtain LMIM's and PTAL's consent to dealings such as these, and it was contended that Bellpac had failed to do so;

(b) a claim that:

(i) Bellpac had engaged in misleading and deceptive conduct by representing that it would not deal with its assets other than in the ordinary course of business, but then entering into the Amendment Deed and Restated Settlement Deed;[28]

(ii) Gujarat was knowingly concerned in that conduct;[29]

(c) a claim for damages for the above conduct. The damages were particularised as "*LM and PTAL's security has thereby been devalued to the extent that rights were released*";[30]

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[28] Ex 119 - FMIF.005.006.0012 at [.0051] at paragraph[39]-[42]
[29] Ex 119 - FMIF.005.006.0012 at [.0053] at paragraphs [43]-[46]
[30] Ex 119 - FMIF.005.006.0012 at [.0053] at paragraphs [42], [45]

(d) a claim for tortious interference with contractual relations, based on the same facts.[31] In this case the damages claimed were the same as those claimed by Bellpac, which included the allegation that the market value of the Bellpac land had not increased to the extent that it would have had Gujarat performed its obligations and the land had been used, or available, for subdivision.[32]

44. Accordingly, the following conclusions should be drawn.

45. *First*, the Bellpac proceedings were not ordinary claims for the recovery of property under a security. They were complex claims for damages and other relief.

46. *Secondly*, the claims on behalf of the MPF in the Bellpac proceedings were separate and distinct from those of the FMIF. They were claims made against a third party, rather than the mortgagor/chargor. The loss claimed was based upon the position of the MPF (as a second ranking secured creditor). Depending upon the devaluation of the Bellpac land, and thus the security, caused by the wrongful actions of Gujarat, the MPF might suffer loss where the FMIF did not, or might suffer a greater loss than the FMIF. If the development had proceeded, LMIM and PTAL would have had an opportunity to make a full recovery of the outstanding loan amounts. A claim of that nature could have survived the land being sold. In the event that the MPF refused to settle, that claim would have continued to exist.

47. *Thirdly,* as a result of the first two points, whilst the aim of the Proceedings was to recover the debts owed by Bellpac to the FMIF and the MPF, they could not be treated as analogous to ordinary recovery claims where the second-ranked security holder would recover only after the first-ranked security holder was completely paid out. On one view, the claim by the MPF was likely to be larger than that of the FMIF, because it would suffer a greater loss from the devaluation of the land. The claims were of equal merit, since they were based upon the same facts.

48. *Fourthly*, the settlement and the discontinuance of the Bellpac proceedings was therefore a substantial thing, from the MPF's point of view. That involved it giving up claims for loss associated with the very conduct that was at the heart of the dispute between all of the parties – the alleged failure of Gujarat to honour its obligations,

[31] Ex 119 - FMIF.005.006.0012 at [.0056] at paragraphs [48]-[49]
[32] Ex 119 - FMIF.005.006.0012 at [.0033], [.0039] at paragraphs [18A], [18AA]

and agreements which were said to have been made without the consent from the MPF (and the FMIF).

49. *Fifthly*, and importantly:

(a) these claims could only be settled by an agreement made on behalf of the MPF;

(b) the claims could only be discontinued by agreement, if that agreement was given on behalf of the MPF.

50. The settlement agreement with Gujarat was a settlement of both sets of claims – those of the MPF and those of the FMIF. The plaintiff's case treats the settlement as if it was a settlement only of claims made by the FMIF.

The Deed of Release and Gujarat Contract (clause 3.1(b) of the Deed Poll)

51. It is now common ground that the MPF was a party to the Deed of Release.

52. The Deed of Release:

(a) expressly obliged LMIM to execute consent orders that would, inter alia, dismiss the Proceedings and, therefore, the claims brought by the MPF;[33]

(b) released all claims in that proceeding, including the claims brought by the MPF.[34]

53. The Gujarat Contract was a part of the settlement "package". It is referred to in the Deed of Release (as the "Sale Contract") and grouped together with the Deed as a "Transaction Document" any breach of which is excluded from the release (see cl 5.1, 6.1). It cannot be viewed in isolation, as if it was a stand-alone sale.

54. The total settlement sum was therefore paid by Gujarat in exchange for all of the consideration provided under the "settlement package". The MPF provided a substantial part of the consideration for both the Deed of Release and the Gujarat Contract, by way of the release and dismissal of its claims against Gujarat. The payment of the sum due under the Deed of Release to PTAL is explained by the fact that the Deed Poll had been signed the week beforehand,[35] and made provision for

[33] Ex 85 - FMIF.003.003.0198 at [.0202] at clause 4
[34] Ex 85 - FMIF.003.003.0198 at [.0203] at clause 5
[35] The executed deed poll was returned to Monaghan on 14 June 2011 – Ex 320 - FMIF.008.001.0125

dividing up the proceeds. The payment of the consideration due under the Gujarat contract was to PTAL because it sold the land as first mortgagee.[36]

55. Again, the plaintiff's case treats the total settlement sum as if it was paid only in respect of the FMIF's claims. At the least, it looks to assess what should have been done with that sum in a vacuum – divorced from its source, and the consideration given for it.

Reliance upon the advice of AAR and WMS (clause 3.1(m) and (n) of the Deed Poll)

56. Having correctly identified the conflict which existed, the directors were entitled to rely on the expertise and advice of their external legal and accounting advisors (see Annexure 2, paragraph 19, 20). This necessarily included WMS, Allens and Mr Monaghan.

57. Allens is a top-tier national firm that had been retained by LMIM in various capacities for some time.

58. There is no suggestion that Mr Drake has legal qualifications. He was entitled to rely on the advice of his lawyers.

59. Relevantly, the Allens advice:

(a) was prepared on instructions framed and articulated by Mr Monaghan. Allens were made aware of the purpose of the advice and sought additional documents in the course of preparing the advice[37]. If Allens required any further information, the firm could have taken steps to obtain that information;

(b) reached a conclusion that the transaction was "legally acceptable". That conclusion is expressed in paragraph 16, subject to some qualifications. The qualification in 16(g) was as follows:

> *"The directors of the RE must comply with their general law and statutory duties under the Corporations Act (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any*

[36] Ex 87 – FMIF.003.001.0001

[37] In the course of preparing the advice Allens sought up-to-date constitutions for the FMIF and MPF Ex 311 – FMIF.400.001.0068

issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed)."

If the case for which the plaintiff contends is correct, Allens could never have reached this conclusion and the directors, on the plaintiff's case, should have been advised, in the clearest of terms, that the proposed split could never occur and the directors would breach their duties under the *Corporations Act* in so acting. There is no suggestion of this in the advice. In fact, the advice does not signal any hint of concern, or even raise it as a possibility;

(c) was endorsed by Mr Monaghan, who advised Mr Darcy and Mr Fisher that *the conclusion reached in the Allens advice was "that the transaction is okay"*.[38] The directors had no reason to second guess Mr Monaghan's advice. Again, he voiced no words of caution or concern. He did not counsel the directors to pause, or give the matter further consideration, or to seek further advice from either Allens or another firm. On the contrary, he endorsed the conclusions in the advice;

(d) identifies the need for the directors to comply with the constitutions of the FMIF and the MPF, general law duties and statutory duties under the *Corporations Act*. It correctly identifies the duties of a responsible entity under s 601FC(1), the duties of the directors under ss 601FD, 180-182, 191, 195 and 197 and in respect of related party transactions. It opines that any expert advice received by a RE is a very important factor in deciding whether the arm's length exception found in s 210 of the *Corporations Act* would apply. It specifically refers to the advice received from WMS;

60. Whilst the plaintiff's case involves some criticism of the advice, it is submitted that it was not, certainly to lay persons, obviously wrong.

61. In addition, the Allens advice is significant for what it does not say. Both Mr Monaghan and Allens were aware of the understanding - the Deed Poll was prepared by Monaghan Lawyers;[39] the Allens advice makes specific reference to the understanding.[40] However:

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[38] Ex 91 - FMIF.200.011.5748
[39] Ex 36 - FMIF.008.001.0126
[40] Ex 36 - FMIF.008.001.0126 at [.0128]

(a) there was no suggestion from any representative of Allens or Monaghan Lawyers that the relevant understanding did not provide a proper basis for the split of the settlement proceeds, or was irrelevant;

(b) no advice was given to the effect that the "two party rule" might apply, such that the understanding was not binding, nor that this might be a problem;

(c) the Allens advice expressly states that "*The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation*" (paragraph 9). However:

(i) it does not go on to say that the absence of a formal agreement creates any sort of problem;

(ii) it does not go on to say that a prior binding agreement for the split was necessary for it to be legally acceptable.

The litigation funding analogy (clause 3.1(m) of the Deed Poll)

62. The litigation funding analogy in the Deed Poll is used as a way to determine the quantum of a reasonable division of the settlement proceeds; it is not used to determine whether or not there is an obligation to pay anything to the MPF.

63. That is evident from the Deed Poll, which refers to the Settlement Proposals (which includes the split between the FMIF and the MPF) as "*reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length*" (cl 3.1(m)). The WMS advice, which uses the analogy, expresses an opinion about "a fair and reasonable split" of the proceeds.

64. That is also evident from the emails by which the directors discussed this topic set out in paragraph 27 above.

65. The plaintiff's case does not impugn this approach on the basis that there was some better way to split up the proceeds; rather, it asserts that there should have been no split at all.

66. As such, if it is accepted that the analogy was only deployed to determine a fair split, rather than to identify an obligation to split, it becomes irrelevant to the plaintiff's case. There is no breach by using it in this way.

The funding of the Proceedings (Background, item H of the Deed Poll)

67. From July 2009, the LMIM as trustee of the MPF funded the Bellpac proceedings. The amount funded was approximately $1,950,421.69.[41]

68. Further, LMIM as trustee of the MPF:

(a) paid an outstanding invoice of Allens. The original certificates of title for the land, which were required for any sale of the property, were held by Allens on account of their unpaid fees in the amount of $25,000. Those certificates could, and would, not be released until those fees were paid in circumstances where only the MPF had capacity to do so;[42]

(b) could have refused to pay the $1.3M payment to Coalfields and thereby prevent the settlement from proceeding[43]. Pursuant to the written Heads of Agreement, the payment of $1.3M to Coalfields was a stand-alone obligation on the part of LMIM[44]. It was ultimately agreed that the payment to Coalfields could be made at Completion and out of the Gujarat Settlement Payment.

69. There is a factual dispute as to whether the FMIF could have funded the Proceedings from a debt owed by the MPF for what are called the Assigned Loans.

70. The dispute is irrelevant. The fact is that the MPF funded the Proceedings, and the Assigned Loans debt was neither partly called in by the FMIF, nor discharged by reference to the MPF's funding payments.

The understanding (Background, item I of the Deed Poll)

71. The Deed Poll, which was drafted by Monaghan Lawyers, records that it was the understanding of LMIM's Directors that it was appropriate for the MPF's

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41 5FASOC at 24(a) - FMIF.PLE.013.0001 at [.0006]; 4FAD of the First Defendant at 24(i) – PCD.PLE.005.0001 at [.0012]

42 Ex 22 – FMIF.100.003.0107

43 Ex 230 - FMIF.100.003.4224; Ex 22 - FMIF.100.003.0107

44 Ex 84 – FMIF.020.005.0081 at [.0081]

contribution to be recognised by providing the MPF with a share of the proceeds recovered by the litigation.

72. The plaintiff contends that the understanding was not binding, as a contract between LMIM and itself.[45] The question of whether the understanding was binding or not is irrelevant. Rather:

(a) the fact was that the MPF had funded most of the cost of the Proceedings;

(b) the understanding arises from this – the directors expressly recognise that there is no "formal agreement" but nevertheless record the existence of an understanding that this "contribution" should be recognised by a share of the proceeds;[46]

(c) this in turn gives rise to the litigation funder analogy, as the directors grapple with the question of how much the MPF was entitled to receive;

(d) the directors then go to Allens to seek advice as to whether or not the division, based on the litigation funder analogy, is "legally acceptable";

(e) the Allens advice runs through a series of legal considerations, and concludes that it is that it is legally acceptable. One of the considerations is that *"...we assume that the RE is satisfied that there is a need to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF (because the overall settlement cannot occur without the agreement of the MPF trustee - for example, it needs to release its security and pay Coalfields to withdraw its caveats*" (paragraph 25). The substance of this consideration is recorded in the Deed Poll at clause 3.1(b).

(f) thus, the Allens Advice approves a split, on the basis of the WMS Advice (which essentially adopts the litigation funder analogy) as appropriate. As set out in paragraph 61 above, it does not identify the understanding, or the fact of funding as irrelevant considerations.

73. Thus, the funding and understanding are part of the background (they are recorded in the Background section of the Deed Poll) which led the directors to the point of

[45] 5FASOC 30C(d)(iii)(D) - FMIF.PLE.013.0001 at [.0010]
[46] Ex 36 FMIF.008.001.0126 at [.0128]

looking to split the proceeds. They do not however end up being critical considerations for the legal acceptability of splitting the proceeds.

The plaintiff's contentions

74. The first defendant here adopts the "6 categories of negligence" used by the third and fourth defendants. The categories and sub categories are used as headings below.

The Independent Experts' Advice

The directors failed to adequately read or consider the content of the Allens Advice[47]

75. On day one of the trial, counsel for the plaintiff confirmed that the evidence for the allegation that the directors failed to adequately read the Allens advice was an inference to be drawn on the face of the document.[48]

76. Since there is a positive allegation made by the plaintiff[49] that Mr Drake "*had available a copy of, and read, the Allens Advice prior to signing the Deed Poll*" and that he "*took into consideration the Allens Advice*"[50] the starting point must be that he did these things.

77. The allegation of lack of adequate consideration is particularised by reference to three matters:[51]

(a) *the matters in paragraph 30H*: these should be rejected, for the reasons set out in the next section. Additionally, these are all matters which, in circumstances where (if they are valid points at all) were not picked up by Allens or Mr Monaghan as requiring further explanation or a change of advice. They are not, objectively, matters that a reasonable director in Mr Drake's position should have picked up;

(b) *the lack of reference to the Allens advice in the Deed Poll*: the Deed Poll reflects the specific legal and factual considerations that were identified in the Allens Advice. It records that the directors gave "*full and comprehensive consideration*" to these issues.[52] The "*Background*" section of the Deed Poll is expressed in almost analogue terms to the "Background" section in the

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47 5FASOC at 34(aa) - FMIF.PLE.013.0001 at [.0018]; 4FAD at 34(aa)(ii) – PCD.PLE.005.0001 at [.0034]
48 T1-30/4-31 – TRN.001.001.0001 at [.0030]
49 5FASOC at 31A(d)(iva) – FMIF.PLE.013.0001at [.0015]
50 5FASOC at 34(f) - FMIF.PLE.013.0001 at [.0020] admitted in 4FAD at 34(i)(i) – PCD.PLE.005.0001 at [.0034]
51 5FASOC at 34(aa) - FMIF.PLE.013.0001 at [.0018]

Allens advice. In addition, the Deed Poll refers to "the independent expert advice as well as a report that has been prepared in accordance with RG111 and RG112" at cl. 3.1(n), which could refer to the Allens advice;

(c) *the fact that the advice was provided 4 days before the Deed Poll was signed*: this cannot be the basis for a finding that there was a lack of adequate consideration, without more.

The directors failed to properly construe the Allens Advice as set out in paragraph 30H of the statement of claim[53]

78. The criticisms in [30H] of the statement of claim mostly proceed on the incorrect premise that the obligations to the FMIF and the MPF were mutually exclusive – the presence of one excluded the other. That is not correct, see paragraph 95 below.

79. As to the subparagraphs:

(a) *subparagraphs (a), (b)* do not critique the advice at all;

(b) *subparagraph (c)* is not correct. Paragraph [25] of the advice correctly identified an assumption that there was a need to reach agreement with the MPF about sharing the litigation proceeds, because the overall settlement could not occur without its agreement. That justified the split. Allens was not called on to consider whether 35% was the appropriate percentage. Paragraph [27] correctly recognised that an "arm's length" split would be in the best interests of the members of the FMIF (see further paragraph 96 below);

(c) *subparagraph (d), (e)* go nowhere as paragraph [56] of the advice was not considering s 601FD(1). In any event, the paragraph correctly stated that LMIM needed to be satisfied that the split did not unfairly put the interests of one fund ahead of the other;

(d) *subparagraph (f)* is incorrect. The Allens advice recorded the absence of a formal agreement, and the existence of an understanding in paragraph [9];

(e) *subparagraph (g)* is incorrect because the obligations to the two funds were not mutually exclusive;

[53] Particulars 5FASOC at 34(aa) - FMIF.PLE.013.0001 at [.0018]

(f) *subparagraph (h)* again proceeds on the mutual exclusivity premise;

(g) *subparagraphs (i), (j)* refer to parts of the advice dealing with statutory or common law principles not in issue in this case;

(h) *subparagraph (k)* is incorrect, because paragraph [16] of the advice reached that very conclusion, subject to the matters set out in subparagraphs 16(a) to (g).

The directors failed to actually obtain independent legal advice, or other independent advice, as to whether, in the circumstances[54]*:*

80. *The MPF could be treated as if it were an arm's-length litigation funder*: for the reasons set out in paragraph 62 above, this should be rejected. The litigation funder analogy was used as a basis for the quantum or proportion of the split, not the obligation. There was advice as to whether that quantum was appropriate from WMS, and as to whether the split was legally acceptable from Allens.

81. *It was reasonable for the MPF to be paid in accordance with the split – an amount above the sum it had paid, or any amount at all*: the Allens advice addressed whether the split was legally acceptable. If the split was unreasonable, it would have been expected that the advice would say so, and would therefore not have concluded that it was legally acceptable.

82. *It was in the interests of the FMIF to agree that the MPF would be paid as per the split (an amount above what it had paid) or any amount at all:* there was an obvious limit to what Allens could do – ultimately, it was for the directors to consider what was in the best interests of the FMIF. The Allens advice:

(a) expressly identified the need to act in the best interest of the members, and made the assumption, correctly, that there was a need to reach agreement with the MPF about sharing the litigation settlement proceeds because the overall settlement could not occur without the agreement of the MPF (paragraph 25). This consideration was picked up in the Deed Poll (clause 3.1(b));

[54] 5FASOC at 34(e) - FMIF.PLE.013.0001 at [.0018]

(b) concluded that the split was legally acceptable, and made an assumption that LMIM had satisfied itself that the terms of the proposed settlement were in the best interests of the members of the FMIF (paragraph 16 and 16(a));

(c) importantly, did not flag any issues that could require further legal advice, or lead to a conclusion that the split could never be in the interest of the FMIF.

As such, the Allens was sufficient legal advice on the topic of "*whether it was in the interests of the FMIF to agree that the MPF would be paid as per the split*".

The directors took into account the Allens Advice and the WMS Report which they ought to have known, did not constitute the advice identified above[55]

83. For the reasons set out in the preceding section this should be rejected.

The directors ought not to have concluded that the WMS Report or the Allens Advice justified the payment of any part of the settlement to the MPF[56]

84. For the same reasons this should be rejected.

Criticism of the instructions to Allens[57]

85. As to these criticisms:

(a) *SOC para [30C(a)]*: these documents did not exist when the Allens advice was asked for and provided. Given the abandonment of the allegation that the MPF was not a party to the Deed of Release, this criticism should be rejected;

(b) *SOC para [30C(c)]*: this paragraph contends that the instructions provided to Mr Beckinsale did not include a copy of the Deed of Priority. However:

(i) it is obvious from the advice that Allens knew that the FMIF and the MPF have first and second ranking securities (paragraph 2);

(ii) a lawyer experienced enough to give advice in this area must be assumed to be experienced enough to know that there might be a deed of priority, and to ask about this if it was important;

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55 5FASOC at 34(f) - FMIF.PLE.013.0001 at [.0020]
56 5FASOC at 37A(aa)(vi) - FMIF.PLE.013.0001 at [.0021]
57 5FASOC at 30C - FMIF.PLE.013.0001 at [.0008]

(iii) Mr Pappalardo and Mr Wacker, to whom the instruction email makes specific reference, had intimate, detailed, long standing knowledge of the dispute with Gujarat. Further, Allens had been provided with a copy of the Deed of Priority on a number of occasions from 2007 onwards[58] and had previously given advice about its effect.[59] Had Allens required any further documents, they had the knowledge and ability to request any further relevant material that they might have required;

(c) *SOC para [30C(d)(i), (ii)]*: the advice records that the MPF was a second mortgagee (paragraph 2) and that it had funded the Proceedings (paragraph 8). There is no significance in the proposition that it funded "as second mortgagee" or added the funding to its debt, given the nature of the proceeding and therefore the settlement, see paragraphs 42-55 above.

(d) *SOC para [30C(d)(iii)]*: the absence of such an instruction was not significant since Allens correctly recorded that there was no formal agreement.

The Priorities (and Mortgagee Sale)

86. This brings together the following allegations, which are dealt with collectively:

(a) the directors failed to have proper regard or give adequate consideration to the fact that PTAL sold the property to Gujarat as a mortgagee exercising power of sale,[60] and that FMIF had priority;[61]

(b) the directors failed to have proper regard or give adequate consideration to the fact that:

(i) the MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac;[62]

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58 Ex 193 - FMIF.300.002.2030; Ex 235 - FMIF.049.002.0003; Ex 194 - FMIF.049.003.0024. See also Schedule B to the defence of Ms Darcy – LMD.PLE.001.0054 at [.0113]

59 FMIF.040.003.0001 – exhibited to Mr Tickner's affidavit at 68.7 – SJT.LAY.001.0001 at [.0026]

60 5FASOC at 34(a)(i) - FMIF.PLE.013.0001 at [.0018]

61 5FASOC at 34(a)(ii) - FMIF.PLE.013.0001 at [.0018]

62 5FASOC at 34(c)(i) - FMIF.PLE.013.0001 at [.0019]

(ii) the MPF had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF Bellpac loan;[63]

(iii) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;[64] and

(iv) PTAL was, as at 22 June 2011, owed $52M by Bellpac.[65]

87. These allegations should be rejected by reason of the matters set out in paragraphs 42-55 above. The settlement proceeds were received as the result of the compromise of litigation, not a mortagee or chargee sale. Even the Gujarat Contract was part of the compromise of the litigation; it cannot be treated as a stand-alone sale. The MPF provided a substantial, material part of the consideration for the compromise. There is no justification for imposing on this compromise an overlay, by reference to the ranking of the securities when that ranking was irrelevant to given the claims made and compromised, and the basis upon which they were compromised.

The "Non-Essentiality" of the MPF

88. This comprises the allegations that:

(a) the directors failed to have proper regard or consideration to the (alleged) fact that there was no necessity for the FMIF to reach agreement with the MPF about sharing the amounts payable to PTAL because there was no binding agreement to share the settlement proceeds[66]; and

(b) the directors ought to have concluded that they need not reach agreement with the MPF about the sharing of proceeds for the settlement to occur.[67]

89. There is no longer an allegation that the MPF was not a party to the litigation or the Deed of Release. It is now common ground that it was a party to both. So, the sole basis for this allegation is that there was no binding prior agreement for the proceeds split.[68]

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63 5FASOC at 34(c)(iii) - FMIF.PLE.013.0001 at [.0019]
64 5FASOC at 34(c)(iv) - FMIF.PLE.013.0001 at [.0020]
65 5FASOC at 34(c)(v) - FMIF.PLE.013.0001 at [.0020]
66 5FASOC at 34(b) - FMIF.PLE.013.0001 at [.0019]
67 5FASOC at 37A(aa)(ii) - FMIF.PLE.013.0001 at [.0021]
68 See the reference in 34(b)(ia) to para 30C(d)(iii). The allegation in 37A(aa)(ii) is not expressly based in that same contention, but it makes sense that it would be so.

90. The allegation cannot succeed – the (alleged) absence of a prior binding agreement is not a sufficient basis for the conclusion that it was not necessary to reach an agreement with the MPF. That agreement had to be reached because the settlement proceeds were received as the result of the compromise of litigation in which it was a party with valuable claims, the compromise of which provided a material part of the consideration for the proceeds.

Litigation Funding Analogy

91. These allegations are:

(a) the directors failed to consider whether the MPF could be treated as if it was an arm's-length litigation funder when it was a second registered mortgagee with second priority;[69]

(b) the directors failed to obtain independent legal advice, or other independent advice, as to whether, in the circumstances, the MPF could be treated as if it were an arm's-length litigation funder;[70] and

(c) the directors ought not to have concluded that the MPF was in an analogous position to a litigation funder and that the settlement proposals would not be reasonable on an arm's-length basis.[71]

92. For the reasons set out in paragraph 80 above these allegations should be rejected.

The Different Interests of the FMIF and the MPF

93. The plaintiff emphasises the different interests of the two funds in several allegations, contending that the directors, in the circumstances, failed to have proper regard or give adequate consideration to the different interests of the FMIF and the MPF.[72]

94. There are two answers to this.

95. *First*, there is a great deal of evidence that the directors were cognisant of the separate interests of the two funds: clauses 2.1(b), 3.1(a), (b) and (m) all recognise this. The

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69 5FASOC at 34(d) (first line) - FMIF.PLE.013.0001 at [.0020]
70 5FASOC at 34(e) - FMIF.PLE.013.0001 at [.0020]
71 5FASOC 37A(aa)(v) – second (v) - FMIF.PLE.013.0001 at [.0022] [note problem with numbering].
72 5FASOC at 34(g) - FMIF.PLE.013.0001 at [.0020]

Allens advice clearly identifies the separate interests. That advice was considered and taken into account by the directors.

96. *Secondly*, the plaintiff's case treats the separate interests as if they are mutually exclusive – a consideration of one excludes any consideration of the other. For the reasons set out below in relation to the "best interests" test, that is not the correct approach. The fact that LMIM was entitled to act in other capacities and deal with itself in those capacities must require an accommodation of its obligations in those other capacities. In addition, by reason of the matters set out above in paragraphs 42-55 above, the FMIF did not have a claim to 100% of the proceeds of the settlement. It could not seek to appropriate a sum that was partly paid to settle the MPFs claims as entirely its own. It could not, in its capacity as RE for the FMIF seek to use its powers as trustee for the MPF to advance the formers interest. Therefore, a consideration of the separate interest of the two funds must have required LMIM to find an impartial or arm's length solution to the question of "who gets what?".

The Central Question: the directors failed to consider whether it was appropriate or fair or in the best interests of the FMIF to split the proceeds in accordance with the 'Proceeds Split' (i.e. 65/35).[73]

97. For the reasons set out above, this must be rejected. The directors were in the position of needing to decide how to split the settlement proceeds between the two funds. Both funds had been parties to the proceeding. Both funds were giving up rights held in the Proceedings. Both funds were entitled to a share of the settlement proceeds.

98. The directors considered the appropriateness of the split – they took advice on the proportion (WMS), advice on whether it was "legally acceptable" (Allens) and recorded their considerations in the Deed Poll. The interests of the funds were not mutually exclusive, as the plaintiff would have it. So, they were not obliged to consider excluding the MPF entirely, merely because they owed an obligation to the FMIF.

The alleged breach of s. 601FD(1)(b)

99. The relevant legal principles are set out in Annexure 1, and are unlikely to be controversial. For the reasons identified in the preceding two sections, there is no demonstrated lack of skill in the conduct of the directors. Objectively viewed, Mr

[73] 5FASOC at 34(d) (second line), 37A(aa)(iii) - PCD.PLE.005.0001 at [.0020] – [.0021], 5FASOC at 37A(aa)(iv) FMIF.PLE.013.0001 at [.0022], 5FASOC at 37A(a)(ii) - FMIF.PLE.013.0001 at [.0022].

Drake exercised the degree of care and diligence that a reasonable person would exercise if they were in his position.

100. It is incumbent on the plaintiff to demonstrate that there was an alternative decision available in respect of the settlement payment which was free from risk. The failure of the plaintiff to examine the alternatives available to the directors is fatal to its case.

101. On the plaintiff's case, there were two options available to the directors at the time of settlement: they could keep the litigation on foot or elect to settle it.

102. LMIM was a party to risky and expensive litigation. The litigation had poor prospects. Nevertheless, it either had to be prosecuted or resolved. Gujarat was a difficult and unpredictable adversary who wanted every last "loose end" tied up. The settlement afforded a complete divorce from any further dealings with Gujarat. PTAL did not have the financial means to progress the litigation in any way. If the litigation was not prosecuted, Gujarat would effectively remain as a "squatter" on the land for many years to come and the land could not be developed.

103. As a party to the Bellpac litigation, the MPF's consent was required to achieve any effective settlement. The settlement reached obliged the parties to the litigation to execute consent orders which had the effect of compromising the MPF's asserted rights in the Bellpac proceedings. The MPF could not be quarantined or sidelined in the settlement.

104. Had the settlement not been reached with the MPF's consent, there was a real prospect that the FMIF would recover very little or nothing. The consequences of not settling the litigation would inevitably involve continued uncertainty, expense and losses for the FMIF.

105. Mr Drake was entitled to rely upon his competent external advisors which included Mr Monaghan, Allens and WMS (see Annexure 2, paragraph 19, 20).

106. The alleged breach of s 601FD(1)(b) has not been made out.

The alleged breach of s. 601FD(1)(c)

107. Section 601FD(1)(c) provides:

> "An officer of the responsible entity of a registered scheme must:
>
> ...

(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests."

The second limb

108. The so-called "second limb" of the section (starting "and, if there is a conflict...") is irrelevant to the present case. The "interests of the responsible entity" must refer to its interests beneficially. In other words, the second limb deals with an interest-duty conflict, by way of a conflict between the RE's own (beneficial) interests and its duty to advance the members interests.

109. There is no allegation in the present case that there was a conflict between the members' interests and those of LMIM beneficially. The plaintiff cannot bring the case within this limb by asserting that there is a conflict between the FMIF members' interests and "the interests of LMIM as trustee of the MPF". That mischaracterises the case. What the plaintiff is truly alleging is a duty-duty conflict, between the duty to the FMIF and its members, and the duty to the MPF and its members.

The first limb - legal principles

110. Two issues arise:

(a) does the first limb, to "act in the best interests of the members" extend to situation beyond a conflict between the interests of the members and the interests of the RE, such as where the RE has a conflict of duty and duty, and this conflict is the basis for the allegation that the directors have not acted in the best interest of the members of a registered scheme?

(b) secondly, if the section does so extend, what obligations, or proscriptions, does it entail in the present case?

Best interests generally – does it extend to duty/duty conflicts?

111. The obligation to act in the best interests of the members has been equated with the trustee's common law duty to act in the best interests of the beneficiaries of the trust.[74]

[74] *ASIC v APCH* [2013] FCA 1342 at [464]ff

112. The best interests duty has also been described as a duty to give "undivided loyalty to the beneficiaries".[75] In *ASIC v APCH*, Murphy J said:

> "The duty of undivided loyalty is the fundamental duty of a trustee requiring it to solely pursue the members' interests, to eschew conflicts of interest between the members' interests and its own, and in the event of a conflict of interests to put the members' interests first."[76]

113. In the same case (sub nom *ASIC v Lewski*), the High Court described the statutory duty as having been "developed and adapted" from its "equitable progenitor"[77]. But:

> "The Loyalty Duty requiring a director to give priority to the members' interests in circumstances of conflict of interest **is narrower in one respect than the equitable rule concerning conflict of interest in duty. It does not proscribe acts of a director to put herself or himself in a position of conflict**. It only proscribes acts in the course of that conflict that do not give priority to the members' interests." (footnotes omitted) (emphasis added)[78]

114. To date, it appears that the section has only been applied in relation to a conflict between the RE's interests and the interests of the members of the fund, and not to a duty-duty conflict situation. In addition, the quotes set out above, are expressly directed at a "conflict of interest", although that may simply reflect the facts in these cases, and that conflicts of duty and duty are less common.

115. In *Australian Securities Investments Commission v ACN 101 634 146 Pty Ltd (in liq)* (2016) 112 ACSR 138, Douglas J observed at [642]:

> "The submission, which I accept, was that a director of a company that is a responsible entity owes the duties imposed by s 601FD. If the company is the responsible entity of multiple schemes, that director owes duties to act in the best interests of the members of all the schemes. Neither the responsible entity nor the officer can escape their statutory duties by asserting they "have nothing to do with scheme B".

116. In *Allco Funds Management Ltd v Trust Co (Re Services) Ltd*[79] Hammerschlag J said:

> "Section 601FD(1)(c) involves only a contest between the members and the RE. It has no field of operation where there is a conflict of interest between the RE and some other entity of which the director of the RE is also a director. It also has no impact on their fiduciary duties at general law."[80]

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[75] *ASIC v APCH* supra at [468]
[76] At [471]
[77] *ASIC v Lewski* (2018) 362 ALR 286 at [71]
[78] Supra at [72]
[79] [2014] NSWSC 1251
[80] At [189]

117. The reasoning of Hammerschlag J is consistent with a more limited reading of the section. The reference to a situation where there was a conflict of interest between "*the RE and some other entity of which the director of the RE is also a director*" would involve a conflict of duty and duty on the part of the director. There is similarly no reason why the section would extend to a situation where there is a conflict of duty and duty on the part of a director or officer because the company is a RE of two different funds.

118. That conclusion is supported by a textual analysis of the section. If the "best interests" limb was intended to cover conflicts of duty and duty, then it could be expected that the second limb would also mention those conflicts, and require the directors to give priority to the members' interests over the conflicting duty as well.

119. In the circumstances, it would be an unduly wide construction of the section to have it extend beyond conflicts between the (beneficial) interests of the RE and the interests of the members.

The present case

120. If the section is held to be capable of extending to duty and duty conflicts, then the next issue is: what does it require of the directors in the present case?

121. In *Lewski*, the High Court said that section 601FD(1)(c) imposes:

> "...a duty to act in the best interests of the members rather than a duty to secure the best outcome for members."[81]

122. The Court went on to identify that:

> "Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than 'the success or otherwise of a transaction or other cause of action'. The purpose and terms of the Trust are the existing legal purposes in terms of the Constitution..."[82]

123. In the present case, the Constitution of the FMIF relevantly provided:

> *"29. OTHER ACTIVITIES AND OBLIGATIONS OF THE RE*
>
> *29.1 Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:*

---

[81] Supra at [71]
[82] Supra at [71]

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

(b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or

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

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

124. The wording of the clause is a little curious. There is nothing in the Constitution that imposes an express restriction upon the RE of the FMIF which might otherwise have extended to restricting it from doing the things set out in clause 29.1. The clause should therefore be construed as authorising the dealings and transactions set out in subparagraphs 29.1(a)-(c).

125. As such, the obligation to act in the best interests of the FMIF had to take into account the fact that the Constitution expressly authorized the FMIF:

(a) to act as an RE for another trust, or fund;

(b) to deal with itself as trustee of another trust;

(c) to be interested in a contract or transaction with itself as trustee of another trust.

126. This clause goes beyond simply authorizing LMIM to act in two different capacities where there would be a potential conflict. It authorizes self-dealing in two different capacities, where there will commonly be a conflict of duty and duty, because on either side of the dealing there will be competing commercial interests in getting the best result out of the dealing.

127. As to the prefatory words "Subject to the Law", s 601FD(1)(c) does not somehow override clause 29.1. Rather, as set out above the best interests test is determined in light of the terms of the Constitution. The plaintiff does not allege that there is some other provision of the *Corporations Act* that would prevent clause 29 of the Constitution from being given its full effect.

128. In light of these matters, a number of propositions should be accepted.

129. First, section 601FD(1)(c) did not impose upon the Plaintiff an obligation not to put itself in a position where its duty to the FMIF conflicted with its duty to another fund or trust. That is consistent with the reasoning in *Lewski*[83] set out above in paragraph 113.

130. Secondly, the obligation to act in the best interests of the FMIF cannot amount to an obligation to completely ignore the obligations that the plaintiff owed to another fund or trust of which it was the manager or RE, in circumstances where it is dealing with itself in a capacity as the RE or trustee of that other fund or trust. If the best interests test takes into account the terms of the Constitution, then it must take those terms into account in a rational and common sense way. The Constitution cannot be seen as authorizing transactions by the Plaintiff with itself, only to have such transactions impose upon it the impossible obligation to pursue the best interests of the FMIF, by ignoring or sacrificing the interests of the other fund or trust (with which it has been expressly authorized to deal).

131. This should not be seen as an unwarranted dilution of the strict obligations of loyalty owed by a trustee. Rather it is a conventional application of the principle that the trustee's obligations of loyalty require the trustee to "perform and adhere to the terms of the trust". In *ASIC v APCH*, Murphy J said:

> "It could not be in the best interests of the beneficiaries for a trust to be managed or administered other than in accordance with its terms. As RP Meagher and WM Gummow explain in Jacob's Law of Trusts in Australia:
>
> > 'The rule that the trustee must strictly conform to and carry out the terms of the trust modifies all other rules because these other rules are applies subject to any provisions contained in the trust instrument itself.'"[84]

132. Similarly, in *Australian Securities and Investments Commission (ASIC) v Drake (No 2)* (2016) 340 ALR 75, Edelman J stated at [354]:

> "Fiduciary duties are shaped, and can be modified, by the trust instrument or an underlying contract. For instance, in Kelly v Cooper[1993] AC 205at 215 (Kelly v Cooper), the Privy Council held that no breach occurred since the contract of agency envisaged that the fiduciary might have a conflict of interest. The decision in Kelly v Cooper was applied by Lord Browne-Wilkinson in Henderson v Merrett where his Lordship said that "[a]lthough an agent is, in the absence of contractual provision, in breach of his fiduciary duties if he acts for another who is in competition with his principal, if the contract under which he is acting authorises him so to do, the normal fiduciary duties are modified accordingly" (206): see also Chan

[83] Supra at [72]
[84] At [472]

> v Zacharia(1984) 154 CLR 178at 196 ; 53 ALR 417at 431 (Deane J). The decision in Kelly v Cooperhas also been approved in Australia: Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)(2007) 160 FCR 35 ; 241 ALR 705 ; 62 ACSR 427 ; [2007] FCA 963 at [278]–[279] (Jacobson J); and Backwell IXL Pty Ltd v Hogg [1998] VSC 155 at [41]–[42] (Chernov J)."

133. What then is the obligation of LMIM in this circumstance?

134. It is submitted that a reasonable analogy is the trustee's obligation to deal impartially between beneficiaries of different classes, which is an aspect of the trustee's best interest duty. The oft-applied dictum of Sir Robert Megarry VC, in *Cowan v Scargill*[85], stated:

> "The starting point is the duty of the trustee to exercise their powers in the best interest of the present and future beneficiaries of the trust, **holding the scales impartially between different classes of beneficiaries**." (emphasis added)

135. Another statement of the obligation has described it as one "*not to sacrifice the tenants for life to the persons interested in the remainder but...[to act] for the benefit of all persons interested ...*"[86].

136. While the analogy is not perfect, it is an example of a situation where a trustee, having obligations to different parties who have different interests, is obliged to deal equitably with them.

137. A further reason to conclude that the best interests test can require fair dealing rather than a ruthless one-sided approach, can be found in the related party provisions of the *Corporations Act*. They are applied with modifications to managed investment schemes by Part 5C.7. In *APCH*, Murphy J referred, at [477] – [478], to paragraph 10.8 of the Australian Law Reform Commission and the Companies and Securities Advisory Committee Collective Investments — Other People's Money: Report No 65 (1993) which states:

> "Duty to act in the interests of investors. Investors in collective investment schemes rely heavily on the operator to act in their best interests. Nevertheless, there will often be a potential for conflict between their interests and those of the operator. This may arise over the fees and charges payable to the operator or the use of scheme property for dealings with parties related to the operator. DP 53 proposed that the law should impose on operators a duty to avoid conflicts of interest. A number of submissions argued that this proposal was neither realistic nor desirable. Conflicts of interest between scheme operators and investors are inevitable. The **Review has concluded that the appropriate formulation of the test is that operators must**

[85] [1985] Ch 270 at 295
[86] *Mortimer v Watts* (1858) 14 Beav 616 at 623-4

> **prefer the interests of investors over their own interests where any conflicts arise**. The Review recommends that the Corporations Law should impose an obligation on the operator of a collective investment scheme to exercise its powers and perform its duties as operator in the best interests of investors rather than in its own, or anyone else's, interest, if that interest is not identical to the interests of the scheme investors. **This duty should be complemented by specific rules for related party transactions.**"
>
> (Citations omitted and emphasis added.)

138. If the plaintiff's approach was accepted then many, perhaps most, related party transactions would be in breach of s 601FD(1)(c) if they provided a benefit to the related party. Whilst s 230 of the *Corporations Act* provides that the related party provisions do not relieve directors of their obligations, it would be a strange result that a transaction was not prevented (or required to have a grant of member approval) by reason of the related party provisions, but the fact of making that transaction was a breach of the directors' obligations.

139. It is submitted that the plaintiff's obligation was to act impartially, or on an "arm's length" basis between the two sets of interests that it represents.

140. Even if this statement of the obligation is rejected, there are some further points.

141. A statement of the conflict rule as applies in the duty-duty situation can be found in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 19-20:

> "Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see Moody v. Cox and Hatt [1917] 2 Ch. 71; Commonwealth Bank of Australia v. Smith (1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability"

142. The statement that the fiduciary might have to cease acting, perhaps for both principals, is consistent with the long standing principle that fiduciary obligations are proscriptive only.[87]

143. There is however, no part of the conflict rule (based on duty-duty or otherwise) or the duty of undivided loyalty to a principal that a party is obliged to:

(a) use its position in another, conflicting, capacity to advantage the principal.

[87] *Breen v. Williams* (1996) 186 CLR 71 at 113

The proposition that the principal might have "no alternative" but to withdraw suggests the opposite – that the principal cannot take a step if that step might breach its duty to one party, even if it would be to the advantage of the other party. The position would be different in a duty-interest conflict, because the principal is able to subordinate its own interests to the duty owed to the beneficiary of the duty.

(b) make overreaching claims or assertions of right on behalf of the principal, that assume the absence of the conflicting duty and the associated set of interests of the other party.

Again the proposition that the principal might have "no alternative" but to withdraw suggests the opposite. The conflicting set of interests (that would (i.e. but for the conflict) require the claims to be rejected) cannot be ignored or assumed not to exist, even if those conflicting interests do not absolve the party with the conflicting duties from liability.

144. The allegations of breach made by the plaintiff appear to be based on a contention that both are part of the obligation of undivided loyalty.

Submission

145. The allegation of breach should be rejected for the following reasons.

146. First, the duty to act impartially, or on an "arm's length" basis between the two interests of the FMIF and the MPF was discharged in circumstances where:

(a) the settlement involved the MPF discontinuing and settling its claims and so it needed to be a party to the settlement agreement, and had a right to a share in the proceeds because it had given up claims of its own;

(b) prospects of the litigation were entirely uncertain and difficult to quantify, it was appropriate for the directors to consider analogous litigation funder scenarios to determine whether the proposed proceeds split fell on arm's length terms;

(c) Mr Drake was entitled to have regard to the Allens advice and the WMS report,

(d) the WMS advice confirmed that the split was reasonable;

(e) the Allens advice confirmed that the split was legally acceptable;

(f) the transaction was in the best interest of the FMIF and the MPF when the comparison is made against continuing the litigation (or never having started it).

147. Secondly, the plaintiff's allegations proceed on the basis that the FMIF had a claim to all of the proceeds of settlement. That premise is incorrect by reason of the matters set out in paragraphs 42-55 above. The proceeds were the outcome of settling both the FMIF and the MPFs claims. They were similar claims, and if anything the MPFs damages claim might have been larger. The ranking of their securities was otherwise irrelevant, because the claims were for declarations and damages, not for sale and recovery under those securities.

148. Thirdly, the plaintiff's claims must therefore assert that LMIM's duty to the FMIF required it to:

(a) take proactive steps to entirely defeat the MPFs claim to a part of the settlement proceeds, or take steps that completely ignored or subjugated that claim;

(b) act in its capacity as trustee of the MPF by doing nothing to assert that claim.

149. Point (a) cannot be accepted. It confuses the obligation to the FMIF that might arise to maximize its share, with an obligation to take all of the proceeds. The latter is completely unjustifiable. It cannot be something that is obligated by the duty of loyalty. As to the former – because the plaintiffs case is "all or nothing" and therefore does not impugn the quantum or proportion of the split, this obligation need not be considered.

150. Point (b) also cannot be accepted. It conflates the obligations owed by LMIM to the FMIF with the powers held by LMIM as trustee to the MPF. The former cannot govern or direct the use of the latter. The proposition from *Bristol and West Building Society* above that the fiduciary cannot absolve himself because "*he cannot fulfil his obligations to one principal without being in breach of his obligations to the other*" does not justify the further step, that the plaintiff seems to urge, that the obligation of loyalty requires the sacrificing of the conflicting party's interests.

151. This is perhaps why the usual obligation of a party in such a conflict is to withdraw from the situation. The plaintiff does not allege such a breach in this case. A withdrawal, leading to the substitution of a different RE and trustee, would have led to an arm's length agreement on sharing the proceeds, not the draconian outcome urged by the plaintiff here.

152. The plaintiff's claim for breach of s 601FD(1)(c) must fail.

Causation and loss

Legal principles

153. Section 1317H provides the Court may order a person to compensate a corporation or registered scheme for damage suffered by a corporation or scheme if

(a) the person has contravened a corporation/scheme civil penalty provision; and

(b) the damage resulted from the contravention.

154. The words "resulted from" mean that "only the damage which as a matter of fact was caused by the contravention can be the subject of an order for compensation".[88] Like the word "by" in s 82 of the Trade Practices Act 1974 (Cth) (see *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at [38]–[42]), they should be given their ordinary meaning of requiring a causal connection between the damage and the contravening conduct, free from the strictures of analogy with equitable claims against fiduciaries.[89]

155. In *Adler*, Giles JA warned against the application of equitable analogies to s 1317H. However, in *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 at [452], Edelman J expressed support for the view that the words "resulted from" import the test applied in equity for linking a breach of duty to the loss and damage suffered.

156. In determining causation under s 1317H, it is appropriate to apply the test prescribed in *March v E and MH Stramare Pty Ltd* (1991) 171 CLR 506, namely determining causation as a matter of fact by reference to common sense and experience: *Hydrocool Pty Ltd v Hepburn (No 4)* [2011] FCA 495 at [476].

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[88] *Adler v Australian Securities & Investments Commission* (2003) 179 FLR 1 at [709] per Giles JA.
[89] *Adler v Australian Securities & Investments Commission* (2003) 179 FLR 1 at [709] per Giles JA; see also *Trilogy Funds Management Limited v Sullivan (No 2)* [2015] FCA 1452 at [713] per Wigney J.

157. If the equitable approach is adopted, it similar. In *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, the Court said at 90:

> "The authorities on this matter have recently been reviewed in O'Halloran v (1998) 45 NSWLR 262 at 272-273. The law in R T Thomas & Family Pty Ltd Australia was there held to be as stated by Lord Browne-Wilkinson in Target Holdings Ltd v Redferns [1996] 1 AC 421 at 439:
>
> > " Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach";
>
> and by McLachlin J in (1991) Canson Enterprises Ltd v Boughton & Co 85 DLR (4th) 129 at 163:
>
> > "it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.""

Submission

158. The plaintiff's case is of narrow compass. It essentially pleads that LMIM should not have agreed to share the proceeds of settlement, and should have kept for the FMIF all of those proceeds.

159. Such a case requires the plaintiff to demonstrate that, in the counterfactual:

(a) the settlement would have been effected, with the same amount paid over by Gujarat;

(b) the FMIF would have taken all of the proceeds;

(c) the MPF either did not have, or would not have exercised its rights.

160. As to the first point, a more detailed background to the settlement is set out in Annexure 1. It demonstrates that:

(a) the disputes were not clear cut or blessed with the likelihood of success. Rather they were:

(i) complex and therefore expensive;

(ii) involved competing claims and cross claims by third parties;

(iii) against a party who was, or at least was seen as, difficult to deal with;

(iv) attended by "significant problems", with prospects that were "at best 50:50";

(b) the settlement:

(i) was hard won, in the sense that it involved:

A. lengthy negotiations;

B. difficult negotiating in the face of extensive delay;

C. a difficult litigator and negotiator on the other side – Gujarat;

D. many changes of position (particularly on the part of Gujarat);

(ii) in light of what is said above about the Proceedings, was an excellent result – it produced an immediate and risk free payment of $45.5 million from difficult disputes and proceedings;

(iii) on the side of Gujarat its value was, or was said to reside in the finalisation of the disputes with no "loose ends";

(c) certainty was therefore critically important, both for LMIM and for Gujarat;

(d) as such it was reasonable for the directors to approach the settlement as something that needed to be treated very cautiously, and therefore to take a very conservative approach to anything that might, even possibly, imperil the settlement.

161. The settlement that was achieved was undoubtedly a good outcome for both the FMIF and the MPF. It resulted from a difficult, protracted negotiation which lasted over 7 months. The Bellpac litigation was generally considered to have uncertain prospects and be attended by significant costs and complexity. If the matter did not settle, LMIM was faced with prosecuting expensive, risky litigation, the outcome of which was wholly uncertain. If the litigation was not prosecuted, LMIM would have no ability to remove Gujarat from the land or sell the property over which it held security.

162. As such, the counterfactual must be based upon not only a conclusion that the settlement would have been effected, but also that there would have been no attempt to change it, in any material respect. And, importantly, no attempt to leave the MPF

out of the settlement in some way. The plaintiff must contend that it would have been obtained, maintained, and consummated in a way that was wholly unchanged.

163. Therefore, since the settlement would not have changed, any counterfactual must necessarily proceed on the basis that:

(a) the MPF was a party to the litigation, with claims for damages that were valuable;

(b) the MPF was a party to the Deed of Release and Deed of Settlement and Release, and therefore:

(i) gave up its claims;

(ii) provided a material part of the consideration for the settlement sum.

164. As to the second point, this might be based upon the proposition that the FMIF was entitled to all of the proceeds.

165. The question then is on what basis?

166. It cannot be that the FMIF was the only party giving up rights, for the reasons set out above.

167. It cannot be the Deed of Priority, because the litigation was not a claim to recover money under the security. Rather it was a claim to upset certain dealings (admittedly, on the basis that they had been entered into without the consent of LMIM required under the charges), and for damages.

168. It cannot be the payment of the settlement sums to PTAL. The Deed Poll had been entered into prior to the time the Deed of Release and Deed of Settlement and Release was signed – in fact a week beforehand. That was a binding obligation on LMIM to divide the proceeds in the way described in the Deed Poll. At the least this shows that the payment to PTAL was for convenience, in that there was already an arrangement for the payment to be split up.

169. Thus, the proposition that the FMIF could, and would have taken all of the settlement sum must rest on the proposition that it would have acted opportunistically. That should not be accepted. At best, it is an overstatement of the obligation to act in the best interests of members by eliding an obligation to maximise the monetary benefit

to the FMIF with an asserted obligation to take the benefits belonging to another fund if the opportunity presented itself.

170. As to the third point, as set out above the MPF had claims in the litigation and was a party to the Deed of Release and Deed of Settlement and Release. As such, the counterfactual must proceed on the premise that these rights would not be asserted, or can be ignored. That can only be on the basis that the directors breach their obligation to the MPF.

171. Ultimately, the plaintiff's case appears to require the counterfactual to be assessed solely from the perspective of the FMIF's interests.

172. That, in turn, involves assessing causation and loss on the basis that LMIM stays in the position of conflict, and acts consistently with its (asserted) duty to the FMIF whilst acting inconsistently with its duty to the MPF. In other words, it involves asserting that the directors would not, or could not, cause the MPF to protect itself, because that would breach their obligations to the FMIF. So, the assessment of loss comes to be made, it seems, on the basis of an assumed wrong to other interests (the MPF).

173. This is an artificial way to look at it. Because it looks to only one side of the equation – the FMIF – and ignores the other, it does not accurately assess what the FMIF has been deprived of.

174. As a matter of common sense, the FMIF has not been deprived of the entire amount paid to the MPF because that sum would never have been paid to the FMIF in any reasonably likely counterfactual scenario. This in turn is because it would only have received that amount if:

(a) the directors had caused the FMIF to claim the entire settlement sum, despite the fact that the MPF was a party to the litigation, and the settlement agreements, and had settled its own claims;

(b) the MPF acquiesced in the FMIFs claim.

175. It is submitted that in fact, any loss should be assessed by reference to a counterfactual situation where there is no conflict, and the interests of the MPF and the FMIF are both represented such that they deal with each other at arm's length. This is the only true common sense measure of what the FMIF has lost. On that

assessment, it has not lost the entire amount paid over to the MPF. An arm's length negotiation would not have resulted in an agreement for the FMIF to have the entire settlement sum.

176. In essence, what occurred represented an arm's length transaction, under respect of which the MPF recovered an amount in recognition of its funding of the litigation and it giving up valuable rights which it otherwise possessed. The FMIF lost nothing.

177. Therefore, the plaintiff has not made out any loss.

Disposition of the proceeding

178. The proceeding should be dismissed as against the first defendant.

179. The plaintiff should pay the first defendant's costs of and incidental to the proceeding.

Gareth Beacham QC and Anastasia Nicholas
Counsel for the First Defendant

7 April 2018

ANNEXURE 1 – DETAILED BACKGROUND TO THE SETTLEMENT OF THE LITIGATION

180. In order to deal with how the impugned MPF settlement payment came to be made, out of the compromise of proceedings to which the MPF was a party, it is necessary to give consideration to the genesis of the disputes and the subject matter of the attendant litigation.

181. The sections below are summarized here for convenience.

182. First, they introduce some antecedent facts, namely:

(a) the loans and securities held by the plaintiff;

(b) the Bellpac land;

(c) the agreements between Bellpac and Gujarat;

(d) the initial disputes between Bellpac and Gujarat.

183. The purpose of this is to introduce matters which are then mentioned or dealt with in the subsequent sections.

184. Secondly, they set out the basis and development of the disputes to which the plaintiff was a party, or which related to the use of the Bellpac land, viz:

(a) how the disputes widened to involve LMIM;

(b) the Proceedings themselves;

(c) how the Proceedings were conducted on behalf of LMIM;

(d) how Mr Monaghan updated, inter alia, the First Defendant in relation to the Proceedings;

(e) two relevant aspects of the Proceedings, namely that they were complex and expensive and that they were conducted against a difficult litigant (Gujarat).

185. The purpose of these sections is to demonstrate that the disputes were not clear cut or blessed with the likelihood of success. Rather they were:

(a) complex and therefore expensive; [90]

(b) involved competing claims and cross claims by third parties;

(c) against a party who was, or at least was seen as, difficult to deal with;

(d) attended by "significant problems", [91] with prospects that were "at best 50:50";[92]

186. Thirdly, they set out the settlement negotiations that resulted in the resolution of the Proceedings, namely:

(a) the mediation which occurred on 9 November 2010;

(b) the subsequent negotiations.

187. The purpose of these sections is to demonstrate that the settlement:

(a) was hard won, in the sense that it involved lengthy negotiations, difficult negotiating in the face of extensive delay, and many changes of position (particularly on the part of Gujarat);[93]

(b) in light of what is said above about the Proceedings, was an excellent result – it produced an immediate and risk free payment of $45.5 million from difficult disputes and proceedings;

(c) on the side of Gujarat its value was, or was said to reside in the finalization of the disputes with no "loose ends". [94] Certainty was critically important.

188. As such it was reasonable for the directors to approach the settlement as something that needed to be treated very cautiously, and therefore to take a very conservative approach to anything that might, even possibly, imperil the settlement.

189. Finally, the settlement and the division of the proceeds are briefly described, before moving onto the submissions as to why the latter was justified.

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[90] Ex 131 - FMIF.040.004.0113 at [.0115].
[91] Ex 131 - FMIF.040.004.0113 at [.0115].
[92] Ex 138 - FMIF.200.014.1489.
[93] See for example: Ex. 162 - FMIF.300.002.9257; Ex. 164 - FMIF.100.003.3803; Ex 165 - FMIF.100.003.5365; Ex. 168 - FMIF.100.003.5742; Ex 178 - FMIF.200.003.6208; Ex 189 - MPF.001.003.2745; Ex 181 - FMIF.100.003.8191; Ex 191 - FMIF.100.003.9385.
[94] Ex 233 - FMIF.100.005.323.

The loans and securities held by the plaintiff

190. On or about 10 March 2003, PTAL advanced $16M of the FMIF's funds to Bellpac on the security of a first mortgage over land (the **land**) and a company charge given by Bellpac.[95]

191. Bellpac's purchase of the land was funded, in part, by PTAL's advance of $16M.[96]

192. The FMIF Bellpac loan agreement was subsequently varied on a number of occasions.[97]

193. On 23 June 2006, the plaintiff as trustee of the MPF advanced $6M of the MPF's funds to Bellpac on the security of a third mortgage over the land and a company charge given by Bellpac.[98] It had previously made an initial advance in 2004 of $5M.[99]

194. On 23 June 2006, the parties to the loans entered into a deed of priority providing that the plaintiff as responsible entity for the FMIF had priority to the extent that security assets were dealt with by either party within the terms of the Priority Deed.[100]

The Bellpac land

195. At the time Bellpac acquired the land, which straddles the Wollongong escarpment at Russell Vale, a colliery was in operation on it, and Bellpac acquired the land with a view to operating the colliery for a period and then developing the land falling to the east of the escarpment, which abuts existing residential and recreational developments.[101] At the time of acquisition, Bellpac was originally both the land owner and lessee under a Crown mining lease which covered between 5000 to 6000 hectares, being Consolidated Coal Lease No 745 issued under the *Mining Act* 1992 (NSW) (**Mining Act**).[102] The land commands ocean views. Were it not for the mining activity, the land was considered to be suitable for residential development.[103]

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[95] 5FASOC at 6, 7 - FMIF.PLE.013.0001 at [.0003] – [.0004] and 4FAD of the First Defendant at 7 - PCD.PLE.005.0001 at [.0003].
[96] Ex 228 - FMIF.100.003.3854.
[97] 5FASOC at 8 - FMIF.PLE.013.0001 at [.0004].
[98] Ex 66 - FMIF.500.008.4491.
[99] 4FAD of the First Defendant at 11(c) - PCD.PLE.005.0001 at [.0005].
[100] Ex 2 - FMIF.009.003.0043.
[101] Ex 131 - FMIF.040.004.0113.
[102] Ex 238 - FMIF.043.004.0016 at [.0019].
[103] Ex 131 - FMIF.040.004.0113 at [.0113].

196. The mining lease was initially to expire on 9 May 2012.[104] Gujarat was successful in securing an extension of the lease under the *Mining Act* until 2023,[105] apparently without the knowledge of LMIM or Bellpac.[106]

197. Gujarat's position was that the mining lease allowed it to use the land for the purpose of mining, with little regard for the position of the land owner, provided it paid compensation under the *Mining Act.*[107] LMIM had received advice from Allens that any compensation payable under the *Mining Act* would be minimal.[108] Gujarat made statements to the effect that the mine on the land has an expected life of 30 years.[109]

Agreements between Bellpac and Gujarat

198. On 22 September 2004, Bellpac agreed to sell to Gujarat and Coalfields certain assets, including the land, pursuant to the LASA.[110]

199. Clause 1.2 of the LASA drew a distinction between what was described as "Development Land", "Retained Land" and the "Residual Land". The Residual Land was the land to be transferred to the buyers under the LASA and mining operations were to continue on it. The "Development Land" and "Retained Land" were Excluded Assets and were to continue to be owned by Bellpac.[111]

200. At the time of entering into the LASA, Bellpac was proposing to develop the Development Land for residential sales. A prerequisite to residential development was that the mining operation on the Development Land and the Retained Land cease, that land was required to be rehabilitated, and the Coal Lease was required to be surrendered over the Development Land and the Retained Land.[112]

201. The principal need for remediation arose because a portal – ie. an entrance to the mine – existed on the Residual Land, which needed to be relocated or replaced. Access to the coal seams via a portal was centrally important to the continued mining operations.

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[104] FMIF.038.001.0194 – exhibited to the affidavit of Tickner at [109] – SJT.LAY.001.0001 at [.0038]
[105] FMIF.038.001.0196 – exhibited to the affidavit of Tickner at [109] – SJT.LAY.001.0001 at [.0038]
[106] Affidavit of Tickner at [109] – SJT.LAY.001.0001 at [.0038]
[107] Ex 237 - FMIF.041.001.0109 at [.0112]
[108] Ex 202 - FMIF.049.006.0275; Ex 131 - FMIF.040.004.0113 at [.0114]
[109] Ex 35 - FMIF.100.003.6995
[110] Ex 67 - FMIF.007.001.0001
[111] Ex 199 - FMIF.049.006.0003 at [.0005] and [.0016].
[112] See 11(c) of the amended commercial list statement – Ex 119 - FMIF.005.006.0012 at [.0020] and Ex 228 – FMIF.100.003.3854

202. The LASA was amended by a series of agreements executed on 3 December 2004 (together, the 2004 Agreements).[113]

203. The 2004 Agreements, in summary, provided that:

(a) within three years from the date of the sale, a plan for remediation of the Development Land and the Retained Land would be formulated by an expert Remediation Management Planner appointed by the parties. In that period, mining operations would be wound down and remediation works would be commenced;

(b) Gujarat would provide a performance bond to Bellpac in respect of its remediation obligations by way of a bank guarantee for $5M;

(c) as between the buyers of the land, Coalfields would become the registered proprietor of the Residual Land shortly after completion of the sale;

(d) Gujarat would pay royalties to Bellpac on annual tonnages of coal won and provide quarterly statements of coal won from the colliery.

204. Specifically, the Remediation Licence Deed provided that:

(a) the buyers were to remediate all of the Development Land to the standard as identified by the Remediation Management Planner as necessary to enable the seller to carry out the residential development (clause 3.3(b));

(b) the buyers were to remediate all of the Retained Land to the DMR Mining Lease Relinquishment Standard and in accordance with the conditions, directions and notices issued by any other governmental agency (clause 3.3(c));

(c) the remediation had to be carried out in accordance with the Remediation Management Plan (clause 3.6);

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[113] An Amendment Deed (Ex 74 - FMIF.007.001.0309); a Remediation Licence Deed (Ex 75 - FMIF.007.001.0130); a Royalty Deed (Ex 76 - FMIF.005.007.0077); a Subdivision Deed (Ex 77 - FMIF.007.001.0321); an Access Licence (Ex 78 - FMIF.007.001.0106); a letter executed by Bellpac, Bounty, Gujarat and Coalfields (Ex 79 - FMIF.013.004.0039). The letter attached a report prepared by Umwelt (Australia) Pty Ltd in November 2004 and contained an agreement that the report constituted the initial Remediation Management Plan deliverable under clause 3.1(c) of the LASA.

(d) the buyers were to procure the surrender or termination of the coal lease from the Development Land and the Retained Land (clause 7.1).

205. There was a remediation management plan authored by Umwelt Pty Ltd in November 2004 which was referred to in the Proceedings. It provided:

(a) that the mining operation on the Development Land and the Retained Land should be de-commissioned and the land rehabilitated, over a period of two years concluding in April 2007;

(b) that approvals should thereafter be obtained from the Department of Primary Industries and other regulatory authorities that the site has been successfully rehabilitated to a sustainable land form for residential development use;

(c) that the land would thereby be made suitable for residential development by the remediation completion date of 3 December 2007.

The initial disputes between Bellpac and Gujarat

206. A dispute arose between Bellpac and Gujarat as to the parties' rights and obligations under the LASA and the 2004 Agreements. The dispute arose in circumstances where:[114]

(a) Gujarat did not cease its mining operations conducted on the land. Instead, it continued and expanded those operations;

(b) Gujarat did not take steps to obtain alternative access to the mine, but instead constructed three new mains access points on the Residual Lands;

(c) no remediation works were carried out by Gujarat or Coalfields;

(d) Coalfields received transfers from Bellpac of part of the Residual Land but was unable to register them when the intended subdivision was not completed;

(e) Gujarat did not pay royalties, or provide quarterly statements, to Bellpac.

[114] FMIF.036.001.0118 exhibited to the affidavit of Tickner at [111] – SJT.LAY.001.0001 at [.0038]

207. In April 2007, Bellpac commenced proceedings against Gujarat seeking an order that it increase the amount of the performance bond for the remediation works from $5M to $11M.

208. On 24 July 2007, Gujarat filed a cross claim in response to Bellpac's proceedings asserting that the parties had failed to appoint a remediation planner, therefore no remediation obligations under the Deed arose.[115]

209. Bellpac and Gujarat purported to settle those proceedings by Deed of Settlement dated 12 September 2007.[116] Clause 8.1 of the Settlement Deed obliged Bellpac to obtain the consent of LMIM and PTAL to enter into the deed. As appears below, there was later a dispute as to whether it did so.

210. Gujarat and Bellpac entered into two further settlement deeds on 23 July 2008[117] – an Amendment Deed and a Restated Settlement Deed. Those deeds relevantly provided:

(a) by Recital 3 to the Amendment Deed, an acknowledgement that the consent of the holders of the securities had not been obtained prior to execution of the Settlement Deeds;

(b) for a purported release of Bellpac's rights under the 2004 Agreements; and

(c) by clause 2.3 of the Restated Settlement Deed, for a sale of part of the Bellpac land to a subsidiary of Gujarat, Southbulli Holdings Pty Limited (**Southbulli**) for $35M.

211. The settlement contemplated that the Mining Lands would be sold to Southbulli, which would have a $25M loan from FMIF to be paid over 10 years.[118]

The disputes widen to involve LMIM

212. It is not controversial, that the dispute between Bellpac and Gujarat impacted Bellpac's ability to service the FMIF Bellpac Loan and the MPF Bellpac Loan.

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[115] FMIF.036.001.0118 exhibited to the affidavit of Tickner at [111] – SJT.LAY.001.0001 at [.0038]
[116] Ex 80 - FMIF.007.001.0213
[117] Amendment Deed to the Deed of Settlement dated 23 July 2008 (**Amendment Deed**) - Ex 81 - FMIF.007.001.0232; Restated Settlement Deed dated 23 July 2008 (**Restated Settlement Deed**) – EX 82 - FMIF.007.001.0274
[118] Ex 122 - FMIF.200.018.0267

213. On 6 May 2009, PTAL appointed receivers to Bellpac. Voluntary administrators were subsequently appointed and on 3 September 2009 Bellpac was placed into liquidation.[119]

214. LMIM assessed the recoverability of the loans and the options available to it. It took the view that the land was unsaleable while Gujarat remained in occupation and LMIM was receiving nothing from Gujarat to offset holding costs or interest. LMIM considered Gujarat to be the only likely buyer of the land[120]. It also gave consideration to locking Gujarat out of the land.[121]

215. Gujarat became aware of threats made by LMIM to lock Gujarat out of possession of the land. Gujarat indicated that, if that was to occur, it would make an urgent application to the Court to prevent any such interference.[122] Allens advised LMIM that it has poor prospects of succeeding on an interlocutory application which sought to lock Gujarat out of the land.[123]

216. On 23 April 2009, Bellpac issued Rectification Notices to Gujarat under the Remediation Licence Deed.[124]

217. On 6 May 2009, LMIM and PTAL issued notices of exercise of power of sale to Bellpac.[125]

Proceedings

218. Against this backdrop, the Proceedings were commenced in 2009 between LMIM, PTAL, Bellpac, Gujarat and Coalfields in respect of the parties' rights and obligations under the LASA, the 2004 Agreements and the various Settlement Deeds.

219. *First*, Gujarat commenced proceedings against Bellpac on 13 May 2009 (**Gujarat proceedings**). By a summons filed in the Supreme Court of New South Wales,[126] Gujarat sought a declaration that the parties' rights under the Remediation Licence Deed had expired. It also sought, *inter alia*, a declaration that the Rectification Notice dated 24 April 2009 served by Bellpac on Gujarat was invalid and a permanent

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[119] 5FASOC at 14 to 16 - FMIF.PLE.013.0001 at [.0005]
[120] Gujarat's position was that the land was worth $7 million and that it would be prepared to pay no more than $24 million, Ex 211 – FMIF.050.005.0006
[121] Ex 198 - FMIF.049.004.0079
[122] Ex 256 - FMIF.040.002.0101
[123] Ex 198 - FMIF.049.004.0079
[124] Ex 123 - FMIF.050.002.0204
[125] Ex 124 - FMIF.009.004.0035; Ex 125 - FMIF.040.004.0047
[126] Ex 126 - FMIF.005.009.0050

injunction restraining Bellpac from taking any steps to enforce its rights under the Remediation Licence Deed or said to arise under the Rectification Notice.

220. Simply put, had the claim in the Gujarat proceedings succeeded, Gujarat could have continued its mining operations, would not have been required to remediate the land and therefore would have had unfettered access to the Development Land so long as the mining lease remained on foot.[127]

221. *Secondly,* by summons filed on 7 July 2009, Bellpac and LMIM started proceedings in the Supreme Court of New South Wales against Gujarat (**Bellpac proceedings**).[128]

222. The relief claimed in the summons refers to a charge granted in favour of the plaintiff dated 23 June 2006, which is the charge granted to MPF. It was therefore commenced on behalf of the MPF.[129] Neither PTAL or LMIM as the RE for the FMIF was a party to this summons.[130]

223. In the Bellpac proceedings, the plaintiffs alleged that, in breach of the terms of the Remediation Deed and the LASA, Gujarat failed to surrender the coal lease by 3 December 2007, renewed the Coal Lease so as to extend its term until 30 December 2023, failed to cease mining operations on the Development Land or the Retained Land by April 2007, failed to decommission the mining operations and rehabilitate the land, failed to remediate the Retained Land and caused the land to be unsuitable for residential development.[131]

224. The plaintiffs sought the following relief:

(a) a declaration that the Settlement Deed and the Amendment Deed were void and of no effect;

(b) an order that the Gujarat procure the surrender or termination of the coal lease and cease mining activities on the Development Land and the Retained Land;

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[127] Ex 131 - FMIF.040.004.0113 at [.0114]

[128] Ex 130 - FMIF.009.004.0004

[129] Although it is not admitted on the pleadings, it was conceded on day one of the trial that MPF was a party to the litigation: T1/39-40 – TRN.001.001.0001 at [.0027]

[130] The summons was supported by an affidavit of David Monaghan sworn on 1 July 2009 Ex 218 – FMIF.300.002.2707. At paragraph 2 of that affidavit, Mr Monaghan deposes that "*the first plaintiff is the trustee of the LM Managed Performance Fund*" and a copy of the MPF Bellpac charge is exhibited at "ADM-1" to this affidavit.. Mr Monaghan provided instructions Wacker on 30 June 2009 to amend his affidavit to remove references to PTAL and to refer to the MPF charge only - Ex 283 – FMIF.050.004.0132

[131] Ex 137 - FMIF.200.007.0784 at [.0791].

(c) a declaration that Gujarat breached the Remediation Deed by conducting mining activities of the Development Land and the Retained Land contrary to the terms of the Remediation Deed.

225. By a list summons[132] and commercial list statement[133] filed on 30 November 2009 PTAL was joined as a party to the Bellpac Proceeding.

226. On 8 February 2010, additional claims were introduced on behalf of PTAL and LMIM as trustee for the MPF sought further relief. In particular, the claims included:[134]

(a) a declaration that Gujarat was knowingly concerned in within the meaning of s75B of the TPA misleading and deceptive conduct on that part of Bellpac in contravention of s52 of the TPA;

(b) a declaration that by Gujarat's entry into the Settlement Deed, Amended Settlement Deed and Restated Settlement Deed, Gujarat tortiously interfered in contractual relations between Bellpac and each of LMIM and PTAL;

(c) damages for tortious interference, and pursuant to s82 or s87 of the TPA.

227. As to the damages claims made by LMIM as trustee for the MPF:

(a) by reason of the breaches by Gujarat and Coalfields of the LASA and Remediation Deed, Bellpac alleged that it suffered loss in that the Development Land had not been remediated to a standard suitable to enable residential development, and the market value of the Development Land and Retained Land had not increased as it would have if remediated and was used or available for residential development;[135]

(b) in turn, the loss suffered by PTAL and LMIM was alleged to be:

(i) diminished value of the security they held, as a consequence of Gujarat's conduct (for the TPA claim);[136]

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[132] Ex 219 - FMIF.300.002.2715.
[133] Ex 219 - FMIF.300.002.2715.
[134] Ex 144 - FMIF.005.006.0001
[135] Ex 119 - FMIF.005.006.0012 at [.0027]; Amended Commercial List Statement at [18], [18F], [18AA].
[136] Ex 119 - FMIF.005.006.0012 at [.0055]; Amended Commercial List Statement at [42], [45].

(ii) the same loss alleged on behalf of Bellpac (for the tortious interference claim).[137]

228. As such, by the time of the mediation, and the subsequent settlement negotiations leading to the resolution of the Proceedings:

(a) LMIM, on behalf of the MPF, had commenced the claims set out above, including damages claims;

(b) PTAL, as custodian of the FMIF, had commenced similar claims.

229. However, the claims of MPF were separate and distinct from those of FMIF because the loss claimed was based upon the security position of MPF (as a second ranking secured creditor). Depending upon the devaluation of the security caused by the wrongful actions of Gujarat, it might suffer loss where FMIF did not, or a greater loss than FMIF. If the development had proceeded, LMIM and PTAL, by extension, would have had an opportunity to make a full recovery of the outstanding loan amounts.[138] A claim of that nature against Gujarat could have survived the land being sold as part of a settlement with Gujarat. In the event that the MPF refused to settle, that claim would have continued to exist.

Thirdly, Coalfields filed a cross claim against Bellpac and Gujarat in the Bellpac proceedings on 16 March 2010 (**Coalfields cross claim**).[139]

230. Coalfields claimed in its cross claim that it was entitled to be the registered proprietor of the lots comprising the Residual Land, and that it had not received royalties and rent from Gujarat as agreed.[140] Coalfields had filed a caveat over the residual land. Gujarat needed the land which was the subject of the caveat to ensure that it had an unchallengeable right of access to the mining land.[141]

231. The Coalfields cross claim was aptly described by its solicitors as the "knot" which needed to be cut if the Proceedings were ultimately to be resolved.[142]

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[137] Ex 119 - FMIF.005.006.0012 at [.0056]; Amended Commercial List Statement, Particulars to [49].
[138] As at 21 October 2010, the feasibility for the development land showed a net present value of $36 million. At this time, Monaghan considered if the Mining Land could be sold to Gujarat for $35 million and the development land was fully developed, that this would result in both loans being paid in full. – FMIF.100.003.0603
[139] Ex 221 - FMIF.005.006.0143
[140] Ex 221 - FMIF.005.006.0143
[141] Ex 233 - FMIF.100.005.3232.
[142] Ex 237 - FMIF.041.001.0109 at [.0110]

232. *Fourthly*, Gujarat also filed a cross-claim in the Bellpac proceeding, seeking relief against LMIM, Bellpac and PTAL for amounts paid under the re-stated settlement agreement[143] (**Gujarat cross claim**).

How the Bellpac proceedings were conducted on behalf of LMIM

233. Mr Drake was the CEO of LMIM, and principally responsible for its strategic vision, direction and structured growth.[144] He travelled internationally on a frequent basis, and was actively involved in LMIM's expansion into ten international offices. [145]

234. As to the subject matter of this proceeding, the following matters are apparent from the documentary record:

(a) he regularly received emails regarding the Bellpac loan, the ensuing litigation and its settlement;

(b) he was not directly involved in these events, save when he was specifically asked for instructions about a particular matter;

(c) there is no evidence that he obtained information about these matters other than via what others told him, usually by email or in meetings.

235. The primary actors on behalf of LMIM in respect of the Bellpac loan and the Proceedings were Mr Monaghan (who also managed the Bellpac loans both before and after they went into default[146]), Mr Tickner[147] and Ms Darcy.[148]

236. At the time the Bellpac proceedings were commenced, LMIM had an in-house legal team, led by Mr Monaghan. In 2005, Mr Monaghan took on the additional role of commercial lending manager for LMIM, in charge of the Commercial Lending Department. Mr Monaghan had previously been employed as a lawyer with Allens Arthur Robinson (**Allens**) for 14 years prior to joining LMIM.[149]

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[143] Ex 224 - FMIF.100.005.1177

[144] 4FAD at 2(a) and 2(b) – PCD.PLE.005.0001 at [.0002]

[145] Affidavit of Tickner at 26.1 – SJT.LAY.001.0001 at [.0008]

[146] Ex 234 – MPF.912.013.000, Affidavit of Tickner at [32] – SJT.LAY.001.0001 at [.0008] ; Affidavit of Darcy at [120] – LMD.LAY.001.0001 at [.0025]; T2-55/6-9; 57/18-19, 59/7-11 - TRN.002.001.0000 at [.0055], [.0057], [.0059]; T3-31/14-19; 31/43-32/2, 37/10-19, 46/39-42, 67/33-35 – TRN.003.001.0000 at [.0031] – [.0032], [.0037], [.0067]

[147] Affidavit of Tickner at [69], [82], [146], [148], [164], [170], [191], [191], [193], [196], [198], [204], [209], [212]. T2-59/13-22 - TRN.002.001.0000 at [.0059]; T3-31/14-19; 31/43-32/2, 37/10-19, 46/39-42 – TRN.003.001.0000 at [.0031] – [.0032], [.0037], [.0046]

[148] Affidavit of Darcy at [123], [110], [187], [195] – LMD.LAY.001.0001; T2-59/13-22 – TRN.002.001.0000 at [.0059]; T3-31/14-19; 31/43-32/2, 37/10-19, 46/39-42 – TRN.003.001.0000 at [.0031] – [.0032], [.0037], [.0046]

[149] Ex 211 - FMIF.050.005.0006 at [.0008]

237. In about March 2010 Mr Monaghan commenced a legal practice under the name "Monaghan Lawyers".[150] Monaghan Lawyers only undertook work on behalf of LMIM and its associated funds. It came to have two additional employees, Mr Trevor Fenwick and Ms Katie Cook.[151] It was situated on LMIM's premises and continued to perform the same function as Mr Monaghan had previously in-house for LMIM.[152]

238. Mr Monaghan acted with a degree of autonomy within the organisation.[153] He conducted litigation and provided instructions to Allens and other external advisors. He rarely sought the directors' instructions as to the conduct of the Proceedings, unless he considered it necessary. He would provide advice, both of a legal and commercial nature, to the board and individual directors, on a regular basis.[154] He attended meetings of directors[155] and provided frequent updates to the directors on the Bellpac litigation.[156] He has variously been described by the defendant directors as being conservative,[157] thorough in the work that he undertook,[158] proactive about stating his opinion,[159] an authoritative resource,[160] experienced[161], careful[162] and meticulous in his approach to legal matters.[163]

239. Mr Monaghan had carriage of the litigation on behalf of LMIM, in the sense that he worked closely with external legal advisors, was their primary point of contact and source of instructions, and provided regular updates to the directors about its progress.

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150 Affidavit of Tickner at [35] - SJT.LAY.001.0001 at [.0012]
151 Affidavit of Tickner at [36] - SJT.LAY.001.0001 at [.0012]
152 Affidavit of Mulder at [85] – FMM.LAY.001.0001 at [.0015]
153 Affidavit of Tickner at [38] - SJT.LAY.001.0001 at [.0012]
154 Affidavit of Tickner at [38] - SJT.LAY.001.0001 at [.0012]
155 Affidavit of Darcy at [61] – LMD.LAY.001.0001 at [.0010]
156 See, for example, 6 July 2009 EX 134 - FMIF.200.014.1144; 16 July 2009 Ex 135 - FMIF.200.013.2537; 23 July 2008 Ex 136 - FMIF.200.007.0783, 29 July 2009 Ex 08 - FMIF.200.009.5397; 7 September 2009 Ex 139 - FMIF.200.007.1345; 22 October 2008 ex 141 - FMIF.200.007.2152; 27 November 2009 Ex 142 - FMIF.300.002.2704; 7 December 2009 Ex 143 - FMIF.200.002.7089; 10 November 2010 Ex 20 - FMIF.100.003.0200; 17 December 2010 Ex 162 - FMIF.300.002.9257; 22 December 2010 Ex164 - FMIF.100.003.3803; 13 January 2010 Ex 165 - FMIF.100.003.5365; 14 January 2011 MPF.001.002.6308; 21 January 2011 Ex – 167 - FMIF.200.003.4599; 27 January 2011 Ex 168 - FMIF.100.003.5742; 4 February 2011Ex 169 - MPF.001.002.7022; 28 February 2011 Ex 173 - FMIF.100.003.6482; 18 March 2011 Ex 179 - FMIF.200.012.6667; 31 March 2011 MPF.001.003.1328; 3 June 2011 Ex 186 - FMIF.200.003.8369; 8 June 2011 Ex 109 - FMIF.100.003.9373; 9 June 2011 Ex 190 - MPF.001.003.2887; 10 June 2011 Ex 192 - 200.003.8583
157 Affidavit of Darcy at [61] – LMD.LAY.001.0001 at [.0010]; Affidavit of Mulder at [82] – FMM.LAY.001.0001 at [.0014]
158 Affidavit of Darcy at [61] – LMD.LAY.001.0001 at [.0010]; Affidavit of Mulder at [82] – FMM.LAY.001.0001 at [.0014]; Affidavit of van der Hoven at [116] – EVH.LAY.001.0001 at [.0019]
159 Affidavit of Darcy at [61] – LMD.LAY.001.0001 at [.0010]
160 Affidavit of Darcy at [62] – LMD.LAY.001.0001 at [.0010]
161 Affidavit of van der Hoven at [116] – EVH.LAY.001.0001 at [.0019]
162 Affidavit of van der Hoven at [116] – EVH.LAY.001.0001 at [.0019]
163 Affidavit of Mulder at [82] – FMM.LAY.001.0001 at [.0014]

The Monaghan updates relation to the Proceedings

240. Prior to commencing the Bellpac proceedings, David Monaghan sought advice from Allens on behalf of LMIM as to a strategy for dealing with Gujarat.[164] Senior Counsel was briefed in June 2009 to provide an advice and Allens produced a strategy paper on 10 June 2009.[165]

241. Mr Monaghan provided frequent, detailed written updates to the directors regarding the Bellpac proceedings.

242. On 2 July 2009, Mr Monaghan advised the directors that Mr O'Donnell QC appeared that day on behalf of LMIM at a directions hearing, at which LMIM was granted leave to file its summons dated 1 July 2009.[166] Orders were made by consent, including that LMIM was to deliver a statement of claim by 16 July 2009 and Gujarat was to deliver a defence and counterclaim by 30 July 2009.

243. On 6 July 2009, shortly after the Bellpac litigation was commenced, Mr Monaghan provided an email summary of the litigation to the directors.[167] Relevantly, that email outlines that:

(a) Gujarat has issued proceedings against Bellpac;

(b) Gujarat contended it was entitled to occupy the land for no payment for so long as the mining lease remained on foot, being until 30 December 2023;

(c) to avoid this result, LMIM issued its own proceedings had then been joined to the Gujarat Proceedings;

(d) the Proceedings were complicated and the effect of the 2004 agreements was unclear;

(e) the directions made in court in the previous week only gave LMIM limited time to formulate and bring its claims against Gujarat;

(f) even assuming LMIM was successful in its claims against Gujarat and Gujarat was forced to surrender the mining lease and vacate the site, there was still uncertainty about where that left LMIM;

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164 Ex 206 - FMIF.050.004.0034
165 Ex 129 - FMIF.009.004.0023
166 Ex 133 - FMIF.200.007.0524
167 Ex 95 - FMIF.200.014.1488

(g) it was too early to form a view about LMIM's prospects, however, from what Mr Monaghan had seen and from discussions with LMIM's QC to date, LMIM had some significant problems to overcome; and

(h) it was Mr Monaghan's intention to bring all possible claims against Gujarat and the costs of the Proceedings would be substantial. If the matter proceeded to trial, the costs would exceed $1 million.

244. On 16 July 2009, Mr Monaghan sent an email to Mr Drake and others.[168] The email forwarded an email from Allens for the director's information. The email informed the directors that a draft statement of claim against Gujarat had been prepared and was to be settled by the QC on Monday then filed. The email noted the potential for a mediation, but only on the basis that Gujarat was willing to discuss purchasing the land.

245. On 29 July 2009, Mr Monaghan sent an email[169] to the directors containing an update on the Bellpac Proceedings. Relevantly, the email stated that:

(a) it was likely that Gujarat would want to proceed to trial because the prospects at that early stage were at best 50:50. Assuming the trial costs, say $2 million for each side, then for an outlay of $2 million, Gujarat would have a 50:50 chance of getting the land for nothing;

(b) even if Gujarat lost, they would still be in a position to try and buy the land;

(c) the logical thing was, therefore, to go to trial and this would mean a long hard fight. There were not many alternatives available to LMIM;

(d) the main risk for LMIM was costs, however, if it did nothing, then Gujarat would continue to use the land without payment to LMIM and the land would be effectively sterilised in any event;

(e) Mr Monaghan's previous estimate was that the case would be likely to cost at least $1 million. Mr Monaghan now estimated that the cost would be more like $2 million;

168 Ex 35 - FMIF.200.013.2537
169 Ex 08 - FMIF.200.009.5397

(f) MPF was currently paying the costs LMIM was incurring. It would need to meet the further costs as things went on; and

(g) with the directors' approval, Mr Monaghan's plan was to proceed with preparation for trial as quickly as possible.

246. On 7 September 2009, Mr Monaghan sent an email to the directors with an update on the Bellpac litigation.[170] The email attached a copy of Gujarat's defence,[171] together with the statement of claim,[172] and advised that:

(a) LMIM was planning to join PTAL as a plaintiff in the proceeding;

(b) at that moment, LMIM's claim was limited to particular contractual obligations which Gujarat has breached (failing to remediate Bellpac's land and failing to surrender the mining lease over Bellpac's land), the remedy for which was damages. The calculation of the damages was problematic so Mr Monaghan had been trying to identify a more general claim for "unjust enrichment" against Gujarat; and

(c) LMIM had been progressing preparation of the case, including reviewing and collating documents, obtaining statements and undertaking legal research.

247. It appears from a briefing note entitled "Bellpac Legal Briefing 15 October 2009" that Mr Monaghan provided a summary of the Bellpac proceedings to all of the directors expect Mr Tickner on around this date. [173] The note records that:

(a) the objective of the litigation was "*[t]o settle with Gujarat on the basis that they purchase site for debt amount. If settlement not possible, recover damages/possession of site*";

(b) costs were likely to be in the amount of $2 million, including the Gujarat Proceedings.

248. On 27 November 2009, Mr Monaghan sent an email the directors[174]. Mr Monaghan provided an update on the Bellpac litigation which provided, in part:

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170 Ex 139 - FMIF.200.007.1345
171 Ex 213 - FMIF.200.007.1347
172 Ex 212 - FMIF.200.007.1346
173 Ex 140 - FMIF.010.002.0011
174 Ex 142 - FMIF.300.002.2704

(a) the Bellpac proceedings had been transferred to the Commercial List and would be case-managed by an experienced commercial judge and fast-tracked to trial;

(b) this process provided maximum pressure on a defendant to settle if they were going to settle, or, alternatively, results in a faster trial than you would get in the general list. Mr Monaghan thought that this pressure was essential to give LMIM the best possible chance of settling with Gujarat;

(c) the decision had been made to change lawyers from Allens to Verekers Lawyers (Rob Tassell).

249. On 23 July 2010, Mr Monaghan sent an email to the directors[175]. Mr Monaghan's email reported that the court had ordered that the Gujarat proceeding go to mediation by 1 October 2010. That date was subsequently extended to 9 November 2010.

Relevant aspects of the Proceedings

250. Two further matters should be mentioned before moving onto the mediation and settlement negotiations.

Complex and expensive nature of the litigation

251. As is apparent from Mr Monaghan's frequent and detailed advice to the directors, set out above, the Bellpac litigation was:

(a) complex;

(b) expensive; and

(c) its outcome was uncertain.

252. The remediation of the land was central to the ability of FMIF and MPF to recover from Bellpac the funds owing under the Bellpac loan. If Bellpac could not redevelop the land it was unlikely to be able to repay the loans. The dispute with Gujarat impacted on the viability of achieving the redevelopment of the land and the timing of any redevelopment (because, until it was resolved, Gujarat would not remediate the land). This, and Gujarat's ongoing mining presence also affected the value of the land, so a mortgage sale would return too little. Ms Darcy viewed Gujarat as

175 Ex 147 - FMIF.100.003.2683

"squatting" on the land.[176] That was in circumstances where Gujarat was in possession of the land under the mining lease but was paying very little, if anything, to Bellpac.[177]

Gujarat as a litigant and negotiator

253. An added complexity of the litigation was the conduct of Gujarat, which was perceived by LMIM to be a difficult litigant approaching the Proceedings from a position of strength, and a difficult negotiator.[178]

254. In July 2009, Mr Monaghan reported to the directors of LMIM, including Mr Drake, that:[179]

> *"if the [Gujarat proceedings] were successful, Gujarat contended that the result was that it was entitled to occupy the land for no payment so long as the mining lease remained on foot"*
>
> and
>
> *"due to Gujarat's difficult attitude, they are unlikely to do this unless they perceive some real risk for them, which is what we are trying to achieve by issuing the proceedings against Gujarat."*

255. In September 2009, Mr Monaghan reported to the directors of LMIM, including Mr Drake, that:[180]

> *"I have spoken with Gary Williams and Coalfields, both ex-partners of Gujarat, who are now in dispute with them. They tell me Arun (Gujarat's chairman) regularly disregards his contractual obligation then engages in litigation in an attempt to avoid them completely. That is consistent with how Arun has treated Bellpac. They both commented on the fact that Gujarat has managed to get a mine worth hundreds of millions of dollars by almost nothing, by disregarding its obligation to Bellpac."*

256. Mr Monghan expressed the view that "*Arun [Jagatramka, Director of Gujarat] thinks he does not need to buy land. He thinks can continue to use land under Mining Act*".[181]

257. Lawyers acting for Coalfields observed that Gujarat's approach was to wear down other parties to litigation until none of them were capable of pursing further rights in relation to the mine and that, as at October 2009, Gujarat was succeeding because it

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176 Affidavit of Darcy at [99] – LMD.LAY.001.0001 at [.0021]
177 Affidavit of Darcy at [99] – LMD.LAY.001.0001 at [.0021]
178 This is not in dispute - 4FAD at 45AA(b)(iii) – PCD.PLE.005.0001 at [.0044] and reply at 41A(b)(i) – FMIF.PLE.008.0001 at [.0033]
179 Ex 131 - FMIF.040.004.0113
180 Ex 139 - FMIF.200.007.1345
181 Ex 207 - FMIF.040.004.0079 at [.0079]

was sitting on the land belonging to Bellpac and which it ought to have been transferred to Coalfields.[182]

258. In the context of the negotiation after the mediation, an example of the perception of Gujarat is an observation by Mr Monaghan:

> *"Gillard has ignored my request of yesterday asking for a commitment to settle by today at the latest, and instead just observed that due to the public holiday settlement will need to be set for 14 June. If you think Gujarat will settle on 14 June you might accept this. However I find it difficult to accept that someone who is serious about settling would respond in this way. If there is a real reason why ?? does not want to settle before 14 June, other than just delay, then it would be a simple matter to tell us what the reason is."*[183]

Mediation

259. On 9 November 2010, a mediation of the Bellpac proceedings occurred in Sydney. Ms Darcy, Mr Tickner, Mr Monaghan and a representative of Verekers attended on behalf of LMIM, with senior and junior counsel. The directors of LMIM in attendance signed a non-binding terms of agreement **(Non-Binding Agreement).** [184]

260. By the terms of the Non-Binding Agreement:

(a) the land was to be sold to Gujarat or its nominee by either the liquidator of Bellpac or via a mortgagee sale for an amount up to $65M to be paid:

(i) $15.5M to be paid by an instalment of $1M payable within one month, and $14.5M within 6 months;

(ii) vendor finance for $46M to $50M which is to be updated on amortisation. There were terms of the vendor finance, which included no interest, a term of ten years, securities of the land, a company charge and guarantees;

(b) LMIM was to pay Coalfields $1.3M to obtain releases of caveats over the land;

(c) LMIM was granted an option to purchase a half share of the land for $15M, on certain conditions, with a view to developing land in a joint venture;

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182 Ex 237 - FMIF.041.001.0109 at [.0109]
183 Ex 189 - MPF.001.003.2745
184 Ex 84 - FMIF.020.005.0081

(d) all claims and cross-claims in the Bellpac proceedings were to be dismissed with all costs orders discharged.

261. On 10 November 2010 at 6:58am, Mr Monaghan sent an email to Mr Drake and others.[185] That email notified them that *"Bellpac has settled subject to board and any other required approvals on both sides"*.

262. On 11 November 2010 at 5:06pm, Mr Monaghan sent an email to Mr Tickner and others which incorporated a draft email to an employee of Deutsche Bank regarding the conduct of the mediation.[186] The email set out that the Bellpac proceedings had been negotiated and that LMIM had *"achieved a very favourable result"*.

263. On 22 November 2010, Mr Monaghan sent an email to Mr van der Hoven, Ms Darcy, Mr Tickner and Mr Petrik. The email requested that Mr van der Hoven confirm that the MPF would have sufficient funds to pay Coalfields $1.3M in order to secure removal of their caveats so that the Property could be sold to Gujarat.[187]

Subsequent negotiations

264. For the next seven months, the parties were engaged in protracted and very difficult negotiations. During the period after the mediation, Mr Monaghan was responsible for the conduct of and progression of the settlement on behalf of LMIM. Allens were retained to assist him with that process. A settlement was not achieved until 21 June 2011, and in the intervening period the proposed settlement almost fell over on a number of occasions. Relevantly:

(a) on 24 November 2010, Mr Monaghan provided an update to the directors which referred to the settlement with Gujarat being complex;[188]

(b) on 18 December 2010, Mr Monaghan advised the directors that Gujarat had begun to renege of aspects of the settlement deal, including a refusal to give a charge to secure the price of the land, and that LMIM alter the contract of sale to the effect that it is an "as is" sale with no warranties;[189]

185 Ex 88 - FMIF.200.003.5819
186 SJT.001.001.1423 exhibited to SJT.LAY.001.0001 at 168
187 Ex 24 - FMIF.100.002.9885
188 Ex 89 - FMIF.100.003.4246
189 Ex 162 - FMIF.300.002.9257

(c) on 13 January 2011, Mr Monaghan provided an update to the directors which advised that Gujarat had outlined that it would not provide any further security. The email identified that it was Mr Monaghan's opinion that an objective of Gujarat was one of delay;[190]

(d) during March 2011, Ms Darcy became increasingly concerned that Gujarat would not proceed towards settlement.[191] She considered that there was a need to try and start reapplying some pressure. On 1 March 2011, Ms Darcy informed Mr Jagatramka that given Gujarat's delay in settlement, if the transaction did not settle within 7 days, LMIM would proceed with its litigation against Gujarat. The delay cost to that date was close to $1M;[192]

(e) on 8 March 2011, Ms Darcy emailed Mr Jagatramka regarding the proposed settlement terms. That email stated in part:[193]

> *"Our duty is to the utmost to protect our investors rights - and the transaction as it currently stands sees our investors recoup all of their outstanding monies over time - that is $73M including interest.*
>
> *As you would understand any offer to settle in full needs to be much higher than the numbers you mentioned over the phone. The only terms whereby LM would be prepared to negotiate a discount to the $73M note above would be such that a full and final settlement would be completed within a 30 day time frame and would require a 10% deposit."*

(f) Mr Jagatramka responded by email of 8 March 2011 in which he referred to a 30 day settlement and a full cash settlement of $45M. [194] This new offer was desirable for LMIM because it gave certainty as to the return, and LMIM would not be tied to Gujarat as a borrower, having to rely on securities provided by Gujarat.

265. Gujarat was eventually prepared to offer a cash settlement of $45.5M. There was still a protracted process of negotiating the terms upon which this would occur and settling the matter in June 2011.

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190 Ex 165 - FMIF.100.003.5365
191 Affidavit of Darcy at [131] – LMD.LAY.001.0001 at [.0024]; see also Ex 172 - MPF.001.002.7684
192 Ex 174 - FMIF.100.003.6803
193 Ex 175 - FMIF.100.003.6824
194 Ex 175 - FMIF.100.003.6824

266. On 9 June 2011, Mr Jagatramka sent an email to Mr Drake and Mr Monaghan regarding the proposed settlement. It articulated a requirement by Gujarat that all "loose ends" be tied up in any settlement, stating:[195]

> *"As regards your suggestion to settle without these lots being resolved, it is not our 1st preference.*
> *You have tried to put a 5% nominal figure of $2 million on such lots, but I would like you to understand that the amount being paid by us in this settlement is more for the peace of mind rather than piece of land. Any loose end hanging doesnt serve the purpose. The premium we are paying is to end all current/potential litigation, as such this needs to be resolved.*
> *We had the mediation more than 6 months back, and until last week, we were given to understand that LM is able to convey all of the land. I don't know why LM have not taken appropriate steps given the time elapsed since mediation. Do LM understand the sensitivity of this matter. We are not prepared to pay such a large sum and still have some outstanding issues. It doesn't make any sense for us. This does put much bigger concern for us. I have copied this mail to LM directors as well so that they could try to resolve this if possible in next 2-3 days.*
> *If at all you suggest to settle keeping this matter pending, then a much larger amount say $5-10 million would have to be retained in trust a/c pending clearance of these lots. Even then I am not sure if I would be happy until this is resolved."* (Emphasis added)

267. In order for the settlement to proceed, LMIM ultimately agreed for an extended completion date in respect of some missing titles for part of the land to be transferred and for $5.5 million of the settlement proceeds to be held by Gujarat's solicitors until that could occur.[196]

195 Ex 233 - FMIF.100.005.3232
196 See 4FAD at 29 – PCD.PLE.005.0001 at [.0021]

ANNEXURE 2 – LEGAL PRINCIPLES IN RELATION TO SECTION 601FD(1)(B)

Corporations Act

1. The *Corporations Act* has detailed provisions in relation to managed investments schemes. A "managed investment scheme" is defined in s 9 of the *Corporations Act* as meaning a scheme which has the following features:

   (a) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

   (b) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

   (c) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)

2. Chapter 5C of the *Corporations Act* contains provisions relating to the registration and operation of managed investment schemes.

3. The requirements for a scheme constitution are set out in Chapter 5C.3 of the *Corporations Act*. Section 601GA(1) provides that the constitution of a registered scheme must make adequate provision for, amongst other things, the powers of the responsible entity in relation to making investments of, or otherwise dealing with, the scheme property. The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity: s 601GB of the *Corporations Act*.

4. Chapter 5C.4 of the *Corporations Act* deals with the requirements of the scheme's compliance plan. Section 601HA(1) provides that the compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with the *Corporations Act* and the scheme's constitution.

5. A registered managed investment scheme must have a responsible entity. The responsible entity of a registered scheme must be a public company that holds an AFSL authorising it to operate a managed investment scheme: s 601FA of the *Corporations Act*. The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and the *Corporations Act*: s 601FB(1) of the *Corporations Act*.

6. Section 601FC(1) of the *Corporations Act* sets out the duties of a responsible entity.

7. Section 601FC(2) of the *Corporations Act* provides that the responsible entity holds scheme property on trust for scheme members. It follows that the responsible entity is effectively a professional trustee company.

8. The officers of a responsible entity are subject to the statutory duties set out in section 601 FD. Section 601FD(1) provides:

> *"An officer of the responsible entity of a registered scheme must:*
>
> *(a) act honestly; and*
>
> *(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and*
> *(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and*
>
> *(d) not make use of information acquired through being an officer of the responsible entity in order to:*
>
> *(i) gain an improper advantage for the officer or another person; or*
> *(ii) cause detriment to the members of the scheme; and*
>
> *(e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and*
>
> *(f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:*
>
> *(i) this Act; and*
> *(ii) any conditions imposed on the responsible entity's Australian financial services licence; and*
> *(iii) the scheme's constitution; and*
> *(iv) the scheme's compliance plan."*

9. Section 601FD(2) of the *Corporations Act* provides that a duty of an officer of the responsible entity under s 601FD(1) overrides any conflicting duty the officer has under Pt 2D.1.

Section 601FC(1)(b) - Duty to exercise reasonable care and diligence

10. In *Trilogy Funds Management Limited v Sullivan (No 2)* [2015] FCA 1452, Wigney J summarised the principles relevant to the duty of care and diligence owed by an officer of a responsible entity.[197] His Honour's summary is extracted, in part, below.

11. The duty of care and diligence owed by an officer of a responsible entity under s 601FD(1)(b) of the *Corporations Act* corresponds with the general duty of care and diligence owed by officers of all corporations under s 180(1) of the *Corporations Act*.[198]

12. This, in turn, warrants consideration of the relevant principles in relation to the duty under s 180(1) of the *Corporations Act* (and predecessor provisions) which are likely to apply equally to the duty under s 601FD(1)(b).

13. *First*, the duty of care and diligence in s 180(1) of the *Corporations Act* is akin to the common law duty of care and it reflects, and to some extent refines, corresponding obligations under the general law.[199]

14. An allegation of contravention based upon s 601FC(1)(b) involves an objective test of the degree of care that a reasonable person would exercise tailored to the circumstances of the responsible entity or director.[200]

15. In *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 (***Adler (No 1)***), Santow J made the following comment regarding the objective assessment of the officer's conduct:

> *"In determining whether a director has exercised reasonable care and diligence one must ask what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances if he or she was acting on their own behalf".*

16. *Secondly*, whilst the test for the standard of care in s 180(1) of the *Corporations Act* is objective, in determining whether a director or officer has exercised reasonable care and diligence, regard will generally be had to the company's circumstances and

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197 At [199]-[210].

198 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 at [191] (***Healey***).

199 *Australian Securities and Investments Commission v Vines* (2005) 55 ACSR 617 at [1070]–[1077] ; *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451 at [142] (*Vines (No 1)*); *Australian Securities and Investments Commission v Maxwell (2006) 59 ACSR 373* at [99] (*Maxwell*); *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 at [7192] (*Rich*); *Australian Securities and Investments Commission (ASIC) v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq) (controllers apptd) (No 3)* [2013] FCA 1342 at [532] (***APCH***, sub nom *Australian Securities and Investments Commission (ASIC) v Lewski* (2018) 362 ALR 286.

200 *Australian Securities and Investments Commission (ASIC) v Lewski* (2018) 362 ALR 286 at [68]

the director's position and responsibilities within the company. The relevant circumstances include: the type of company involved the provisions of the company's constitution; the size and nature of the company's business; the composition of the board of directors; the particular director's position and responsibilities within the company; the particular function the director was performing; the experience and skills of the particular director; the terms upon which he or she has undertaken to act as a director; the competence of the company's management; the competence of the company's advisors; the manner in which responsibility is distributed between the company's directors, officers and employees; and the circumstances of the particular case.[201]

17. *Thirdly*, the Court is to consider what an ordinary person with the knowledge and experience of the director in question might be expected to have done in the circumstances if he or she were acting on his or her own behalf.[202]

18. *Fourthly*, directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company. The directors must become familiar with the fundamentals of the business in which the corporation is engaged and are under a continuing obligation to keep informed about the activities of the corporation. Directorial management requires a general monitoring of corporate affairs and policies. The directors should maintain familiarity with the financial position of the corporation.[203]

19. *Fifthly*, directors are generally entitled to rely upon others, other than in circumstances where they know, or by the exercise of reasonable care, could or should have known, facts that would deny reliance.[204]

20. Directors are entitled to rely on expert advice, including that provided by legal advisors and accountants. That reliance ceases to be reasonable when a director is or should be aware of circumstances which would cause a reasonable person to question what he or she is being told or where there are "obvious errors".[205]

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201 *Adler (No 1)* at [372]; *Maxwell* at [100]; *Healey* at [165] ; *APCH* at [533(b)] .
202 *Adler (No 1)* at [372(4)] ; *APCH* at [533(a)] .
203 *Healey* at [166] .
204 *Maxwell* at [101]; *Healey* at [167].
205 Healey at [569], [579].

21. There will be circumstances in which a fiduciary could not, in good faith, act on advice which it knows to be obviously wrong or, where, to the knowledge of the fiduciary there has been an error in the advice given.[206]

22. In *Adler (No 1)*, Santow J listed some of the factors that might be relevant in considering the reasonableness of reliance or delegation. His Honour observed (at [372(11)] that although reasonableness of the reliance or delegation must be determined in each case, the following may be important in determining reasonableness:

(a) the function that has been delegated is such that, "it may properly be left to such officers": *Re City Equitable Fire Insurance Co Ltd* per Romer J[207];

(b) the extent to which the director is put on inquiry, or given the facts of a case, should have been put on inquiry: *Re Property Force Consultants Pty Ltd* per Derrington J;

(c) the relationship between the director and delegate, must be such that the director honestly holds the belief that the delegate is trustworthy, competent and someone on who reliance can be placed. Knowledge that the delegate is dishonest or incompetent will make reliance unreasonable: *Biala Pty Ltd v Mallina Holdings Ltd* (1994) 13 WAR 124 at 185–6;

(d) the risk involved in the transaction and the nature of the transaction: *Permanent Building Society v Wheeler* (1994) 11 WAR 187 (although in this case the chief executive officer in question also had a conflict of interest);

(e) the extent of steps taken by the director, for example, inquiries made or other circumstances engendering "trust";

(f) whether the position of the director is executive or non-executive: *Permanent Building Society v Wheeler* per Ipp J, though, in *Daniels v Anderson*, the majority have moved away from this distinction.

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206 *Cairns Shelfco No 16 Pty Ltd v State of Queensland (No 2)* [1998] 1 Qd R 579 at 584 per Fitzgerald P , Pincus JA , Dowsett J, a statement made in the context of an expert valuation and not, as in this case, the giving of legal advice.

207 [1925] Ch 407

23. Santow JA also summarised the relevant principles in relation to permissible reliance in *Vines (No 1)* in the following terms (at [731]):

> *"The degree of an officer's permissible reliance on others will turn on similar considerations as those that determine the overall standard of care for an individual director. They focus particularly on the characteristics of the company, the skills and experience of the officer concerned and the delegate, and the reasonably anticipated risks entailed in so doing. What is expected here is a level of scrutiny as befits supervision, not the detailed direct involvement that is associated with operational responsibility. Where there is no cause for suspicion nor circumstances demanding critical and detailed attention, it is reasonable for an officer to rely on advice, without independently verifying the information or scrutinising the data or circumstances upon which that advice is based: see Australian Securities and Investments Commission v Adler (2002) 168 FLR 253 ; 41 ACSR 72 ; [2002] NSWSC 171 at [371] ."*

24. In *APCH*, Murphy J concluded (at [535]–[537]) that whilst the duty in s 601FD(1)(b) corresponds with the duty in s 180(1), the standard of care under s 601FD(1)(b) will often be higher. His Honour reasoned that this flowed from the fact that the relevant director will be a director of a responsible entity which is acting as a trustee and holding itself out to the public, and being remunerated, as a professional trustee.

ANNEXURE 3 – LIST OF THE PROCEEDINGS

Dispute – referred to in paragraph 19 5FASOC			
Date	Doc ID	Document filed	Document filed by
24.07.2008	FMIF.036.001.0118 (exhibited to the affidavit of Mr Tickner – SJT.LAY.001.0001)	Commercial List Cross-Claim Statement	Gujarat & Ors

Gujarat Proceedings – referred to in paragraph (22(a) 5FASOC			
Date	Doc ID	Document filed	Document filed by
12.05.2009	Ex 126 - FMIF.005.009.0050	Summons	Gujarat

Bellpac Proceedings – referred to in paragraph (22(b) 3FASOC and 22(b) 4FAD			
Date	Doc ID	Document filed	Document filed by
07.07.2009	Ex 130 - FMIF.009.004.0004	Summons	LMIM and Bellpac
01.07.2009	Ex 218 - FMIF.300.002.2707	Affidavit of Alexander David Monaghan	LMIM and Bellpac
17.11.2009	Ex 214 - FMIF.010.002.0005	Notice of Motion	LMIM and Bellpac
17.11.2009	Ex 215 - FMIF.010.002.0007	Affidavit of Andrew Carl Stumer	LMIM and Bellpac

22.07.2009	Ex 212 – FMIF.200.007.1346	Statement of claim	LMIM and Bellpac
02.09.2009	Ex 213 - FMIF.200.007.1347	Defence	Gujarat
30.11.2009	Ex 219 - FMIF.300.002.2715	List Summons	LMIM, Bellpac and PTAL
30.11.2009	Ex 219 - FMIF.300.002.2715	Commercial List Statement	LMIM, Bellpac and PTAL
08.02.2010	Ex 144 - FMIF.005.006.0001	Amended List Summons	LMIM, Bellpac and PTAL
08.02.2010	Ex 119 - FMIF.005.006.0012	Amended Commercial List Statement	LMIM, Bellpac and PTAL
16.03.2010	Ex 145 - FMIF.005.006.0138	First Cross Claim – Cross Summons	Coalfields
16.03.2010	Ex 221 - FMIF.005.006.0143	Commercial List Cross Claim Statement – First Cross Claim	Coalfields
04.05.2010	Ex 278 - FMIF.005.009.0068	Commercial List Response	Gujarat
26.06.2010	Ex 289 - FMIF.005.006.0183	Commercial List Cross-Claim Response	Gujarat
26.06.2010	Ex 224 - FMIF.100.005.1177	Second cross-claim commercial list cross-claim statement	Gujarat and Southbulli

21.07.2010	Ex 290 - FMIF.005.006.0117	Reply to first defendant's commercial list response	LMIM, Bellpac and PTAL
21.07.2010	Ex 291 - FMIF.005.006.0132	Reply to second defendant's commercial list response	LMIM, Bellpac and PTAL
21/07/2010	Ex 292 - FMIF.005.006.0171	Commercial list response to first cross claim	LMIM, Bellpac and PTAL
23/08/2010	Ex 225 - FMIF.011.002.0106	Cross' defendant's commercial list response to second cross claim	LMIM, Bellpac and PTAL

DEFINED TERMS FROM THE FIFTH FURTHER AMENDED STATEMENT OF CLAIM AND FOURTH FURTHER AMENDED DEFENCE

Defined Term	Definition	Reference in 5FASOC
LMIM	LM Investment Management Limited (Receivers & Managers Appointed) (in Liquidation) ACN 007 208 461	1
RE	Responsible Entity	1(b)
FMIF	LM First Mortgage Income fund ARSN 089 343 288 (or sometimes called LM Mortgage Income Fund??)	1(b)
LM Order	Order of de Jersey CJ dated 12 April 2013	1(c)
MPF	The LM Managed Performance Fund	1(c)
Deutsche / DB	Deutsche Bank AG	1(e)
The FMIF Order	Order of Dalton J dated 21 August 2013	3
Liquidators	John Park and Ginette Muller appointed to LMIM on 1 August 2013	1(f)
Act	The *Corporations Act* 2001	3(c)
PTAL	Permanent Trustee Australia Limited as Custodian of LMIM as RE of the FMIF	5
FMIF Bellpac Loan Agreement	Loan agreement between PTAL and Bellpac on or about 10 March 2003	5
FMIF Bellpac Loan	Advance of $16M by PTAL to Bellpac	6
PTAL Mortgage	First Registered Mortgage over land known as "Balgownie No. 1 Colliery Wollongong" in the State of New South Wales and granted to PTAL by Bellpac	7(a)
Property	Land known as "Balgownie No. 1 Colliery Wollongong" in the State of New South Wales	7(a)
PTAL Charge	Registered charge over Bellpac	7(b)
MPF Bellpac Loan Agreement	Agreement between LMIM as Trustee for the MPF with Bellpac, on or about 23 June 2006	9
MPF Bellpac Loan	Advance of $6M to Bellpac by LMIM as Trustee for the MPF	10
The MPF Mortgage	Third Registered Mortgage over the property	11(a)
MPF Charge	Registered Charge over Bellpac	11(b)
Deed of Priority	Deed of Priority between LMIM as RE of the FMIF, LMIM as Trustee for the MPF, GPC No. 11 Pty Ltd,	12

Defined Term	Definition	Reference in 5FASOC
	GPC No. 12 Pty Ltd, GPC No. 8 (Bulli) Pty Ltd, Austcorp Project No. 20 Pty Ltd and Bellpac dated 23 June 2006	
GPC	GPC Equipment Pty Ltd	17
Gujarat	Gujarat NRE Coking Coal Limited (formerly Gujarat NRE Minerals Limited)	17
Bounty	Bounty Industries Australia Pty Limited	17
Coalfields	Coalfields (NSW) Pty Limited	17
LASA	Land and Asset Sale Agreement	17
2004 Agreements	Certain or other agreements entered into by Bellpac and GPC and Gujarat and Coalfields on or about 3 December 2004	18
Dispute	Dispute between Bellpac and Gujarat as to the parties' rights, obligations and liabilities under the LASA and 2004 Agreements	19
Settlement Deeds	The 2007 and 2008 Settlement Deeds executed by Bellpac and Gujarat in order to resolve the Dispute	20
2009 Dispute	Dispute between LMIM, PTAL and Bellpac and Gujarat and Coalfields as to the parties' rights, obligations and liabilities under and as a consequence of the LASA, the 2004 Agreements and the Settlement Deeds	21
Gujarat Proceedings	Proceedings commenced by Gujarat against Bellpac in or about May 2009	22(a)
Bellpac Proceedings	Proceedings commenced by LMIM, PTAL and Bellpac against Gujarat, Coalfields, Bounty and GPC in or about November 2009	22(b)
Coalfields Cross-Claim	Proceedings commenced by Coalfields against Bellpac and Gujarat by Cross-Claim in the Gujarat Proceedings	22(c)
Proceedings	Collectively the Gujarat Proceedings, the Bellpac Proceedings and the Coalfields Cross-Claim	22
Mediation Heads of Agreement	A nonbinding Heads of Agreement recording agreement in principle was executed in the course of a mediation between the parties to the Proceedings in or about November 2010	25
Southbulli	Southbulli Holdings Pty Ltd	28(a)
Deed of Release	Deed of release executed by LMIM in its capacity as RE for the FMIF, PTAL, Bellpac, Gujarat and	28(a)

Defined Term	Definition	Reference in 5FASOC
	Southbulli Holdings pursuant to which the parties agreed to settle all of their disputes including the disputes in the Proceedings and to regulate their relationship	
Deed of Settlement and Release	Deed of Settlement and Release signed simultaneously with the execution of the Deed of Release whereby the parties agreed to settle their differences in respect of the Proceedings	28(b)
Gujarat Contract	PTAL as mortgagee exercising power of sale under the PTAL Mortgage entered into a contract to sell the Property to Gujarat for the purchase price of $10M exclusive of GST	28(c)
WMS	WMS Chartered Accountants	30A
WMS Report	Report by WMS containing the opinion sought and referred to in paragraph 30A of the ASOC on or about 7 March 2011	30D
Allens Advice	An advice provided by Allens sought and referred to in paragraph 30B of the ASOC on or about 20 March 2011	30E
Settlement Payment	Payment of $15,546,147,85 [sic] to LMIM as Trustee for the MPF from the proceeds payable to PTAL as custodian of the LMIM as RE of the FMIF pursuant to the terms of the: (a) Gujarat Contract; and (b) Deed of Release.	35

Defined Term	Definition	Reference in 4FAD
Monaghan Lawyers	Law firm called Monaghan Lawyers of which David Monaghan was the principal	2A(e)
Fischer	Grant Fischer, CFO of LMIM from in or around 2008	2B(a)
Gujarat cross-claim	Cross claim filed by Gujarat in the Bellpac Proceedings against LMIM, Bellpac and PTAL	22(d)
Allens	Major Australia Law firm retained by LMIM	22A(c)
Verekers	Sydney litigation firm retained by LMIM	22A(d)
Pappalardo	Alf Pappalardo, Partner at Allens	22A(fa)(i)
Extended completion arrange	Arrangement pursuant to clause 54 of the Gujarat contract	29(b)
WMS terms of engagement	Letter from WMS dated 6 December 2010	30A(d)
Beckinsale	John Beckinsale, Partner at Allens	30B(a)
FMIF Settlement Payment	$32,927,184.73 – amount received by LMIM as RE of the FMIF upon and after completion (including the amount received on the extended completion)	34(c)(iii)(b)
Chapter 2E considerations	LMIM's obligations under chapter 2E of the Act subject to the modifications prescribed by section 601LA of the Act	34(f)(i)(A)
Accounting considerations	LMIM's obligations under accounting standard AASB 124	34(f)(i)(B)
Completion	21 June 2011	35(a)
Gujarat Settlement Payment	$35.5M pursuant to cl.7 of the Deed of Release; and $10M pursuant to cl. 16.7 of the Gujarat Contract	35(c)
Agreed Contribution	Amount received by LMIM as trustee for the MPF: $13,601,547.38 on 21 June 2011 (after adjustments); and $1,944,600.47 on 8 September 2011 Being a total sum of $15,546,147.85	35(e)
Settlement	The settlement obtained under the Deed of Release, Deed of Settlement and Release and Gujarat Contract	45AA(b)(i)

PEOPLE/ROLES

Abbreviation	Full Name	Positions Held
Armes	Adrien Armes	LMIM – Arrears Manager
Arun	Arun Jagatramka	Director of Gujarat
Beckinsale	John Beckinsale	Allens, Partner
Breene	John Breene	Breene & Breene Solicitors
Chalmers	Shelley Chalmers	LMIM, PAM team
DB		DB Strategic Advisors
Darcy	Lisa Darcy	LMIM, Second defendant
Drake	Peter Drake	LMIM – first defendant
Fenwick	Trevor Fenwick	Monaghan Lawyers
Fischer	Grant Fischer	Executive Director, LMIM; Employee, LMA
Gillard	Brian Gillard	Gillard Consulting Lawyers (acting for Gujarat)
Kannan		Gujarat
Lavell	Aaron Lavell	WMS Solutions
Monaghan	David Monaghan	Commercial Lending Manager, LMIM, then Lawyer, Monaghan Lawyers, then Allens
Mulder	Francene Mulder	LMIM – fourth defendant
O'Sullivan	John O'Sullivan	Fifth defendant
Pankaj		Deutsche Bank
Pappalardo	Alf Pappalardo	Allens, Partner
Petrik	Andrew Petrik	LMIM
Tassell	Robert Tassell	Verekers Lawyers
Tickner	Simon Tickner	LM, sixth defendant
Tzovaras	Ted Tzovaras	Acts for Alfred Wong
van der Hoven	Edgard van der Hoven	LM, third defendant
Wacker	Bruce Wacker	Allens, Senior Associate
Wong	Alfred Wong	Director, Bellpac and guarantor of the Bellpac facilities
Wang	Michael Wang	PKF

"SC-16"

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS 12317 of 2014

Plaintiff	**LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
	And
Defendants	**PETER CHARLES DRAKE**
	(and seven other defendants)

SECOND DEFENDANT'S OUTLINE OF CLOSING SUBMISSIONS

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1. INTRODUCTION

1.1 This is the outline of closing submissions of the Second Defendant, Ms D'Arcy.

1.2 This outline is accompanied by a Note of the Factual Findings Sought by the Second Defendant, with references to the evidence. This outline contains some references to the evidence but also cross-refers to the separate note.

1.3 An updated chronology with references to the evidence (including exhibit numbers) is also attached.

1.4 The Plaintiff's case in not made out against Ms D'Arcy for two principal reasons.

1.5 First, the alleged contraventions of s 601FD(1)(b) or s 601FD(1)(c) of the *Corporations Act* 2001 (Cth) ("**Corporations Act**") are not made out on the evidence.

1.6 Second, and in any event, the Plaintiff has not established the alleged counterfactual with respect to its damages claim, namely that the Gujarat Proceedings would have settled without the payment to LMIM as trustee of MPF of the funding split.

1.7 Ms D'Arcy is a person who does not have legal training, and she relied on, and deferred to, legal advice received from Allens and Monaghan as they were more knowledgeable, skilled and experienced than her in such matters. There is no doubt about this on the evidence.

1.8 She took a prudent and considered approach to the proposed funding split.

1.9 She ensured that the FMIF's auditors (of the financial accounts and compliance plan) were informed of the consideration being given to the proposed funding split and sought their opinion as to what was appropriate, and what in their opinion needed to be done in consideration of the proposal. The auditors were kept abreast of the developments, being provided with the Allens Advice and the Deed Poll. She followed the advice of the auditors and sought independent legal advice from Allens, who had been acting for LMIM since 2007. Monaghan was involved in this process. Subsequently, on the recommendation of the auditors, the Deed Poll was prepared by Allens.

1.10 Monaghan, an experienced and trusted lawyer, was involved in every step of the consideration of the funding split by Ms D'Arcy and the other directors of LMIM.

1.11 At no time did either Allens, Monaghan or the auditors inform Ms D'Arcy that the proposed funding split ought not to occur or ought to be reconsidered.

1.12 Having followed this process, Ms D'Arcy considered that the proposed funding split was in the best interests of the FMIF.

2. WITNESSES

2.1 Ms D'Arcy was a credible witness. The Court is invited to accept her evidence.

2.2 While there were a number of matters about which Ms D'Arcy was cross-examined which she could not recall, that is to be expected given the passage of time. It was to Ms D'Arcy's credit that she readily admitted that she could not recall certain matters, and it was apparent that she was attempting to assist the Court to the best of her abilities.

2.3 Much was sought to be made in Ms D'Arcy's cross-examination of her inability to refer to documentary evidence of conversations such as minutes and emails. This line of cross-examination fell flat. The undisputed evidence is that emails were not the only method of communication between the directors and other personnel at LMIM, including with Monaghan. There were regular communications between the directors and between Monaghan; there was regular informal consideration by the directors of current issues;[1] and the directors would, also, meet regularly and frequently with other

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1 Ex 262, Aff LD, para 17; Tr dax 2, p 44, ll 35-36; Tr day 2, p 48, ll 3-5, 19-20.

personnel.[2] Ms D'Arcy and Monaghan while working at LMIM sat closely within the offices of LMIM and they would discuss issues that arose.[3] When Monaghan established Monaghan Lawyers he was still in close proximity to the offices of LMIM and Ms D'Arcy would usually see him on a daily basis and they would often chat about LMIM business.[4]

2.4 The Plaintiff did not call Monaghan, despite providing a summary of his evidence[5] and the fact that he was a central person involved in the events the subject of these proceedings. The Court is invited to infer that Monaghan's evidence would not have assisted the Plaintiff.

2.5 Ms D'Arcy could not have been expected to call Monaghan herself. Ms D'Arcy contacted Monaghan but he declined to provide a statement on the basis that he owed obligations of confidence to the Plaintiff.[6]

3. SUMMARY OF LEGAL PRINCIPLES

3.1 The key principles governing the two duties allegedly breached by Ms D'Arcy may be summarised at the outset.[7]

Duty of care

3.2 The duty under s 601FD(1)(b) of the Corporations Act is to, "*exercise the care and diligence that a reasonable person would exercise if they were in the officer's position*". This imposes an objective standard requiring the degree of care that a reasonable person would exercise tailored to the circumstances of the director.[8]

3.3 The duty under s 601FD(1)(b) corresponds with the duties imposed on company directors under s 180(1), which themselves are akin to the common law duty of care.[9] In that context, two points are well-established.

3.4 *First*, the standard required is reasonable care and skill, not perfection.[10]

3.5 *Secondly*, to discharge their duty, directors are to required, "*to take reasonable steps to place themselves in a position to guide and monitor the management of the company*".[11] They are not required to be intimately involved with all of the details of the company's affairs, or to be expert in all areas relevant to the supervision of

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2 There were also other business meetings attended by directors and executives: Ex 262, Aff LD, paras 18 to 20 and 181.

3 Ex 262, Aff LD, para 60; Tr day 2, p 57, ll 45-46.

4 Ex 262, Aff LD, paras 66 & 67; Tr 2-57 l 45.

5 Ex 261, Aff of Greg Rodgers, para 7, LMD.LAY.001.0345.

6 Ex 261, Aff of Greg Rodgers, paras 3-6 and LMD.LAY.001.0344.

7 The legal principles relevant to relief from liability under s 1317S of the Corporations Act are summarised further below.

8 *ASIC v Lewski* (2018) 362 ALR 286 at [68] (HCA).

9 *ASIC v Healey* (2011) 196 FCR 291 at [191] (Middleton J); *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [199]-[200] (Wigney J).

10 *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [208] (Wigney J).

11 *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [203] (Wigney J); *ASIC v Adler* (2002) 41 ACSR 72 at [372(8)] (Santow J).

management. Directors are entitled, and indeed may be required, to rely upon the advice of management, other officers and professional advisers; and it will ordinarily be reasonable for them to do so. Middleton J summarised the position thus in *ASIC v Healey* (2011) 196 FCR 291 at [167]:

> While directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company, they are entitled to rely upon others, at least except where they know, or by the exercise of ordinary care should know, facts that would deny reliance.

3.6 Similarly, in *Vines v ASIC* (2007) 73 NSWLR 451, Santow JA said (at [731]) that:[12]

> Where there is no cause for suspicion nor circumstances demanding critical and detailed attention, it is reasonable for an officer to rely on advice, without independently verifying the information or scrutinising the data or circumstances upon which that advice is based.

3.7 *Healey* and *Vines* did not concern legal advice, but the proposition applies equally to such advice.[13]

3.8 Whether a director knows, or should have known, facts that deny reliance depends on all the circumstances,[14] including the skills and experience of the director concerned and the adviser; the relationship between the director and delegate or adviser, particularly whether the director believes that the adviser is trustworthy or competent and the length of their working relationship; and the extent to which the director is put on inquiry, or given the facts of the case should have been put on inquiry.[15] Matters that may put a director on inquiry include that the advice is unclear or equivocal;[16] is based on instructions or assumptions that are not identified;[17] or is based on instructions or assumptions that do not reflect the factual basis on which the directors' decision is being made.[18]

3.9 While it has been suggested that the standard of care for an officer under s 601FD(1)(b) may be more exacting than the corresponding duty under s 180(1) by reason of the RE's position as a professional trustee,[19] this does not deprive the officer

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12 Santow JA dissented in the result, but not on principle: see *ASIC v Healey* (2011) 196 FCR 291 at [170] (Middleton J).

13 See e.g. *ASIC v Maxwell* (2006) 59 ACSR 373 at [101], [113] (Brereton J).

14 *ASIC v Healey* (2011) 196 FCR 291 at [162] (Middleton J).

15 See *ASIC v Adler* (2002) 41 ACSR 72 at [372(11)]; *Vines v ASIC* (2007) 73 NSWLR 451 at [731] per Santow JA; *ASIC v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [533(e)]; *ASIC v Mariner Corporation Ltd* (2015) 241 FCR 502 at [533] (Beach J).

16 See *ASIC v Adler* (2002) 41 ACSR 72 at [435]; *Re Idyllic Solutions Pty Ltd* [2012] NSWSC 1276 at [2456]; *ASIC v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [593] (and, on appeal, see *ASIC v Lewski* (2018) 362 ALR 286 at [69]).

17 *Re Idyllic Solutions Pty Ltd* [2012] NSWSC 1276 at [2456], [2474].

18 *ASIC v Adler* (2002) 41 ACSR 72 at [307], [434]-[435]; *Re Idyllic Solutions Pty Ltd* [2012] NSWSC 1276 at [2474].

19 *ASIC v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [534] (Murphy J); *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [211] (Wigney J).

of the ability reasonably to rely on legal advice.[20] As set out below, Ms D'Arcy discharged her duty of reasonable care even applying a more exacting standard.

Duty to act in members' best interests

3.10 Section 601FD(1)(c) creates two distinct duties of loyalty: (1) one to, "*act in the best interests of the members*"; and (2) another to, "*if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members interests.*"[21]

3.11 The latter duty is expressly confined to conflicts between the interests of members of the RE and duties owed by the officer to the RE itself. It does not require officers to prioritise the interests of members at the expense of discharging any duties owed to other persons.[22]

3.12 While the Plaintiff has pleaded the alleged contraventions in broad terms,[23] it has not pleaded any conflict of interest between the interests of LMIM and the interests of the FMIF's members. The Plaintiff's case is confined to the first of the two duties of loyalty imposed by s 601FD(1)(c).

3.13 The duty to act in members' best interests requires more than mere honesty, but it does not require the director to achieve the best outcome for members.[24] Where the line is to be drawn between these two ends of the spectrum has not been conclusively settled. It submitted that the correct approach is as follows.

3.14 *First,* the line is drawn at a requirement of reasonableness. Thus, the duty requires an officer honestly to act in the best interests of members and to do so reasonably.[25]

3.15 *Secondly*, the assessment of what is reasonable in the best interests of members involves deference to the judgment of the officer. There is an objective element, in that a decision cannot be irrational or one that no reasonable officer could have reached. However, the Court should otherwise not interfere with commercial decisions of officers. This echoes the approach taken to trustees' and directors' duties in analogous contexts.[26]

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20 See *ASIC v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [532], where Murphy J applied the authorities on the general law duty of care and s 180(1) in determining whether the directors of an RE reasonably relied on legal advice.

21 See *ASIC v Lewski* (2018) 362 ALR 286 at [70].

22 *Allco Funds Management Ltd (Receivers and Managers Appointed) (In Liq) v Trust Company (RE Services) Ltd* [2014] NSWSC 1251 at [189] (Hammerschlag J).

23 5FASOC at [45].

24 *ASIC v Lewski* (2018) 362 ALR 286 at [71].

25 See *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at [107] (Byrne J), approved by Murphy J in *ASIC v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342 at [482].

26 See *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at [118] (Byrne J); *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 at [923] (Lee AJA), [2772] (Carr AJA) and see also at [1983] per Drummond AJA.

3.16 Alternatively, if the requirement of reasonableness is more exacting, it is no higher than the duty to exercise reasonable care. Otherwise, the duty would be impermissibly transformed into one to achieve the best outcome for members.[27]

4. THE ALLEGED BREACH OF DUTY OF CARE

Introduction

4.1 The Plaintiff adopts a convoluted and scatter gun approach to the alleged contravention of s 601FD(1)(b), relying on 20 odd grounds to establish its case.[28]

4.2 Ms D'Arcy did exercise the degree of care that a hypothetical reasonable director would have exercised in her position.

4.3 The Note of Factual Findings Sought by the Second Defendant deals with majority of the allegations, but it is appropriate to consider the broad factual circumstances, the time at which it was known that the settlement proceeds would be insufficient to pay out the FMIF Bellpac Loan, the WMS Report, the Allens Advice and the Deed Poll.

4.4 Consideration will then be given to some specific categories of the 20 odd grounds.

Factual circumstances

Monaghan, Allens and Ernst & Young involvement

4.5 The reasonableness of Ms D'Arcy's conduct is to be measured in the context of the integral involvement of Monaghan[29] and Allens, their knowledge, skill and expertise, and the undisputed evidence[30] that she gave about reliance on that knowledge, skill and expertise.

4.6 Ms D'Arcy sought to have both Monaghan and Allens involved.[31]

4.7 Ms D'Arcy does not have legal training, and she relied on, and deferred to, legal advice received from Allens and Monaghan as they were more knowledgeable, skilled and experienced in those matters upon which legal advice was sought.[32] Given Monaghan's background knowledge of the Bellpac Loans and the Proceedings, and position as a lawyer Ms D'Arcy considered that he would ensure that Allens would be given the relevant background information that would be required by them.[33]

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27 Contrary to recent High Court authority: see *ASIC v Lewski* (2018) 362 ALR 286 at [71].

28 5FASOC at [34], [37A].

29 Where Monaghan had been the risk manager, the commercial lending manager and in-house legal counsel for LMIM, and managed the Bellpac Loans and Proceedings: see Note of the Factual Findings at [1.7].

30 Ex 262 and Note of the Factual Findings at [1.9], [1.10], [8.7]-[8.9].

31 For example: Ex 262, Aff LD, para 186 (requesting Monaghan contact WMS to initiate obtaining and independent accountants report), para 195 (requesting Monaghan to seek further legal advice about the proposed funding split).

32 Note of Factual Findings at [1.7], [1.8], [1.9], [1.10]; and specifically Ex 262, Aff LD, para 186.

33 Ex 262, Aff LD, para 210.

4.8 Ms D'Arcy also sought advice from the auditors for LMIM. After receipt of the WMS Report,[34] she considered whether that would be a sufficient basis for a decision to be made on the funding split and then sought assistance from Ernst & Young, the auditors of FMIF's financial accounts and compliance with the compliance plan.[35] She wanted to ensure that the auditors were aware of the proposal and to obtain their opinion as to what was appropriate and what in their opinion needed to be done in consideration of the proposal to split the proceeds from the Proceedings.[36]

4.9 She followed the recommendation and requested Monaghan to obtain legal advice on how to deal with issues, including the first and second mortgages and conflicts.[37] Such advice was important to Ms D'Arcy.[38]

4.10 Monaghan informed Ms D'Arcy that the Allens Advice concluded that the proposed split of the proceeds from the Proceedings was "ok" and it could proceed.[39]

4.11 The WMS Report, the Allens Advice[40] and the Deed Poll[41] were provided to Ernst & Young, to the knowledge of Ms D'Arcy.[42] At the time the Allens Advice was provided to her it was also provided to LMIM's Business Standards and Compliance Manager, who was a member of LMIM's compliance committee.[43]

4.12 Following the recommendation of Ernst & Young the Deed Poll was prepared.[44] It was prepared by Monaghan Lawyers.[45]

4.13 At no time did Monaghan, Monaghan Lawyers or Allens advise Ms D'Arcy, or to her knowledge LMIM, that the proposed transaction could not occur or should be reconsidered.[46] Ernst & Young did not inform Ms D'Arcy, or LMIM to her knowledge, that in their opinion the proposed split ought not occur or should be reconsidered.[47] Neither the compliance manager or compliance committee of LMIM as RE of the FMIF identified to Ms D'Arcy that the proposed split of the settlement proceeds should not occur or should be reconsidered.[48]

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34 Ex 32.

35 Note of Factual Findings at [7.4]-[7.5], [7.17], [10.3].. Ex 262, Aff LD, para 87 and 195; s 601HG(1), requirement of RE to ensure an auditor is engaged to audit compliance with the scheme's compliance plan.

36 Ex 262, Aff LD, para 197.

37 Ex 262, Aff LD, paras 195,196 and 197 (last sentence – "as I recall that she had suggested that the legal advice be obtained").

38 Ex 262, Aff LD, para 212.

39 Note of Factual Findings at [7.13]. Ex 262, Aff LD, para 204.

40 Ex 35.

41 Ex 36.

42 Note of Factual Findings at [10.4]. Ms D'Arcy forwarded Monaghan's email of 29 March 2011 together with the Allens Advice to Ernst & Young shortly after it was received by her: Ex 262, Aff LD, para 199.

43 Ex 262, Aff LD, paras 22 and 198; Note of the Factual Findings at [10.6].

44 Ex 262, Aff LD, paras 213.

45 That appears on the face of the document. It was sent by Monaghan to LMIM: Ex 262, Aff LD, paras 216.

46 Note of the Factual Findings at [7.20].

47 Note of the Factual Findings at [10.5].

48 Note of the Factual Findings at [10.7].

4.14 If Ms D'Arcy had received such advice she would not have proceeded with the split or reconsidered it. She would have sought further advice about this.[49]

The timing issue

4.15 It was put to Ms D'Arcy in cross-examination that it was only upon there being an identification of there being a shortfall to MPF that she believed that something was had to be done "to ensure that MPF got something back for the undertaking of the funding of the proceeds".[50]

4.16 Ms D'Arcy denied this. Her evidence is consistent with other evidence. [51]

The WMS Report and Allens Advice

WMS Report

4.17 WMS were instructed by Monaghan, to provide advice as to whether the proposed split of the proceeds of the litigation would be considered reasonable if the parties were dealing at arm's length.[52]

4.18 The WMS Report addresses only the question of the reasonableness of the percentage breakup between the two funds of the litigation proceeds. It is the Allens Advice that considered whether a proceed split was "legally acceptable". [53]

4.19 Although much is sought be made by the Plaintiff about this report, it is irrelevant to the determination of whether there is a contravention of s 601FD, as the Plaintiff's case is not about whether there should have been a different percentage apportionment. [54]

4.20 The WMS Report, however, expressed the opinion that a commercial decision was undertaken by MPF to fund the litigation to attempt to preserve the capital entitlements under the loan documents and in effect MPF's role was not dissimilar to a litigation funder.[55]

4.21 The anticipated capital proceeds were identified as $50.5M being $15.5M in cash over 6 months and $35M vender finance.

4.22 It was also identified that a call option is proposed to be granted in favour of LMIM "as RE for both funds to acquire a 50% interest in the Bellpac land a future point in time".

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49 Note of the Factual Findings at [10.8].

50 Tr 2-83 ll 18-21.

51 It was on 7 or 8 March 2011 that the concept of the settlement changed to being a cash payment: Ex 262, Aff LD, para 194. An agreement was raised in August 2010 (Ex 262, Aff LD, paras 169 and 172), in October 2010 and in November 2010 (Ex 262, Aff LD, paras 176, 180, and 172). This led to a communications as to litigation funding rates: Ex 262, Aff LD, paras 183, 186 to 188. Then on 6 December 2010, Monaghan communicated with WMS about an advice about as to the fair and reasonable split of the likely proceeds: Finding 7.1. The WMS Report was provided on 7 March 2011: Finding 7.2.

52 Ex 262, Aff LD, paras 189, FMIF.100.002.9133. Also, WMS Report, Ex 32, "Introduction".

53 The Allens Advice (Ex 35).

54 Tr 1-18 ll 34-46.

55 Section 4.0 p 10.

4.23 As identified in the report, the opinion was addressing only one component of the proposed settlement, being the cash component.[56]

4.24 The instructions to WMS were prepared by Monaghan.[57] The instructions record Monaghan's knowledge of the matters described by him. Although Ms D'Arcy reviewed them, she relied upon Monaghan in drafting the instructions and providing the background facts.[58]

4.25 There are number of contentions by the Plaintiff that WMS was not provided with certain documents or information.[59] These can be dealt with in short compass:

(a) the "Gujarat Contract", the "Deed of Release" and "Deed of Release and Settlement" are defined in paragraph 28 of the 5FASOC, being the executed documents. They were not in existence at the date WMS was instructed, having been executed or about 21 June 2011 as is alleged in paragraph 28;

(b) it is contended that the Deed of Priority was not provided or its terms stated. The information provided to WMS included a review of securities, however the Plaintiff did not put that summary into evidence. It is not alleged by the Plaintiff how that deed would have impacted on the opinion expressed in the report. The existence of the Deed of Priority was irrelevant to the opinion expressed by WMS;

(c) LMIM as trustee of MPF funded the proceedings as second mortgagee. This is incorrect.[60] The Monaghan email referred to the understanding of the directors;

(d) LMIM as trustee of MPF drew the funding against the MPF Bellpac Loan. This an irrelevant fact. In any event, the Monaghan email records that the loan statements were provided to WMS;

(e) there was no binding agreement to split the settlement proceeds. Page 7 of the WMS Report refers to there not being a "formal agreement".

4.26 Further, in expressing the opinion at paragraph 4.0, the WMS Report identifies the information relied upon, which included discussions with Monaghan.[61] The information provided by those discussions does not appear in the report. Further, the report identifies reliance on an undertaking in the "Gujarat/Williams proceedings"; the Heads of Agreement; the position papers at the mediation; and a review of the securities.

4.27 As the Plaintiff did not put into evidence these documents, nor call either Mr Lavell or Monaghan, the Court cannot be satisfied that WMS were not provided with the information the Plaintiff contends ought to have been provided.

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56 P 2.

57 Note of the Factual Findings at [7.1]; Instructions are at Ex 262, Aff LD, para 189, FMIF.100.002.9213.

58 Ex 262, Aff LD, para 189. This email was also tendered by the plaintiff in its case: Ex 30.

59 5FASOC at [30C]

60 Note of the Factual Findings at [4.5] and Appendix E.

61 The information is set out on page 2 and the reference to the discussions is on page 10.

4.28 The instructions refer to an inability of FMIF to provide funding after the litigation commenced and identified that was still the position; FMIF being unable to satisfy any adverse cost order that might be made in the Proceedings and hence the burden of the funding of the litigation fell on MPF and as to the understanding of the directors. It is not said in the instructions that there is an agreement.

4.29 The report expresses an opinion that from the information provided, including the discussions with Monaghan, it is considered that that a commercial decision was undertaken by MPF to funding the litigation to attempt to preserve the capital entitlements under the loan documents and in effect MPF's role was not dissimilar to a litigation funder.[62]

4.30 Having considered the WMS Report, Ms D'Arcy communicated with Ernst & Young about that report, she instructed Monaghan to obtain legal advice. It was important to Ms D'Arcy that she made Ernst & Young aware of the proposal and obtain their opinion as to what is appropriate and needed to done by LMIM in consideration of the proposal to split the settlement proceeds. [63]

The Allens advice

4.31 The purpose of the Allens Advice was to ascertain whether it is legally acceptable to split the settlement proceeds between FMIF and MPF on the basis of the opinion of the WMS Report[64], given that LMIM as RE of FMIF is in a position of conflict in its capacity as RE of the FMIF and its capacity as trustee of the MPF.[65] The advice affirmed that it was, subject to the 7 matters that are identified.[66]

4.32 Ms D'Arcy knew that Monaghan was instructing Allens and that Beckinsale was told that other persons of that firm are acting in relation to the documentation of the settlement of the Proceedings.[67]

4.33 As with the WMS Report, the Plaintiff contends that Allens was not provided with certain documents or information.[68] Again this can be dealt with in short compass:

(a) the "Gujarat Contract", the "Deed of Release" and "Deed of Release and Settlement" are defined in paragraph 28 of the 5FASOC, being the executed documents. They were not in existence at the date the Allens was instructed, having been executed or about 21 June 2011 as is alleged in paragraph 28. In any event, as admitted by the Plaintiff, Allens were preparing these documents[69];

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62 That is, on the instructions given to WMS, that firm formed their own opinion as to the characterisation of MPF's role.

63 Ex 262, Aff LD, paras 195, 196 and 197.

64 Whether there should have been a different percentage split is not an issue on the plaintiff's case: Tr 1-18 ll 40-46.

65 Note of Factual Findings at [7.3]. Ex 35, para 16.

66 Ex 35, para 16.

67 That is disclosed in the email chain of 14 March 2011 of 14 March 2011: Ex 262, Aff LD, paras 195, 196; also Ex 104.

68 5FASOC at [30C]

69 See Defence at [2(e)(v)]; Reply at [1B(e)].,

(b) it is contended that the Deed of Priority was not provided to Allens, yet that firm knew of the Deed of Priority, having undertaken reviews of the securities, which included that deed;[70]

(c) LMIM as trustee of MPF funded the Proceedings as second mortgagee. This is incorrect.[71] The instructions as recorded in the Allens Advice referred to the understanding of the directors. The fact is also irrelevant to the advice being sought;

(d) LMIM as trustee of the MPF drew the funding against the MPF Bellpac Loan. The fact is also irrelevant to the advice being sought;

(e) there was no binding agreement. Paragraph 9 refers to there being no formal agreement as to the split of the proceeds, and refers to the understanding of the directors.

4.34 These contentions also need to be assessed in the context of the knowledge of the members of Allens, and their solicitors, having acted for LMIM since about 2007, including in relation to the Bellpac Litigation.

4.35 Allens, however, did request further information and it was provided by LMIM.[72]

4.36 Ms D'Arcy expected at that time that Allens in providing the advice would consider the relevant facts and circumstances which they knew or were told and would request from Monaghan further information if they required it.[73] That expectation was reasonable.

4.37 There was no warning in the advice that further advice was necessary or prudent.

4.38 Monaghan, having read the advice, did on 29 March 2011 advise Ms D'Arcy that the conclusion of the advice was that the "transaction is ok".[74]

4.39 It was also expected by Ms D'Arcy that Allens in providing the advice would identify any risks with the proposed split that ought to be considered by LMIM, by its directors, and given that Allens continued to be involved in the settlement of the Proceedings, would identify any circumstance that arose prior to the settlement that that warranted the proposal not to occur or be reconsidered.[75] That expectation too was reasonable.

4.40 The position of the hypothetical reasonable director includes Ms D'Arcy's knowledge at the time of the skill and expertise of Allens and the knowledge that firm had regarding LMIM, FMIF and MPF; that Mr Beckinsale had special expertise in the areas of responsible entities and management schemes;[76] the advice given by Monaghan as to the conclusion reached by Allens together with his extensive knowledge of LMIM,

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70 Defence at [28(d)(i) and (ii)], which is admitted: Reply at [15(d)(iii)].

71 Note of the Factual Findings at [4.5] and Appendix E.

72 Ex 42.

73 Ex 262, Aff LD, para 208.

74 Finding 7.11. Monaghan also told Ms D'Arcy that the advice was "okay" and the transaction could proceed: Ex 262, Aff LD, para 204.

75 Ex 262, Aff LD, par 209.

76 Ex 262, Aff LD, para 82.

FMIF and MPF, the Bellpac Loans and the Proceedings; and the trust and confidence placed in Monaghan as lawyer, which has been gained over a long and close working relationship.[77]

4.41 Yet, it is contended by the Plaintiff that it would be apparent to the hypothetical reasonable director, who has no legal training,[78] that upon reading the advice that the opinion given by Allens was contrary to what is stated in paragraph 16 of the advice, that the proposed transaction was "legally acceptable".[79]

4.42 That contention ought to be rejected. It would not be apparent to such hypothetical reasonable director. The Plaintiff's contention involves the hypothetical reasonable director having sufficient legal knowledge to reach a conclusion that the opinion expressed in the advice cannot be relied upon, on a reading of the advice, including second guessing the summary of the advice given by Monaghan, a trusted and experience lawyer.

4.43 Telling, are the following:

(a) that Beckinsale, to the knowledge of Ms D'Arcy had special expertise with respect to management investment schemes and responsible entities;

(b) that Monaghan, a very experienced lawyer, did not reach such conclusion. How then is the reasonable hypothetical director with no legal training to have reached a different conclusion;

(c) that Ernst & Young, having been provided with the Allens Advice, did not inform Ms D'Arcy or LMIM that the Allens Advice did not reach the conclusion expressed in paragraph 16;[80]

(d) the Plaintiff, having commenced this proceeding in 2014, only pleaded this contention by way of the Third Amended Statement of Claim,[81] in circumstances where the Allens Advice was already the subject of the allegations in earlier pleadings settled by Queens and junior counsel. If it was so apparent why was it not pleaded from the commencement of the proceedings?

4.44 The hypothetical reasonable director in the position of Ms D'Arcy is not to be elevated to a person who has extensive legal training, knowledge and acumen, and pours over each word in each paragraph of the advice to determine whether the opinion does in fact conclude, as it says, that proposed funding split is "legally acceptable". That is

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77 Ex 262, Aff LD, para 205.

78 Ex 262, Aff LD, para 210.

79 5FASOC at [30H(k)].

80 It is inferred that Ernst & Young read the advice: first,it was the subject of the discussions with Ms D'Arcy as referred to in her email of 14 March 2011: Ex 262, Aff LD, para 210; second, the Allens Advice was sent to Ernst & Young on 30 March 2011: Ex 262, Aff LD, para 199; and third, Ernst & Young subsequently recommended the a Deed Poll be prepared: Ex 262, Aff LD, para 213. It is inferred that Ernst & Young did not reach an opinion contrary to that expressed in paragraph 16 of the Allens Advice, as they did not inform Ms D'Arcy that the funding split ought not to occur or ought to be reconsidered: Ex 262, Aff LD, para 224.

81 5FASOC at [30H(k)].

what the Plaintiff contends by the allegations in paragraphs 30F and 30H of the 5FASOC.

4.45 Also, despite Ms D'Arcy's recollection being impacted by the passage to time, it can be inferred that she did adequately consider[82] the Allens Advice upon reading it, and she gave consideration to the matters referred to in it and the other matters she knew of at the time, including Monaghan's email of 29 March 2009, in the context that she did not have legal training, and her reliance on the knowledge, skill and expertise of Allens and Monaghan. The inference is readily drawn from her consideration of the WMS Report, which prompted the enquiry and discussion with Ernst and Young, the following instruction to Monaghan to obtain the legal advice, and that she provided the Allens Advice together with Monaghan's 29 March 2011 email to that firm.

4.46 Against this background, there is little need for the Court to engage with the minute and at times tortured analysis of the terms of the Allens Advice set out at paragraph 30H of the 5FASOC. The above is sufficient for the Court to conclude that Ms D'Arcy's reliance on Allens Advice was reasonable.

4.47 But in any event, the Plaintiff's analysis of the Allens Advice has no validity.

4.48 The **first and second** complaints are that the Allens Advice noted certain matters, including the position of conflict between LMIM as RE of the FMIF and LMIM as trustee of the FMIF.[83] Be that as it may, the advice did not state or warn that the proposed split of the proceeds of the settlement would contravene s 601FD(1)(b) or (c). To the contrary, the advice was that the proposed split was legally acceptable, subject to the matters in subparagraphs 16(a) to (g) of the advice.

4.49 The **third** complaint is that it did not state how paying 35% of the settlement proceeds to the LMIM as trustee of the MPF would be consistent with the obligation to act in the best interests of LMIM as RE of the FMIF.[84] This critique is misdirected:

(a) The determination of what is in the best interests of LMIM as RE of the FMIF is a matter of commercial judgment, not legal advice. Hence Allens' conclusion was that the proceeds split was *"legally acceptable"*, provided that LMIM, separately in each of its representative capacities, was satisfied that the proceeds split was in the best interests of the members of each fund (subparas 16(a)-(b)); and

(b) Further, or alternatively, the Allens Advice did not warn that the split of the settlement proceeds would or may be inconsistent with the bests interests of LMIM as trustee of the FMIF, or with the duties under s 601FD(1)(b) or (c). To the contrary, it stated that Allens was not aware of any reason why the split may be contrary to the directors' duties. In those circumstances, it was reasonable for Ms D'Arcy to consider there was no risk that this may be the case.

4.50 The **fourth** substantive complaint is that the Allens Advice at [56], *"stated that LMIM would need to be satisfied that the terms of the settlement and the proposed split of*

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82 In terms of a hypothetical reasonable director in her position.

83 5FASOC at [30H(a)-(b)].

84 5FASOC at [30H(c), (e)].

litigation proceeds did not unfairly put the interests of the FMIF ahead of the MPF, which misconstrued the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act."[85] This too is misdirected:

(a) Paragraph 56 of the advice addresses issues for an RE as an AFS licensee, not the requirements of ss 601FC(1)(c) or 601FD(1)(c). It is therefore wrong that the paragraph misconstrues those sections of the Act; and

(b) In any event, it is completely unrealistic to suggest that the exercise of a reasonable standard of care required a non-lawyer such as Ms D'Arcy to identify that a leading national law firm had misconstrued provisions of a complex statutory regime in a single paragraph of a 22 page opinion.

4.51 The **fifth** complaint is that the Allens Advice was premised on an assumption (said to appear at paragraph 9) that there was "*an existing agreement*" between LMIM as RE of the FMIF and LMIM as trustee of the MPF, which, it is alleged, Ms D'Arcy "*knew was not the case*".[86] This misstates the terms of paragraph 9, which expressly record that "*the FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation despite it being the understanding of the RE's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation*" (underlining added). This makes it quite clear that there was something less than an agreement.

4.52 The **sixth** complaint is that the Allens Advice set out inconsistent conclusions without reconciling how the inconsistencies were to be resolved. The particulars are that paragraph 25 of the Allens Advice is irreconcilable with paragraph 35, and that paragraph 27 is irreconcilable with paragraph 37.[87] This too is wrong:

(a) For one thing, none of these paragraphs set out conclusions. Allens' conclusion is set out at paragraph 16 and is that the proposed transaction is legally acceptable;

(b) Turning to the specifics of the particularised paragraphs, the complaint appears to be that these collectively state that LMIM had to act simultaneously in the best interests of the members of both the FMIF and the MPF, which it could not do. This is not correct. Logically, there is no reason why a transaction could not be in the interests of both the FMIF and the MPF. The split of the settlement proceeds was such a transaction.

4.53 The **seventh** complaint is that the Allens Advice referred (indirectly, by reference to LMIM's Compliance Plan or other procedures) to the obligations in ss 601FC(1) and 601FD(1), but did not explain how those obligations could be reconciled with the statement at [35] of the Allens Advice that LMIM must act in the best interests of the MPF's members.[88] This is a variation on the theme that Allens referred to the duty to act in the best interests of the members of the FMIF but did not advise how that could

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85 5FASOC at [30H(d)].

86 5FASOC at [30H(f)].

87 5FASOC at [30H(g)].

88 5FASOC at [30H(h)]; see also the Reply at [17C(k)].

be achieved. This is addressed at paragraph 4.49 above. In short, such judgments about the best interests of the funds and their members were commercial matters for LMIM. The conclusion offered by the advice was that the transaction was legally acceptable provided that the directors were satisfied that the split was in the best interests of the members of each fund.

4.54 The **eighth** complaint is that Allens stated, at [57], that LMIM would need to ensure that it followed any procedures or policies it established, but did not state how the proceeds split could be reconciled with LMIM's Conflicts Management Policy.[89] This allegation goes nowhere. There is no alleged failure by LMIM to follow and apply its processes for dealing with conflicts.

4.55 **Ninth**, the Plaintiff complains that Allens, *"stated at [63] that the effect of section 601FD(2) of the Act may have been to impose fiduciary duties on LMIM to act in the best interests of members of the FMIF, but did not identify what those duties would be or that such duties would include a duty of undivided loyalty".*[90] This also goes nowhere:

(a) The allegation misstates paragraph 63 of the Allens Advice, which flags that s 601FD(2) might in future be taken to impose fiduciary duties directly between directors of an RE and the members of the scheme. The paragraph does not address fiduciary duties owed by LMIM to scheme members;

(b) In any event, given that paragraph 63 merely observed a possible uncertainty in the law, it was not necessary for Allens to speculate or opine further about what the duties would be if a court one day in the future decided to recognise some form of direct fiduciary relationship;

(c) Even if it were necessary for Allens to say more about this point, it did so: Allens expressly concluded in the summary (at subparagraph 16(g)) that they were not aware of any reason why the proposed split would raise issues for the directors in complying with their general law and statutory duties; and

(d) In any event, there is no contention in this case that Ms D'Arcy breached fiduciary duties owed directly to scheme members.

4.56 **Finally**, the Plaintiff's last resort is that the Allens Advice did not in fact opine that that proposed transaction was legally acceptable.[91] This contention should be rejected as contrary to the express terms of paragraph 16 of the Allens Advice. The qualifications in subparagraphs 16(a) to (g) did not negative or eliminate the opinion. Certainly, it was reasonable for Ms D'Arcy so to conclude.

Deed Poll

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89 5FASOC at [30H(i)].

90 5FASOC at [30H(j)].

91 5FASOC at [30H(k)].

4.57 The Deed Poll was recommended by Ernst & Young and was prepared by Monaghan Lawyers, which Ms D'Arcy knew.[92]

4.58 It is contended by the Plaintiff that the Deed Poll didn't refer to:

(a) the Allens Advice. This is irrelevant as it is not disputed that Ms D'Arcy read the Allens Advice. She also took it into account at the time of considering the Deed Poll. In any event, there is a reference to independent advice in cl 3.1(n);

(b) the Conflicts Management Policy. In the context of what is stated in the Deed Poll it was not necessary to specifically refer to that policy. By clause 2.1(b) the Deed Poll expressly refers to possible conflicts that may arise as a result of the Settlement Proceeds flowing to LMIM preferring the interests of the relevant funds against the other. Then clause 2.1(c) refers to procedures in the Constitution, The Trust Deed and the Compliance Plan and other procedures that are in place in respect to conflicts of interest;

(c) sections 601FC or 601FD.[93] This is irrelevant as Ms D'Arcy was aware of her duties as a director.[94] In any event, clause 3.1(f) refers to the "*Settlement Proposals are permitted ..by the Compliance Plan*", which is defined in clause 1.1 to relevantly mean the Compliance Plan of FMIF. The 16 March 2011 Compliance Plan, which was signed by Ms D'Arcy, summarises the ss 601FC or 601FD duties and refers to the management of conflicts of interest policy.[95]

4.59 In executing the Deed Poll, Ms D'Arcy also relied upon the fact the Deed Poll had been prepared by Monaghan Lawyers, the WMS Report, the Allens Advice, and the emails of 29 March 2011 and 10 June 2011 from Monaghan. She also took into account that Monaghan was a lawyer and had a far greater knowledge of all the relevant facts than she did.[96] She was conscious that Monaghan had been LMIM's Risk Manager.[97]

4.60 Ms D'Arcy had also not been advised by either Allens, Monaghan, Ernst & Young, the LMIM compliance committee or its Business Standards and Compliance Manager that the proposed funding split ought not to occur or ought to have been reconsidered.[98] If that occurred she would not have allowed the funding split to occur or would have reconsidered it. She would have got further advice about the proposal.

4.61 Upon reading Monaghan's email of 10 June 2011 addressed to Allens, and which was cc to her, informing Allens that the split of the settlement monies between PTAL and LMIM as trustee of MPF was 65% / 35% she understood that Monaghan held the opinion that the proposed split between the funds was still "ok" and that no

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92 Ex 262, Aff LD, paras 138, 213 and 221, 216, FMIF.400.001.0011; Ex 36, first page,

93 5FASOC at [32A].

94 Ex 262, Aff LD, para 205. Compliance Plan is FMIF.500.015.1877.

95 Compliance Plan is FMIF.500.015.1877.

96 Ex 262, Aff LD, para 221.

97 Ex 262, Aff LD, para 206. The evidence is that Ms D'Arcy relied upon Monaghan when he was the Risk Manager: Tr 2 p39, ll 41-42; Tr 2 p40, ll 19-20; Tr 2 p40, ll 25-27; Tr 2 p45, ll 11-12; Tr 2 p49, ll. 3-5; Tr 2 p51, ll 26-27.

98 Ex 262, Aff LD, paras 211, 224 and 225.

circumstance had arisen since his email of 29 March 20111 which warranted the proposed split not proceeding or being reconsidered.[99] That understanding was reasonable.

4.62 Prior to executing the Deed Poll, Ms D'Arcy was aware of and considered the following:

(a) there were issues of conflict between FMIF on the hand and MPF on the other regarding the proceeds split. That is one of the reasons why she sought the Allens Advice;[100]

(b) that LMIM as trustee of the MPF was a subsequent mortgagee of the Property and a subsequent charge holder over the assets of Bellpac;[101]

(c) the Deed of Priority;[102]

(d) that at the time of the Deed Poll part of the structure of the proposed settlement was that the Property be sold by PTAL as mortgagee in possession under the PTAL Mortgage to Gujarat, and that sale would comprise part of the settlement sum.[103] This was subject to any change in the settlement negotiations;

(e) of the approximate amount that PTAL was owed by Bellpac. Ms D'Arcy had been informed of the amounts owing during the settlement process;[104] and

(f) of the duties imposed by s 601FD.[105]

4.63 The Deed Poll was read by Ms D'Arcy prior to executing it, knowing that it would be provided to Ernst & Young.[106] She did, to the best of her recollection, having read the Deed Poll, take into account the matters referred to in it in making the decision to execute the deed.[107] Due to the passage of time, Ms D'Arcy cannot now recall the specific components of the Deed Poll which she considered at that time. To the best of her recollection she believed what was recited to be correct, and the factors stated therein were taken into account in making the decision to execute the deed.[108]

4.64 Despite Ms D'Arcy's recollection being impacted by the passage to time, it can be inferred that she adequately considered[109] the Deed Poll, gave consideration to the

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99 Ex 262, Aff LD, paras 216.

100 Ex 262, Aff LD, para 195.

101 Note of the Factual Findings at [8.13(b)]. Ex 262, Aff LD, para 222. Ms D'Arcy's email of 14 March 2011 in which refers to obtaining legal advice to deal with the "first and second mortgages": Ex 262, Aff LD, para 195 FMIF.200.012.6633

102 Note of the Factual Findings [8.13(a)]. Ex 262, Aff LD, para 222.

103 Note of the Factual Findings [8.13(c)].

104 Note of the Factual Findings [8.13(d); and see Ex 262, Aff LD, paras 111 and inferred from 134 and 135. The amounts outstanding are also referred to in the WMS Report at p 5.

105 Ex 262, Aff LD, para 205.

106 Ex 262, Aff LD, para 219.

107 And at Tr 2-93 l 47.

108 Ex 262, Aff LD, para 219 and 220.

109 In terms of a hypothetical reasonable director in her position.

matters referred to in it and the other matters she knew of at the time which are referred to in her evidence and at paragraphs 4.57 to 4.63 above. The inference is readily drawn from her consideration of the WMS Report, which prompted the enquiry and discussion with Ernst and Young, the following instruction to Monaghan to obtain the legal advice, knowing that Ernst & Young had recommended the Deed Poll be prepared, and her provision of the Allens Advice to Ernst & Young and knowledge that the Deed Poll would be also be provided.

4.65 Yet, the Plaintiff contends that Ms D'Arcy failed to adequately read or consider, or failed to have proper regard to or give consideration to a number of matters. There is also a contention of a failure to consider facts or matters that were considered, which ought not to have been considered. Each of these are dealt with below.

4.66 The language "adequately read or consider" or "failed to have proper regard or given consideration" identifies a case as to the weight being read or considered. As such the Plaintiff does not contend that these matters were not either read or considered at all.

4.67 **First**, there was no failure to "adequately read or consider the content of the Allens Advice".[110] That is considered above.[111]

4.68 **Second**, there was no failure by Ms D'Arcy to "have proper regard or give proper consideration" to the Property being sold by PTAL to Gujarat as mortgagee exercising power of sale or the Deed of Priority[112] and this is referred to above.

4.69 **Third**, it is contended that LMIM as trustee of the MPF could not have prevented the sale of the Property to Gujarat by refusing to provide a release of the MPF Mortgage over the Property.[113] Ms D'Arcy was aware that FMIF (via PTAL) had a first registered mortgage and of the existence of the Deed of Priority. As referred to above these are factors she took into account. The critical factor which is not addressed by this allegation is that MPF (via LMIM as trustee) could have refused to provide a release of the claims in the Proceedings and its consent to the discontinuance of the Proceedings which would have prevented the settlement. This is dealt with below at paragraph 4.89ff under the heading "The non-essentiality of MPF".

4.70 **Fourth**, it is contended that proper regard or adequate consideration was not given to the "fact" that there was no necessity for LMIM as RE of FMIF to reach agreement with LMIM as trustee of MPF about the sharing the amounts payable under the Deed of Release or Gujarat contract.[114] This is dealt with below at paragraph 4.89ff under the heading "The non-essentiality of MPF".

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110 5FASOC at [34(a)].

111 It is a complete nonsense that an inference as to inadequate consideration of the Allens Advice could be drawn from the fact that Deed Poll was provided to LMIM on 10 June 2011 and it was executed by 14 June 2011, in the context that Ms D'Arcy was provided with that advice by Monaghan on 29 March 2011.

112 5FASOC at [34(a)(i) or (ii)]

113 5FASOC at [34(a)(iii)].

114 5FASOC at [34(b)].

4.71 **Fifth**, that the instructions to WMS and Allens did not state that there was no binding agreement.[115] The instructions to both firms referred to an understanding and not an agreement and both the report and the advice referred to their being no formal agreement.

4.72 **Sixth**, Ms D'Arcy did consider and take into account that LMIM as trustee of the MPF was a subsequent mortgagee of the Property and charge holder over the assets of Bellpac.[116] This is referred to above, and is identified in Ms D'Arcy's email to the directors when Monaghan was requested to seek an advice from Allens.

4.73 **Seven**, it is contended that LMIM as trustee of the MPF originally funded the Proceedings as a registered mortgagee with second priority under the Deed of Priority.[117] That is contrary to the evidence.[118] It is also contended that there was a failure to have proper regard or give adequate consideration to the funds being drawn against the Bellpac Loan. That was known to Ms D'Arcy and she considered it.[119]

4.74 **Eight**, although Ms D'Arcy knew as at 21 June 2011 of the sale of the real property by PTAL, that occurred subsequent to the execution of the Deed Poll. She, however, was aware of the settlement proposal that the property would be sold by PTAL.[120]

4.75 **Nine**, Ms D'Arcy knew the amount the amount that was owing as at 22 June 2011 (being the day after settlement), although the Deed Poll was executed by her on or prior to 14 June 2011.[121]

4.76 **Ten**, whether LMIM as trustee for the MPF could be treated as a litigation funder is dealt with below under the heading "Litigation Funding Analogy".[122]

4.77 **Eleven**, whether Ms D'Arcy took into consideration the Allens Advice and WMS Report which they ought to have known did not constitute independent legal advice or independent advice.[123] The WMS Report and Allens Advice were independent advice, and independent legal advice, and it was reasonable for Ms D'Arcy so to conclude.

4.78 **Twelve**, Ms D'Arcy did have "proper regard" or "gave adequate consideration" to the different interests of FMIF and MPF.[124] She believed that the settlement was in the best interests of both FMIF and MPF[125] and that the splitting of the settlement

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115 Yet, the Plaintiff by particular D to [30C(d)] provides that if any such agreement, if it was made, would have been unenforceable as a purported agreement between LMIM and itself in two different capacities. So why then would it be necessary to provide an instruction about that there was no binding agreement.

116 5FASOC at [34(c)(i)].

117 5FASOC at [34(c)(iii)(A).

118 Note of the Factual Findings at [4.5] and Appendix E.

119 See paragraph 4.62(b) above.

120 5FASOC at [34(c)(iv)]; Defence at [35(c)(i)]..

121 5FASOC at [34(c)(v); Defence at [35(c)(i)]..

122 5FASOC at [34(d)]

123 5FASOC at [34(e)]

124 Cf. 5FASOC at [34(g)].

125 See the Deed Poll, recital K.

proceeds was appropriate,[126] and it was in fact that the case, or at least reasonable to conclude, that the proceeds split was in fact in the FMIF's best interests.[127]

4.79 **Thirteen**, it is contended that there was a failure to consider whether it was appropriate to split the settlement proceeds in accordance with the proceeds split.[128] Consideration was given to this. This was the subject of the Allens Advice, the discussions between Ms D'Arcy and Ernst & Young, and can be inferred from those matters referred to in paragraph 4.64 above. It is also the subject of the Deed Poll.

4.80 In cross-examination of Ms D'Arcy, it was put to her that clause 3.1(a) of the Deed Poll was opposite to the advice given by Allens which identified she did not adequately read the Deed Poll. This is not pleaded. In any event she gave evidence that she thought this may be an error in the clause.[129] Ms D'Arcy was aware of the conflicts and that is why she instructed Monaghan to obtain the Allens Advice.

Litigation Funding Analogy

4.81 The complaint is that there was a failure to consider whether LMIM as trustee for the MPF could be treated as an arms-length litigation funder when it was a registered mortgagee with second priority.[130] This is a failure to consider point, and is not founded on an inadequate consideration.

4.82 The concept of the "arms-length litigation funder" was a mechanism considered to determine an apportionment of the split of the settlement proceeds. This case is not about whether another mechanism ought to have been used or another percentage split ought to have been applied.

4.83 The suggestion that Ms D'Arcy failed to consider whether it was appropriate to treat MPF in a manner analogous to a litigation funder is hopeless.

4.84 The chronology is as follows:

(a) On 1 December, Monaghan informs Ms D'Arcy that he has investigated the going rate for litigation funding and had contracted Allens and makes a suggestion of the apportionment of the potential settlement sum of up to 30% of $40M, but suggests that an accountant is the type provide confirmation of what is reasonable.[131] Ms D'Arcy relied upon Monaghan who was more skilled, experienced than her and he did not inform her that consideration of a split of that type was inappropriate;[132]

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126 Ex 262, Aff LD1, para 223.

127 See further Section 5 below. This consideration is also referred to in the Deed Poll, cll 3.1(g), (h).

128 5FASOC at [34(d)]

129 Tr 2-93, ll 19-21. She reiterated that she read the Deed Poll and considered it: Tr 2-93 ll 47.

130 5FASOC at [34(d)].

131 Ex 262, Aff LD1, para 183.

132 Ex 262, Aff LD1, para 184 and as to the preparing of the instructions to WMS: para 189.

(b) Ms D'Arcy then received an email with a presentation about funding, which included the range of funding fees;[133]

(c) Ms D'Arcy then asked Monaghan to contact WMS to obtain an independent accountants' report;[134]

(d) Mr Monaghan prepared and provided the instructions to WMS;[135] and

(e) WMS then provided its report.

4.85 In its report, WMS expresses the opinion (at p. 10) that "*MPF's role was not dissimilar to a litigation funder*". The analogy between MPF and a litigation funder thus comes from, or is endorsed by, WMS itself. The analogy is based on WMS's opinion that "*a commercial decision was undertaken by MPF to fund the litigation to attempt to preserve the capital entitlements under the loan documents*". This, in turn was "*based on the information provided and our discussions with Monaghan Lawyers*". As noted above, the information provided to WMS included a review of securities.

4.86 Thus, Ms D'Arcy caused advice to be obtained to address, and which did in fact address, the issue whether MPF could be treated as a litigation funder. That advice was provided with knowledge of MPF's priority position. Ms D'Arcy then read and considered that advice, as developed above.

4.87 Ms D'Arcy then sought yet further advice from Allens as to whether proceeding on this basis was legally acceptable, which she also read and considered, as developed above.

4.88 Further, insofar as the litigation funding analogy was imperfect, the inference is that that too was taken into account. MPF did not recover the costs it funded, in addition to the proceeds split. In that regard, the proceeds split was more favourable to the FMIF than it might have been if it had in fact engaged a litigation funder.

The "non-essentiality" of MPF

4.89 Although the 5FASOC deletes much of this, the Plaintiff retains some remnants of allegations that it was not necessary for LMIM as trustee of the MPF to consent to or cooperate in the settlement.[136]

4.90 These allegations are now irrelevant in light of admissions made by the Plaintiff in its most recent amendments. It is now common ground that the consent of LMIM as trustee of the MPF was necessary to settle the Proceedings because LMIM as trustee of the MPF was a plaintiff in the Proceedings and its consent was required to discontinue the Proceedings on settlement.[137] Thus, the Plaintiff does and cannot now contend that LMIM as trustee of the MPF was not essential to the settlement. This

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133 Ex 262, Aff LD1, para 185.

134 Ex 262, Aff LD1, para 186.

135 Ex 262, Aff LD1, para 186.

136 5FASOC at [34(a)(iii), (b)], [39A(aa)(ii)].

137 Defence at [35(b)(iib)(A)]; Reply at [19(b)(iib)(A)].

belated concession is properly made. There are numerous reasons why the participation of LMIM as trustee of the MPF was essential to the settlement.[138]

4.91 The allegations retained in the 5FASOC are also misconceived in their own right.

4.92 The **first** point retained in the 5FASOC is that there was no necessity for LMIM as RE of the FMIF to reach agreement with LMIM as trustee of the MPF because there was no binding agreement between them that there should be a proceeds split.[139] This misses the mark. There are different reasons why the agreement of LMIM as trustee of the MPF were necessary, as the Plaintiff apparently now accepts.[140]

4.93 The **second** point retained in the 5FASOC is that LMIM as trustee of the MPF could not have prevented the sale of the Property to Gujarat by refusing to provide a release of the MPF Mortgage.[141] This too is wrong. The MPF Mortgage was granted to LMIM as trustee for the MPF and it was a matter for LMIM as trustee for the MPF whether to provide a release of it.

4.94 As pleaded in its Reply, the Plaintiff's case now seems to be that there is a legal reason why this course would not have been open to LMIM as trustee for the MPF even had it wanted to take it.[142] This contention is based on an erroneous construction of ss 601FC(1)(c) and (3), as addressed in the context of loss below.[143] Its force is even weaker in considering whether Ms D'Arcy breached her duty of reasonable care. Even if the Plaintiff's construction of those provisions were correct (which it is not), it is hardly reasonable to expect that Ms D'Arcy ought to have been aware of that herself against the background of the professional legal advice provided.

5. THE ALLEGED FAILURE TO ACT IN MEMBERS' BEST INTERESTS

5.1 The Plaintiff's contention that Ms D'Arcy breached her duty to act in LMIM's as RE of the FMIF's best interests by causing or permitting the Settlement payment to be made to the MPF is contrary to the facts and established principle.

5.2 As set out above, the Plaintiff's case is confined to the first of the two duties of loyalty provided for in s 601FC(1)(c). This is not a duty to achieve the best outcome for members, and nor does it require an officer to disregard the interests of others. The duty is honestly and reasonably to advance the best interests of members.

5.3 The Plaintiff does not plead that Ms D'Arcy was dishonest in her service of the FMIF's interests and nor was this put to her in cross-examination. Any such contention or suggestion would have been hopeless on the evidence. Ms D'Arcy believed that the

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138 These include that Gujarat himself was insisting on a release of all claims: see, e.g., Ex 316. See further Note of the Factual Findings at [8.11].

139 5FASOC at [34(b)(ia)].

140 See Note of the Factual Findings [8.11].

141 5FASOC at [34(a)(iii)].

142 See Reply at [19(iib)(E)].

143 Paragraphs 6.9 to 6.10.

splitting of the settlement proceeds was appropriate and it was not contrary to any duty she had as a director of LMIM.[144]

5.4 The Plaintiff's claim is thus reduced to the contention that Ms D'Arcy did not act reasonably to advance the best interests of members. This contention is misconceived, whether or not the standard of reasonableness adopted is akin to the *Wednesbury* standard or akin to the standard of reasonable care.

5.5 The most fundamental problem for the Plaintiff is that its case proceeds on the assumption that Ms D'Arcy's choice was whether LMIM as RE of the FMIF should receive $45 million or $30 million. In fact, the choice was whether to do a fair deal with the MPF or to continue with the Proceedings, which were difficult, complex and uncertain and which in any event the FMIF could not afford. As set out further in Section 6 below, it is common ground that the consent of LMIM as trustee of the MPF was necessary to settle the Proceedings[145] and the suggestion that LMIM as trustee of the MPF would have agreed to settle for nothing is fanciful. That being so, the decision to make the Settlement payment was honest and reasonably justifiable in the best interests of the FMIF's members. Ms D'Arcy was justified in paying an amount to the MPF to secure a substantial benefit for the FMIF which otherwise it would not have obtained.

5.6 The reasonableness of this course is reinforced by the facts that WMS had advised that the 65/35 split was fair and reasonable and that none of Allens, Monaghan or Ernst & Young suggested otherwise. Tellingly, the Plaintiff does not contend that there should have been a different split.

5.7 The Plaintiff's case is, thus, all or nothing. This is both unreal and contrary to authority. It is unreal because it allows no room for a scheme operator to make sensible concessions in order to achieve a commercial outcome – on the Plaintiff's approach, an RE could never make compromises on its absolute best outcome. It is contrary to authority because the duty is not to one to secure the best outcome for members.[146] Nor does it require officers to disregard the interests of others.[147]

5.8 Although not explicitly referred to in the Deed Poll, it is also notable that after the Deed Poll was executed the MPF continued funding:

(a) the costs by LMIM as trustee for MPF to enable settlement to occur. These included the lawyers costs and stamp duty. Such costs continued to paid after the settlement on 21 June 2011;[148] and

(b) the costs of proceedings related to the Bond Litigation and Guarantor Litigation.[149]

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144 Ex 262, Aff LD1, para 223.

145 Defence at [35(b)(iib)(A)]; Reply at [19(b)(iib)(A)].

146 *ASIC v Lewski* (2018) 362 ALR 286 at [71].

147 See further paragraphs 3.11 above and 6.10 below.

148 Except for some minor items, this is admitted: Defence at [20(e)(iv)], Reply at [11(c)(iii)]; Ex 264, Aff LD3, para 10.

5.9 Thus, as a consequence of the settlement and split of the proceeds, MPF continued paying those costs, which FMIF benefitted from.[150]

5.10 In the end, a commercial decision was made to settle. The settlement was a "package" pursuant to which the FMIF received certainty of return from complex and difficult litigation, which also involved protracted and difficult negotiations. The settlement date had been delayed by Gujarat on a number of occasions. In the circumstances, the decision to make the Settlement payment was honestly and reasonably made, and in fact in the FMIF's members' best interests.

6. LOSS AND DAMAGE

6.1 If, contrary to the submissions above, the Court finds that Ms D'Arcy was in breach of her duty, that breach did not cause the Plaintiff any loss.

6.2 The Plaintiff's primary loss and damage claim is for the amount of the Settlement payment. The premise of this claim is that, but for the payment to the MPF, the settlement would still have occurred, but the FMIF would have received the full amount.

6.3 This contention has always lacked reality, and the Plaintiff has not made it out on the evidence.

6.4 Despite the Plaintiff's previous protestations, it is now common ground that the consent of LMIM as trustee of the MPF was necessary to settle the Proceedings.[151] Thus, to establish loss, the Plaintiff must prove that LMIM as trustee of the MPF would have consented to the settlement even though it would receive no financial benefit from it.

6.5 There is no basis for such a finding. To the contrary, the proper inference is that LMIM as trustee of the MPF would not have discontinued the Proceedings and released Gujarat from its claims for nothing, in circumstances where:

(a) LMIM as trustee of the MPF had funded the Proceedings and the settlement in the amount of approximately $1.5 million and, moreover, provided an undertaking to pay any costs awarded against Bellpac in favour of Gujarat in the Bellpac proceedings;

(b) LMIM as trustee of the MPF asserted its own valuable claims against Gujarat in the Proceedings; and

(c) Gujarat was prepared to and did in fact agree to pay a substantial sum to settle the Proceedings ($45.5 million, or $35.5 million excluding the purchase price for the Property). This was not a case where LMIM as trustee of the MPF's interests could conceivably have been served by walking away on terms that each party

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149 Ex 264, Aff LD3, para 12.

150 It is inferred from the evidence of Ms D'Arcy that such costs would not have continued to be paid if the settlement proceeds were not split: Ex 262, Aff LD1, paras 227-230.

151 Defence at [35(b)(iib)(A)]; Reply at [19(b)(iib)(A)].

bear its own costs. Gujarat evidently perceived a substantial risk that the claims against him might succeed and was prepared to offer a very substantial sum to settle those claims. That being so, it is inconceivable that LMIM as trustee of the MPF would have agreed to walk away with nothing.

6.6 This inference is all the more compelling given the duties owed by the directors of LMIM and by LMIM as trustee. The directors of LMIM owed LMIM duties to act in good faith and with reasonable care to ensure that LMIM discharged its duties as trustee.[152] LMIM's duties as trustee included duties to act in the best financial interests of MPF's members[153] and to exercise reasonable care and skill in the management of the MPF.[154] Insofar as LMIM failed in those duties, the directors of LMIM were susceptible to claims for breach of their duties to LMIM and, further, to liability as accessories under the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244. As Finn J has observed, directors of trust companies are "*peculiarly vulnerable*" to this form of liability because "*often enough, it will be their own conduct in exercising the powers of the board which causes their company to commit a breach of trust*".[155]

6.7 It would not have been consistent with LMIM's duties as trustee of the MPF to have agreed to walk away from the Proceedings for nothing, or for LMIM's directors to have caused it to do so. It could hardly have been in the MPF's best interests voluntarily to forego the Settlement payment, in circumstances where it had apparently valuable claims and had invested so substantially in the Proceedings.

6.8 The unreality of the Plaintiff's case is particularly evident from its contention that LMIM as trustee of the MPF would have continued to pay Allens legal fees.[156] It is fanciful to suggest that LMIM as trustee of the MPF would have continued to pay legal fees in respect of the documentation of a settlement *even after* a decision had been made that it would receive nothing from that settlement.

6.9 By mid-way through the hearing, the Plaintiff did not really contend to the contrary. Rather, faced with these difficulties, the Plaintiff's riposte is that LMIM as trustee of the MPF could not have withheld consent to the settlement even if it wanted to because LMIM was required to act in the best interests of FMIF under s 601FC(1)(c) and, further, to prioritise those interests at MPF's expense pursuant to s 601FC(3).[157]

6.10 This is another misguided contention:

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152 *Re S&D International Pty Ltd (No 4)* (2010) 79 ACSR 595 at [283] (Robson J); *Australasian Annuities Pty Ltd* at (2015) 318 ALR 302 at [59] (Warren CJ), [227]-[228] (Garde AJA) (Neave JA agreeing at [134]).

153 *Cowan v Scargill* [1985] Ch 270 at 286-7 (Sir Robert Megarry V-C). The deed establishing the MPF has not been disclosed in these proceedings. However, it is apparent from the Deed Poll dated 25 November 2009 [FMIF.400.001.0116] that the purpose of the trust is to provide financial benefits for the beneficiaries (see esp. cll 3.1, 3.5, 11). The Deed Poll dated 25 November 2009 and a Supplemental Deed Poll dated 22 February 2011 [FMIF.400.001.0110] together constitute the constitution for the MPF: see Ex 242 and 311.

154 *Wilkinson v Fieldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 693 (Rolfe J); *Trustee Act* 1973 (Q), s 22(1)(a).

155 *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504 at 523E (Finn J).

156 See Defence at [35(b)(iib)(E)(2)]; Reply at [19(b)(iib)(E)].

157 Reply at [19(b)(iib)(E)], [25B(b)(iii)].

(a) *First,* s 601FC(3) (and also s 601FD(2)) expressly do not override any duties that the RE or its officers owe at general law. They apply only to duties owed by an officer "*under Part 2D.1*" of the Corporations Act. The duties owed by LMIM as trustee of the MPF do not arise under Part 2D.1 of the Corporations Act. Similarly, while LMIM's directors owe LMIM duties under Part 2D.1 of the Corporations Act, they also owe LMIM separate duties at general law.

(b) *Secondly,* more fundamentally, s 601FC(3) and 601FD(2) are enlivened only where there is a conflict between: (i) the duties owed by an officer of an RE, or the RE, in her or its capacity as such; and (ii) a duty owed by the officer to the RE itself under Part 2D.1 of the Corporations Act. Thus, ss 601FC(3) and 601FD(2) do not apply to any conflict between: (iii) the duties that an officer of an RE, or the RE, owes in relation to one scheme; and (iv) any duties that the RE or officer owes in relation to another person.[158]

(c) *Thirdly*, even if the Plaintiff were correct about the operation of ss 601FC(3) and 601FD(2) (which it is not), that would not discharge its onus. The Plaintiff must prove that LMIM and its directors would have adopted this analysis at the time that the settlement was being entered and decided, based on ss 601FC(3) and 601FD(2), that they were required to prioritise FMIF's interests at the expense of MPF. There is simply no evidence to support this. To the contrary, Ms D'Arcy's evidence was that as a director of LMIM as trustee for the MPF she would not have countenanced a settlement by which MPF received nothing.[159]

6.11 This disposes of the Plaintiff's damages claim in relation to the alleged breach of s 601FD(1)(c).

6.12 However, in relation to the alleged breach of s 601FD(1)(b), the Plaintiff advances an alternative claim for the difference between the Settlement payment and the amount required to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings plus a commercial rate of interest.[160]

6.13 This claim fails for similar reasons as the primary damages claim. The premise of this claim is that LMIM as trustee of the MPF would have agreed to the settlement on the basis that it was reimbursed with interest. There is no direct evidence of this, and nor can the Court be satisfied that this is the correct inference. While a settlement on this basis would have provided the MPF with a return on the funding provided, MPF would still have received nothing in respect of its claims against Gujarat. There is no basis for finding that LMIM as trustee of the MPF would have consented to a settlement on such unfavourable terms.

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158 See Hanrahan, "Conflicts of Duties in Statutory Contexts: Managed Investments, Superannuation and Financial Services", paper delivered to the Supreme Court of NSW Annual Commercial and Corporate Law Conference, 15 November 2017 at p. 13, referring to ALRC, "Collective Investments: Other People's Money", Report No. 65, 30 September 1993, Volume 1 at [10.17]; *Allco Funds Management Ltd (Receivers and Managers Appointed) (In Liq) v Trust Company (RE Services) Ltd* [2014] NSWSC 1251 at [189] (Hammerschlag J).

159 Tr day 2, p 96, ll 30-31; see also Ex 262, Aff LD paras 164, 178.

160 See 5FASOC at [45AB].

6.14 Alternatively, on the Plaintiff's counterfactual no funding split would have occurred. In such circumstance, LMIM as trustee of the MPF would not have continued to make the funding payments.[161]

6.15 On that counterfactual, LMIM as RE of the FMIF has received the benefit of those payments made after the settlement toward the Bond proceedings and settlement of the Gujarat Proceedings, which would not have otherwise been made.

6.16 That benefit includes the continued funding of the "Bond" proceedings.[162] The affidavit of Mr Rodgers, and the cross-examination of Mr Whyte[163], identify that there is a potential benefit from these proceedings in relation to the recovery of some $6.3M with respect to the bonds.[164]

6.17 Mr Whyte in evidence said that he funded the "Bond" proceedings, but that is not consistent with the updates provided by Mr Monaghan. Mr Whyte also contended in evidence that he funded the $2M bond proceedings, but at the date of the settlement the proceedings had been heard and a decision was pending.[165] He then gave evidence that he was unsure that he funded the first instance decision or the appeals.[166]

6.18 The evidence supports an inference that there is causal link between the funding subsequent to 21 June 2011 (by payment to the liquidators of Bellpac and their lawyers) of the Bond proceedings[167] and the recoveries identified by Mr Whyte in his evidence and the BDO Report.[168]

6.19 The Plaintiff, despite request, refused to provide disclosure with respect to this. The Plaintiff, therefore, has not discharged its onus in establishing the claimed loss or damage.

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161 Ex 264 paras 10 and 12. Breene & Breene were acting in the proceedings to recover the bonds: see entry para 12 for 7.09.11. Subsequent to 21 June 2011 there are entries for payment of that firms fees and fees of the liquidators for 7.09.11, 31.05.12 and 4.01.13. The fact those payments would not be continued is t be inferred from Ex 262, Aff LD paras 227 to 230 and the absence of any benefit to MPF.

162 A summary of these proceedings are referred to in Monaghan's update of 4 August 2010: Ex Aff LD para 71(k)/101(g) FMIF.100.003.2530. This also refers to litigation to recover $2M in bonds. The update of 12 July 2011 identifies that the judgment in spending: Ex Aff LD para 287.

163 Tr 1-90 l 35 – Tr 1-92 l 26.

164 Tr 1 p89, l.35 - only saying that MPF "allegedly did".

165 *Warner (in his capacity as joint and several liquidator of BELLPAC PTY LTD (recs and mgrs apptd)* (ACN 101 713 017) (in liq)) and Others v HUNG and Others (No 2) [2011] FCA 1123; Warner v Hung, in the matter of Bellpac Pty Limited (Receivers and Managers Appointed) (In Liquidation) (No 3) [2012] FCA 819; Emmett J third main decision: Warner v Hung, in the matter of Bellpac Pty Limited (Receivers and Managers Appointed) (In Liquidation) (No 4) [2012] FCA 1206.

166 Tr 1-89 ll 25-Tr 1-90 l 33.

167 The email from Anthony Warner of CRS Insolvency Services dated 19 March 2015 identifies that a payment of $50,000.00 was made on 7 September 2011 on account of funding professional costs and disbursements associated with the matter "Bellpac v Hung & Ors Federal Court": Ex 263, Aff LD at p27. This document is also referred to in Ex 264, Aff LD at [9].

168 Affidavit of Mr Rodgers.

7. RELIEF FROM LIABILITY

7.1 If, contrary to the submissions above, the Court finds that the Ms D'Arcy was in breach of her duty and that loss was caused, then she should be relieved from liability pursuant to s 1317S(1) or 1318(1) of the Corporations Act.[169]

7.2 The inquiry under these provisions involves three stages:[170]

(a) *First,* the Court must be satisfied that the officer acted honestly. For this purpose, the test is whether the person has acted without deceit or conscious impropriety, without intent to gain improper benefit or advantage for herself or another, and without carelessness to such a degree that no genuine attempt has been made to carry out her duties.[171]

(b) *Secondly,* the Court must inquire whether the officer ought fairly to be excused. This involves a consideration of all the circumstances, including the degree to which the officer's conduct fell short of the relevant standards; the seriousness of the contravention; whether it involved any impropriety; whether the officer obtained and followed expert advice; and whether the officer benefited from the contravention.[172] Relief from liability may be appropriate even where the contravening conduct has been found to be unreasonable.[173]

(c) *Thirdly,* the Court must inquire whether the officer should be relieved from liability in whole or in part.

7.3 There can be no doubt that Ms D'Arcy acted honestly. It is clear that she acted conscientiously and had no intention to and did not receive any benefit or advantage from her alleged breaches. Her decision to cause the Settlement payment to be made to LMIM as trustee of the MPF was based on advice from WMS, Allens and Monaghan, and she also raised the proposed split with Ernst & Young. To her knowledge, there was no suggestion by any of these advisors, nor by LMIM's risk manager or compliance committee, that the proposed split could or should not occur. Had there been such a suggestion, she would not have proceeded with the split, at least without seeking further advice.[174]

7.4 Further, it is submitted that this is a case in which Ms D'Arcy ought fairly to be excused:

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169 There is some uncertainty about the relationship between ss 1317S(1) and 1318(1). It is not necessary to resolve this issue as the relevant considerations and principles are materially the same: see *ASIC v Healey (No 2)* (2011) 284 ALR 734 at [83]-[85] (Middleton J); *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [864] (Wigney J).

170 See *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [865]-[874] (Wigney J).

171 *Jones v Jones* [2015] QCA 100 at [80] (Philippides JA, McMurdo P agreeing).

172 See *ASIC v Australian Property Custodian Holdings Ltd* (2014) 322 ALR 45 at [73] (Murphy J) (varied on appeal but not affecting this summary of principle); *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185 at [868]-[874] (Wigney J).

173 *ASIC v Vines* (2005) 65 NSWLR 281 at [41] (Austin J).

174 Ex 262, Aff LD1, paras 224-226.

(a) In light of all the circumstances set out above, any failure of Ms D'Arcy's conduct to meet the required standards was slight;

(b) Ms D'Arcy obtained and acted on expert, independent advice;

(c) There was no impropriety on her part; and

(d) Ms D'Arcy received no benefit from any contravention.

7.5 It would be appropriate wholly to relieve Ms D'Arcy from any liability.

PP McQuade QC and AJH O'Brien

Counsel for the Second Defendant

7 April 2019

"SC-17"

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**

CLOSING SUBMISSIONS FOR THE THIRD & FOURTH DEFENDANTS

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PART A: INTRODUCTION

1. The FMIF was unable to fund complex litigation in the Supreme Court of New South Wales involving a number of parties and claims and cross-claims. So, the MPF, another LMIM fund which also had a security interest in the land the subject of the proceedings, funded the proceedings to the extent of $1.9m.[1]

2. When settlement of the proceedings became a possibility, the directors of LMIM sought the advice of *Allens* and *WMS Accountants* on what was a fair split of the anticipated proceeds. The directors accepted the legal and accounting advice[2] that a fair split of the proceeds was:

   (a) FMIF – 65%; and

   (b) MPF – 35%.

3. Thus, when settlement cheques were paid, it was shared in the proportion 65/35 with MPF receiving $15.5m.

4. By agreeing to that apportionment, did the directors breach their duties?

5. The plaintiff's case is that the FMIF was entitled to all of the proceeds of the settlement and the directors breached their duties by allowing any apportionment to MPF. The defendants contend that the settlement was a compromise of a complex set of claims and cross-claims, some of which involved the MPF. Further, they say that in any event, they were entitled to decide on a fair apportionment and to act in accordance with the advice they received.

6. The plaintiff asserts two breaches of the *Corporations Act* 2001 (Cth) (**the Act**), arising from the same alleged conduct on part of each of the first to sixth defendants respectively.

7. The statement of claim[3] alleges that by causing LMIM as RE of the FMIF to agree to make and to cause, permit or direct the settlement payment to be made to LMIM as trustee of the MPF, the first to sixth defendants (in their capacity as officers of LMIM as RE of the FMIF):

   (a) failed to exercise the degree of care and diligence that a reasonable person would exercise, were they in the position of each of the first to sixth defendants respectively, in breach of s 601FD(1)(b) of the Act (**the reasonable care allegation**);[4] and

   (b) did not act in the best interests of the members of the FMIF and give priority to the interests of the members of the FMIF, in breach of s 601FD(1)(c) of the Act (**the best interests allegation**).[5]

8. The plaintiff further alleges that, as a result of the breaches of duty, LMIM as RE of the FMIF suffered damage as its assets were depleted by the amount of the settlement payment, or at least by the amount exceeding what was necessary to reimburse LMIM as trustee for the MPF for its contribution towards the funding of the proceedings.[6]

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1 The amount is pleaded as $1.95m in the Fifth Further Amended Statement of Claim dated 2 April 2019 (hereinafter referred to as "Statement of Claim") **[FMIF.PLE.013.0001**. The allegation is not admitted. However, the third and fourth defendants now admit that allegation. The Deed Poll (Exhibit 360 **[FMIF.008.001.0126]**, referred to below, records that MPF contributed 91% of the costs of the litigation.

2 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]** and WMS Report (Exhibit 32) **[FMIF.100.003.6807]**.

3 Referencing the Statement of Claim **[FMIF.PLE.013.0001]**.

4 Statement of Claim **[FMIF.PLE.013.0001]**, para 45(a).

5 Statement of Claim **[FMIF.PLE.013.0001]**, para 45(b).

6 Statement of Claim **[FMIF.PLE.013.0001]**, paras 45A and 45B.

9. For the reasons set out below, those allegations are not made out on the evidence.

10. Further, as will be explained, the plaintiff's case suffers from a number of misconceptions, *viz*:

(a) until the trial, the plaintiff did not accept that settlement of the proceedings could not have occurred without the concurrence and cooperation of the MPF, which was a party to the Bellpac proceeding. That proceeding was commenced by the MPF. Permanent Trustee Australia Limited (**PTAL**), the custodian for LMIM as RE of the FMIF, was only later joined as a further claimant to that proceeding;

(b) the plaintiff's case incorrectly assumes that the FMIF was entitled to all of the proceeds from the settlement with Gujarat;

(c) the plaintiff's case measures the interests of the FMIF and its members strictly through a prism of what would improve the immediate cash position of the FMIF at the time of settlement. It fails to acknowledge that the determination of what was in the best interests of a company was often a matter of commercial judgment, informed by more than simply the immediate or short-term cash advantage;

(d) the plaintiff considers that the duty upon the directors to act in the best interests of the members of the FMIF compelled the MPF to consent to the Gujarat settlement for no consideration;

(e) the plaintiff's case ignores, or at least fails to give proper weight to, the fact that the settlement payment was the subject of, and approved by, legal and accounting advice from reputable firms and practitioners;

(f) the plaintiff does not allege any fact, and has adduced no evidence, to establish that any other result would have occurred had the defendants not relied on the independent advice or had taken some other type of advice;

(g) no distinction is made between the different position and role of each of the defendants and each of their differing responsibilities and levels of knowledge. In particular, the case fails to recognise the division of responsibility within the company, or that the third and fourth defendants had other responsibilities and reasonably relied on the conduct of Mr David Monaghan (**Monaghan**), a solicitor, and those directors with carriage of the matter; and

(h) no facts are alleged by which it could be said that LMIM, in its own right, stood to benefit from the proceeds split or preferred its own interests above those of the members of the FMIF.

PART B: OUTLINE OF THE PLAINTIFF'S CASE

11. Between 2009 and 2011, LMIM operated several managed funds, relevantly including the LMIM First Mortgage Income Fund (**FMIF**) and the LMIM Managed Performance Fund (**MPF**). The FMIF was a registered scheme under the Act. LMIM was the responsible entity for that scheme. The MPF was not a registered scheme but was a unit trust. LMIM was its trustee.

12. In 2009, proceedings were commenced that concerned land now known as Bellambi West Colliery, Princes Highway, Russell Vale, near Wollongong in New South Wales.

13. Those proceedings initially comprised of two separate actions in the Supreme Court of New

South Wales, *viz*:

(a) proceeding number 2773/09, commenced by summons filed on 13 May 2009 (**Gujarat proceeding**) by Gujarat NRE Minerals Limited (**Gujarat**) against Bellpac Pty Limited (**Bellpac**); and

(b) proceeding number 3577/09, commenced by summons filed 7 July 2009 (**Bellpac proceeding**) by LMIM as trustee for the MPF, and by Bellpac, against Gujarat

(together, **the proceedings**).

14. The plaintiff now admits that the Bellpac proceeding was commenced by LMIM as trustee for the MPF[7] and that PTAL was subsequently added as a further plaintiff to those proceedings.[8] Also, as detailed below, that proceeding was subsequently merged into proceeding number 298727/09 and placed on the NSW Supreme Court's Commercial List.[9]

15. The combined proceedings were settled in June 2011. The settlement involved Gujarat buying certain land from Bellpac for a contract price of $10m (excluding GST) and paying a further settlement sum of $35.5m.

16. The focus of the plaintiff's case is the sharing of those total proceeds between the FMIF (who received $32,927,184.73; approximately 65%) and the MPF (who received $15,546,147.85; approximately 35%).[10]

17. The plaintiff contends that each of the defendants, as directors of LMIM in June 2011, acted unreasonably in agreeing to the Deed Poll[11] (whereby the apportionment was agreed) because:

(a) they failed to consider that, pursuant to the Gujarat Contract[12], PTAL sold the property to Gujarat as a first mortgagee exercising its power of sale;[13]

(b) the FMIF had first priority pursuant to clause 3.1 of the Deed of Priority;[14]

(c) the MPF could not have prevented the sale by refusing to release its mortgage;[15] and

(d) there was no necessity for the FMIF to agree to share the amounts payable by PTAL as:

i. MPF was not a party to the Deed of Release[16] or the Gujarat Contract;[17]

ii. there was no "binding express prior arrangement" for LMIM as trustee of the MPF

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7 Reply to the Amended Defence of the Third Defendant to the Fifth Further Amended Statement of Claim (hereafter referred to as "Reply to Third Defendant") **[FMIF.PLE.010.0001]**, para 8(a); Reply to the Amended Defence of the Fourth Defendant to the Third Further Amended Statement of Claim (hereafter referred to as "Reply to Fourth Defendant") **[FMIF.PLE.011.0001]**, para 8(a).

8 *Ibid.*

9 See Amended Commercial List Statement – Case Number 2009-298727 - filed 8 February 2010 (Exhibit 119) **[FMIF.005.006.0012]**.

10 See Cheques dated 17 June 2011 (Exhibit 321) **[FMIF.003.003.0053]** and cheques dated 8 September 2011 (Exhibit 330) **[FMIF.100.004.4598]**.

11 Deed Poll (executed in counterparts) (Exhibit 36) **[FMIF.008.001.0126]** and **[FMIF.008.001.0137]**.

12 Gujarat Contract (Exhibit 87) **[FMIF.003.001.0001]**.

13 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(i).

14 Deed of Priority dated 23 June 2006 (Exhibit 2) **[FMIF.009.003.0043]**.

15 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(iii).

16 Deed of Release dated 21 June 2011 (Exhibit 85) **[FMIF.003.003.0198]**.

17 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(b)(i).

to be paid any amount, if the sum paid on settlement was insufficient to discharge the debt to the FMIF;[18] and

iii. the MPF's agreement was not required in order for the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract;[19]

(e) they failed to consider that:

i. the MPF was a subsequent mortgagee and charge holder;[20]

ii. the MPF funded the proceedings as a mortgagee with second priority under the Deed of Priority;[21]

iii. the MPF was drawing down the funding of the litigation against the MPF Bellpac loan;[22]

iv. PTAL sold the property as mortgagee in possession under the PTAL Mortgage;[23] and

v. PTAL was, as at 22 February 2011, owed $52.5m by Bellpac;[24]

(f) they failed to consider whether the MPF could be treated as if it were an arm's length litigation funder;[25]

(g) they failed to consider whether it was appropriate to split the proceeds (65/35);[26]

(h) they failed to obtain independent legal advice, or other independent advice, as to whether:

i. the MPF could be treated as an arm's length litigation funder;

ii. it was reasonable for the MPF to be paid in the proportion 65/35 – an amount over and above reimbursement or any amount at all; and

iii. it was in the interests of the FMIF for the MPF to be paid 35% and above reimbursement or any amount at all;[27]

(i) they took into account the Allens Advice[28] and the WMS Report[29] – which they ought to have known did not advise as set out above;[30]

(j) they failed to have proper regard to the different interests of the FMIF and the MPF;[31]

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18 Statement of Claim **[FMIF.PLE.013.0001]**, paras 34(b)(ia) and 30C(d)(iii).
19 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(b)(i)(ii).
20 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(i).
21 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(iii)(A).
22 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(iii)(B).
23 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(iv).
24 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(v).
25 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(d).
26 *Ibid.*
27 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(e).
28 Allens Advice (Exhibit 35) **[FMIF.100.003.6695]**.
29 WMS Report (Exhibit 32) **[FMIF.100.003.6807]**.
30 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(f).
31 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(g).

(k) reasonable directors, in the same circumstances, would have concluded that the proceeds split was unreasonable and would not have concluded that:

i. the 'overall settlement' could not have occurred without the agreement of the MPF;[32]

ii. they needed to reach an agreement with the MPF about sharing the proceeds;[33]

iii. the proceeds split was fair to the FMIF;[34]

iv. the proceeds split was in the best interests of the FMIF's members;[35]

v. the proceeds split was not unreasonable;[36]

vi. MPF was in an analogous position to a litigation funder and the Bellpac settlement and proceeds split would not be reasonable if the FMIF and the MPF were at arm's length;[37] and

vii. the WMS Report or the Allens advice justified the payment of any part of the Settlement payment to LMIM as trustee of the MPF;[38] and

(l) reasonable directors, in the same circumstances, would have determined that:

i. the MPF had no entitlement to be paid at all, or to be paid beyond reimbursement;[39]

ii. it was not in the interests of the members of the FMIF to make the proceeds split;[40]

iii. the proceeds split would cause detriment to the FMIF by depleting its assets;[41] and

iv. the proceeds should be not split at all.[42]

18. The plaintiff's case is that the alleged conduct was a breach of the duties under s 601FD(1)(b) (reasonable care), and s 601FD(1)(c) (best interests).[43] However, the plaintiff's contentions, as summarised, do not accord with the facts of the case.

19. Each of the third and fourth defendants reject the plaintiff's claim and say, properly considered, their conduct (and that separately of each of the other directors) was reasonable, proper and in the interests of the members of the FMIF.

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32 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(i).
33 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(ii).
34 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(iii).
35 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(b).
36 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(v).
37 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(v).
38 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(vi).
39 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(i).
40 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(ii).
41 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(iii).
42 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(iv).
43 The plaintiff recently, on 1 February 2019, abandoned allegations in their Third Further Amended Statement of Claim **[FMIF.PLE.002.0001]**. Their previous claim alleged conduct constituted a breach of s 180(1) (**reasonable care**) and s 182(1) (**improper use of position**) of the *Corporations Act 2001 (Cth)* (hereafter referred to as "the Act"). The pleading also abandoned the alleged breach of s 601FD(1)(e) of the Act (**improper use of position**).

PART C: FACTUAL BACKGROUND

20. In addressing the plaintiff's contentions, it is useful first to outline some undisputed facts. None of the facts set out below in this part were disputed.

21. The material events in issue in these proceedings occurred between 2009 and June 2011. There are documents referred to by the plaintiff that substantially pre-date this period and indeed, pre-date each of the third and fourth defendants' appointment as directors of LMIM. This proceeding was not commenced until December 2014 and has only now proceeded to hearing in April 2019.

22. Where such a long period has elapsed between the relevant events and the giving of evidence, inability of a person to recall all the relevant events should not be called in aid of drawing any inference against them.[44] That is particularly so where the witnesses in this case were asked about their knowledge and reasoning process in the period 2009 to 2011.

The NSW Proceedings

23. Each of PTAL (as custodian for LMIM as RE of the FMIF) and the MPF was a secured lender to Bellpac.

24. PTAL had made loans to Bellpac from 2003, pursuant to a loan agreement[45] and subsequent variation deeds.[46] PTAL held security in the form of:

    (a) a registered mortgage (dealing no. 9481438R) over the land specified therein;[47] and

    (b) a fixed and floating charge dated 21 March 2003, being registered charge no. 931141.[48]

25. PTAL made an initial loan advance to Bellpac in 2003 of $16 million pursuant to that loan agreement.

26. The MPF also loaned money to Bellpac pursuant to two agreements dated 14 July 2004 and 23 June 2006[49] respectively. In total, the MPF made principal advances to Bellpac of $11 million, comprising of:

    (a) $3 million on 26 June 2004;

    (b) $2 million on 28 August 2005; and

    (c) $6 million drawn progressively between January 2007 to the end of 2011.

27. The MPF also held security in the form of:

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44 *Lewski v ASIC* (2016) 34 ACLC 16-030 per Greenwood, Middleton and Foster JJ at p. 511 [263].

45 Loan Agreement dated 10 March 2003 (Exhibit 120) **[MPF.001.004.4454]**.

46 Various deeds entitled, "*Deed of Variation of Loan Agreement and Consent by Guarantor*", dated 5 December 2003 (Exhibit 55) **[FMIF.300.002.1892]**, 13 February 2004 (Exhibit 56) **[FMIF.300.002.1887]**, 14 May 2004 (Exhibit 57) **[FMIF.300.002.1888]**, 4 October 2004 (Exhibit 59) **[FMIF.015.002.0024]**, 2 May 2005 (Exhibit 61) **[FMIF.300.002.1893]**, 11 July 2008 (Exhibit 63) **[FMIF.500.014.9633]**; Variation Deed dated 23 June 2006 (Exhibit 62) **[FMIF.013.001.0091]**.

47 Registered Mortgage 9481438 dated 21 March 2003 (Exhibit 50) **[FMIF.013.003.0092]**; Memorandum no. 2447323 dated 21 March 2003 (Exhibit 51) **[FMIF.015.002.0004]**; Deed of Mortgage dated 21 March 2003 (Exhibit 52) **[FMIF.015.002.0036]**.

48 Certificate of Entry of Charge no 931141 dated 9 October 2006 and Fixed and Floating Charge dated 23 June 2006 (Exhibit 54) **[FMIF.004.005.0001]**.

49 Loan Agreement dated 23 June 2006 (Exhibit 64) **[FMIF.006.001.0031]**.

(a) a registered mortgage dated 17 December 2004 (dealing no. AB211547W) over the land specified therein;[50] and

(b) a fixed and floating charge dated 9 October 2006, being registered charge no. 1327826.[51]

28. The land subject of the PTAL and the MPF securities was subject to a mining lease to Gujarat.

29. As the statement of claim relates,[52] disputes arose between Bellpac and Gujarat, culminating in Gujarat commencing proceedings against Bellpac pursuant to summons filed 13 May 2009 (proceedings 2773/09). The underlying dispute was a fight for control and possession of the land which Bellpac owned. Gujarat was mining and in possession of the land, which was the subject of PTAL's and the MPF's securities with Bellpac.

30. To protect its position, LMIM commenced the Bellpac proceeding against Gujarat on 7 July 2009 by a Summons in case number 3577/09 (see below). Until recently, in the present case, there had been a dispute as to the capacity in which LMIM was involved in that NSW litigation. The plaintiff in this case now admits that LMIM was acting in the Bellpac proceeding as trustee of the MPF.[53]

31. There remains some utility in explaining the progress of the Bellpac proceeding by reference to the documents filed in those proceedings. The Bellpac proceeding was commenced by LMIM as trustee of the MPF and those proceedings were commenced to assert ***only*** the rights of LMIM as trustee of the MPF. The relevant court documents filed in the Supreme Court of New South Wales record that:

(a) LMIM commenced its proceeding against Gujarat by summons filed 7 July 2009. The original proceeding number was 3577/09. That summons was supported by an affidavit sworn by LMIM's in-house lawyer, Monaghan, sworn 1 July 2009. That affidavit was filed for LMIM, the first plaintiff in the Bellpac proceeding. By paragraph 2 of that affidavit, Monaghan deposed that:

> *I am the Commercial Lending Manager employed by the first plaintiff. I am duly authorised to swear this affidavit on behalf of the first plaintiff.*
>
> *The first plaintiff is the trustee of the LM* ***Managed Performance Fund.***
>
> [emphasis added]

(b) Monaghan's affidavit explained that the MPF had loaned monies to Bellpac and taken a charge over certain of Bellpac's property and further outlined that dealings between Bellpac and Gujarat had been entered without the MPF's prior written consent pursuant to cl 6.1 of the Bellpac charge. Exhibit "*ADM-1*" of the affidavit was a copy of the charge from Bellpac to the MPF;

(c) the relief claimed in the Bellpac proceeding included a declaration that the Settlement Deed and Amendment Deed between Bellpac and Gujarat were entered in breach of cl 6.1 of the

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50 Registered Mortgage AB211547 dated 17 December 2004 (Exhibit 65) **[FMIF.500.014.1392]**; Memorandum no. 2447323 dated 21 March 2003 (Exhibit 51)**[FMIF.015.002.0004]**; Deed of Mortgage dated 21 March 2003 (Exhibit 52) **[FMIF.015.002.0036]**.

51 Certificate of Entry of Charge no. 1327826 dated 9 October 2006 and Fixed and Floating Charge dated 23 June 2006 (Exhibit 66) **[FMIF.500.008.4491]**.

52 Statement of Claim **[FMIF.PLE.013.0001]**, paras 17 to 21.

53 Reply to Third Defendant **[FMIF.PLE.010.0001]**, para 8(a); Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para 8(a).

Bellpac charge;

(d) by order of 2 July 2009 in the proceeding, Registrar Walton ordered that the Gujarat Proceeding and Bellpac proceeding be heard together. A new proceeding number, **298733/09**, was then allocated to the combined proceedings;

(e) the statement of claim filed subsequently asserted a claim by LMIM as trustee of the MPF, pursuant to the MPF's rights as mortgagee;

(f) on about 30 November 2009, the Bellpac proceeding was expanded to include PTAL as a plaintiff, asserting rights as custodian of the FMIF; and

(g) on 8 February 2010, an Amended Commercial List Statement[54] was filed together with an Amended List Summons in proceeding **298727/09**, which recorded LMIM as first plaintiff, Bellpac as second plaintiff, and PTAL as third plaintiff. LMIM continued seeking relief, *inter alia*, under the MPF charge. PTAL sought materially identical relief under a similar charge granted by Bellpac to LMIM as Responsible Entity of the FMIF. LMIM also sought damages against Gujarat for the diminished value of the assets secured by the MPF's charge.[55]

32. It is clear from the above that the Bellpac proceedings were commenced by LMIM as trustee of the MPF, which thereafter remained the first plaintiff in those proceedings. PTAL was subsequently added as a further plaintiff. The FMIF was not, at least directly, a party to the proceedings.

LMIM's Organisational Structure

33. No single individual can be across all facets of the daily business of a large organisation. The work and responsibility in such an organisation are necessarily shared and divided amongst various teams, departments and persons.

34. Prior to the Global Financial Crisis (**GFC**), LMIM:

(a) operated several 9 separate funds (including the FMIF and the MPF);[56]

(b) as RE of the FMIF had a loan book up to $1 billion and as trustee of the MPF had a loan book up to several hundred million dollars;[57]

(c) employed, through an administration company,[58] around 120 to 130 staff;[59]

(d) operated a network of domestic and international offices, including two at the Gold Coast (Beach Road and Cavill Avenue), as well as offices in Sydney, Perth, Hong Kong, London, Auckland, Queenstown, Dubai, Johannesburg, Bangkok, Tokyo, Toronto and Seattle;[60]

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54 Amended Commercial List Statement (Exhibit 119) **[FMIF.005.006.0012]**.

55 Amended Commercial List Statement (Exhibit 119) **[FMIF.005.006.0012** at **.0055]**.

56 Affidavit of Eghard van der Hoven filed 26 March 2019 (hereafter referred to as "Affidavit of van der Hoven") **[EVH.LAY.001.0001]**, para 6; Affidavit of Francene Maree Mulder filed 26 March 2019 (hereafter referred to as "Affidavit of Mulder") **[FMM.LAY.001.0001]**, para 4.

57 Affidavit of Simon Jeremy Tickner sworn 21 March 2019 (hereafter referred to as "Affidavit of Tickner"), para 40.

58 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 28; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 11.

59 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 109; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 17.

60 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 20 and 21; Affidavit of Mulder

and

(e) had made about 160 loans to about 40 borrowers (which declined to 20 post-GFC).[61]

35. At all material times, and even with the impact of the GFC, LMIM remained a large company with the same number of funds under management and no less than about 100 staff (even by 2014).[62]

36. The nature of LMIM's business was also complex. It was a fund manager that operated in a highly-regulated environment. It managed different funds with different objectives, investor bases and risk profiles. The business attracted investments from financial adviser clients from around the world. The operation of such a business required a diverse skill set relevantly including finance, funds management, foreign exchange expertise, property management, town planning, marketing, accounting and legal.[63]

37. As each of Mr van der Hoven[64] and Ms Mulder[65] explain LMIM had a tiered management structure and its directors and staff reflected the different skill sets and experience necessary to run the business.

38. Mr van der Hoven and Ms Mulder both variously describe that:

(a) at the top of the company sat the Board of Directors (**Board**), which provided strategic oversight and direction;[66]

(b) each director had a specific area of responsibility within the company relevant to their skills and experience.[67] In that regard, the Product Disclosure Statement for the FMIF provided that *"[e]ach executive is responsible to the Board for the operation of their own business unit"*.[68] Mr van der Hoven confirms that this was an accurate reflection of the allocation of responsibility amongst the directors;[69]

(c) the Board did not manage the day-to-day business of LMIM or its various funds;[70]

(d) the Board usually met four times a year, but could meet at other times if required;[71]

(e) there were weekly LMIM meetings open to all staff;[72]

[FMM.LAY.001.0001], para 18. See also the Information Memorandum for the MPF dated 22 February 2011 **[FMIF.500.004.9923]**.

61 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 108(k); Affidavit of Mulder **[FMM.LAY.001.0001]**, para 4(a).

62 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 17.

63 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 71; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 71.

64 See generally Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 64-117.

65 See generally Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 30-90.

66 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 30 and 35; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 61 and 64.

67 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 66-74; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 32.

68 Product Disclosure Statement dated 10 April 2008 (Exhibit 1) **[FMIF.500.001.9688]**.

69 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 67.

70 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 35; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 62 and 79.

71 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 77; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 34.

72 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 78.

(f) the main decision-making bodies governing the operation of the funds were the LMIM committees,[73] including credit committees, the Funds Management Committee, Compliance Committee, Risk Committee, Property Research and Analysis Committee (**PRAC**), Arrears Management Committee and the Audit Committee. The roles, membership and function of these committees are described in the affidavits of Mr van der Hoven and Ms Mulder; and

(g) beneath the committees, the staff were organized into distinct work teams (or departments) for which there was a team leader who was usually, though not always, a director.[74] These teams made most of the 'everyday' decisions relating to the operation of the funds.[75] The teams included the Finance Team (lead by the second defendant, Ms Lisa **Darcy**), the Property Asset Management Team (**PAM Team**) (led by Monaghan and then led by the sixth defendant, Mr Simon **Tickner**), the Finance Team, the Marketing Team (led by Ms Mulder), the Foreign Exchange Team (led by Mr van der Hoven) and an in-house legal team (led by Monaghan).[76]

39. This structure meant that, in practice, there was a clear division of responsibility for work throughout the company.[77]

40. Relevantly, Mr van der Hoven's principal role in the company was to lead the Foreign Exchange Team and to manage the cashflow within the funds.[78] Ms Mulder's role was to manage the Marketing Team and coordinate marketing across the whole company, including that conducted by international offices with foreign investors.[79]

41. Throughout the period of the proceedings, each of Mr van der Hoven and Ms Mulder was busy attending to and managing their portfolio and team within the company.[80] They were not the persons with carriage of the Bellpac recovery, including the management of the proceedings.[81]

42. The evidence of each of Mr van der Hoven and Ms Mulder establishes that they had very limited, and no material, involvement in the Bellpac proceedings or Bellpac recovery. While they were sent updates from time to time, they did not (and were not required to) acquire detailed knowledge of the proceedings and Bellpac loans or recovery of the loans.

43. The Bellpac proveedings and reocvery were matters managed by, and were within the areas of responsibility of, Monaghan (as head of the In-House Legal Team) and each of Ms Darcy (who was also the informal '2IC' to the CEO, Mr Peter Drake),[82] and Mr Tickner (as leader of the

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73 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 80. See also Affidavit of Mulder **[FMM.LAY.001.0001]**, para 35.

74 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 55.

75 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 55; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 107.

76 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 107 and 108; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 55–79.

77 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 66.

78 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 29–63; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 32(c).

79 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 20–29; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 69.

80 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 53–56, 63, 123–125; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 26–29 and 95–102.

81 *Ibid.*

82 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 72 and 73; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 32(e).

PAM Team).[83]

PART D: THE UNDERSTANDING

44. It is necessary to deal with a factual issue that was disputed.

45. With some acceptable variation in expression, the evidence of the four directors was that they understood that the MPF's funding of the proceedings against Gujarat was to be recognised by a share of any proceeds from such litigation.[84] It was, in particular, the understanding of Mr Tickner, who was the director most closely responsible for the Bellpac recovery.[85] As best he recalls, that was his understanding from July 2009 onwards.[86] Although Mr Drake did not give oral evidence, he signed the Deed Poll which recorded back in 2011 that the directors had always had such an understanding. The Deed Poll is in evidence for all purposes and was signed by LMIM in addition to the directors.

46. The plaintiff disputes the existence of such an understanding.[87]

47. It is submitted that on the evidence the Court would accept there was an understanding as the directors contend. This is analysed below, but it is necessary to note at the outset that this is an arid dispute; it has no consequence on the outcome of this case.

48. This is because the facts of the case establish that the directors, as officers of LMIM as trustee for the MPF, did, in fact, require some payment to be made to the MPF in recognition of it having funded the proceedings.[88] It does not matter whether this was based on an early understanding, or on a view which developed over time but certainly before the settlement with Gujarat occurred.[89]

49. That being said, on balance of the evidence, the Court should accept that there was an understanding as the director defendants recall.

50. The existence of the directors' understanding is confirmed by each of the documents produced when the directors were considering how the likely settlement proceeds should properly be dealt with. In this regard, the understanding is referred to in:

    (a) each of the WMS Report[90] and the Allens Advice,[91] and the instructions provided to those

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83 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 125–129; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 95–98.

84 Affidavit of Lisa Maree Darcy sworn 24 March 2019 (hereafter referred to as "Affidavit of Darcy") (Exhibit 262) **[LMD.LAY.001.0001]**, paras 164 and 169; T2-44.20 and T2-44.45 to .47; T2-48.1 to. 5; Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 268 and 347; T3-32.33 to .35, T3-31.21 to. 27; Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, paras 121, 122, 209 and 210; T3-45.42 to .47; T3-46.3 to .4; T3-46.39 to. 43; Affidavit of Tickner (Exhibit 324) **[SJT.LAY.001.0001]**, paras 142 – 149.

85 T3-60.43 to .47.

86 T3-66.29 to .30.

87 Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at para 37 (in particular, subparagraphs 37(c) and 37(d)); Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para 18.

88 This constitutes the essences of the plaintiff's complaint.

89 See Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at para 37(e).

90 WMS Report (Exhibit 32) **[FMIF.100.003.6807]**.

91 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**.

firms,[92] which all recorded the existence of the directors' understanding about the basis on which the MPF had been funding the litigation costs; and

(b) the Deed Poll,[93] which similarly recorded the directors' understanding.[94]

51. Each of these documents referred to the directors' understanding that it was appropriate for the MPF's contribution to be recognised by providing it with a share of any proceeds recovered by the litigation.

52. There was no reason for the directors to have contrived this understanding, either now, or back when it was referenced in those documents in 2011. There was no suggestion of this litigation, or other litigation, at that time.

53. An assertion made during the opening of the plaintiff's case was, *"The purpose of the advice was to justify a decision that they'd already made, we say. They'd effectively decided that there was going to be ..."*.[95] The plaintiff does not plead this, or identify the decision already made, or any other, ill-motive or state of mind on part of any of the directors. It was not put to any of the directors that they acted with any improper purpose or motive. Relevantly to the present argument, it was not put to any of the directors that the references to their understanding in the instructions to Allens and WMS, and as then recorded in those reports and the Deed Poll, was a contrivance or made for some improper purpose.

54. The plaintiff's challenge to the existence of the understanding was made on three broad bases.

55. ***First***, it points to the lack of contemporaneous documentation of the understanding. However, the absence of documentation did not mean that the directors did not have the understanding. That seems consistent with the fact that the directors plainly did not consider it was then necessary to document what they regarded as a mere understanding at that time.[96]

56. ***Second***, the plaintiff took the directors to a single document entitled, *"ASIC Benchmark Disclosure & Update for Investors"*, dated 2 September 2010.[97] The lack of reference to the understanding is, again, largely explicable for the reason in the preceding paragraph. However, it is also important to note:

(a) even though that document was admissible under s 1305 of the Act, there was no evidence to establish its status as a final document, as distinct from a draft, or to establish the document was ever lodged or published as an LMIM investor update;

(b) each of Mr van der Hoven[98] and Ms Mulder[99] did not recall reading it. Ms Darcy was never actually asked if she recognised or recalled the document.[100] Mr Tickner was not taken to the document;

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92 Instructions to Allens (Exhibit 33) **[FMIF.200.012.6633]**; Instructions to WMS (Exhibit 31) **[FMIF.300.004.2881]**.

93 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]** which records that *"it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation"*.

94 As confirmed by Mr van der Hoven under cross examination. See T3-40.10.

95 T1-24.28 to .29.

96 See XXN of van der Hoven at T3-30.26 to .29; XXN of Mulder at T3-46.6 to 10; XXN of Tickner at T3-65.16 to .23; XXN to Darcy, T2-44.22 to 27.

97 FMIF ASIC Benchmark Disclosure & Update for Investors dated 2 September 2010 (Exhibit 18) **[FMIF.500.009.8033]**.

98 T3-33.5 to 11.

99 T3-47.21 to 23.

100 T2-49.44 to T2-50.34.

(c) further, the production of a single document, in the absence of comprehensive evidence showing all disclosures actually made to investors, does not prove that the matter was not disclosed. Whether or not the directors' understanding was disclosed to investors is not an issue directly raised on the pleadings. Disclosure in these proceedings has not been made on the basis of any such issue arising on the pleadings. In circumstances where the directors do not have the books and records of LMIM,[101] the fact that the directors could not point to disclosure documents recording the understanding is of no weight or consequence. The events occurred almost a decade ago; and

(d) even if the plaintiff had proven the publication of this document, the date of 2 September 2010 is more than a year after the FMIF had been closed to new investors.[102] That is not to say that disclosure does not matter, but it may assist to explain why the funding of the proceedings against Gujarat was overlooked.

57. Ultimately, the FMIF ASIC Benchmark Disclosure & Update for Investors dated 2 September 2010 (Exhibit 18) **[FMIF.500.009.8033]** is not probative of whether the directors held the understanding they each gave evidence on oath about.

58. ***Third***, Mr Tickner was challenged as to why he did not respond to emails from Monaghan to the effect that an agreement was unnecessary because the MPF was a second mortgagee. A reading of the email exchanges shows that Mr Tickner and Mr Monaghan were at cross-purposes, or perhaps Mr Monaghan could not recall having been told about the understanding. What Mr Tickner's emails do reveal, although it is not stated expressly, is that he obviously did believe that there was an arrangement between the FMIF and the MPF other than as first / second mortgagee. On 17 August 2010,[103] Mr Tickner wrote to Mr Grant Fischer (copied to Ms Darcy) asking, *"Have we documented an agreement between MIF and MPF..."*. He is asking for a pre-existing arrangement to be *"documented"*. Mr Tickner then says, *"if not I think we should formalise as soon as practicable"*. Again, his language assumes the existence of something that needed to be formally documented.

59. Later, on 30 August 2010, Mr Tickner asks, *"can we amend any agreement we have in place for MPF to assist with litigation costs on Bellpac to also cover Statutory Charges..."*.[104] Plainly, Mr Tickner believed there was an existing arrangement between the funds.

60. It is submitted otherwise that the Court ought not to read anything into the various directors' limited recall of details around their understanding and their discussions about it, given the passage or nearly a decade since the relevant events.

61. It is also submitted that the Court would accept the directors' evidence that there was an understanding to the effect contended.

62. Even if the Court was circumspect as to Mr Tickner's and Ms Darcy's understanding of the matter, the Court should nevertheless accept that Mr van der Hoven and Ms Mulder were each told that the MPF was funding the proceedings on the basis that it would receive a share of any proceeds. Evidently, someone at LMIM was giving instructions to that effect, as is reflected by the instructions given by Monaghan to Allens and WMS, the Allens Advice, the WMS Report, and the Deed Poll.

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101 The books and records of LMIM are in Mr Whyte's possession.

102 The funds in the FMIF had been frozen since 3 March 2009. See Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 10, 35 and 36.

103 Email chain ending with email from Fischer to Tickner copied to Darcy, Monaghan and Chalmers dated 18 August 2010 (Exhibit 13) **[FMIF.100.003.2182]**.

104 Email from Tickner to Monaghan dated 31 August 2010 (Exhibit 17) **[FMIF.100.003.2096]**.

63. The finding of the Court should be that there was an understanding as contended for by the directors.

Proposed Finding

The MPF funded the proceeding pursuant to an understanding of LMIM's directors that it would receive a share of any proceeds from that litigation.

PART E: THE BEST INTERESTS ALLEGATION – 601FD(1)(c)

Introduction

64. Section 601FD(1)(c) provides:

> *"(1) An officer of the responsible entity of a registered scheme must:*
> *(a) ...*
> *(b)*
> *(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; ..."*

65. There are two limbs to s 601FD(1)(c), imposing two distinct duties.[105]

66. ***First***, the officer must act in the best interests of the members (as distinct from the responsible entity).

67. ***Second***, where there is a conflict between the members' interests and the interests of the responsible entity, the officer must give priority to the members' interests.

The First Limb of s 601FD(1)(c) – the Best Interests Duty

Some Applicable Principles

68. The following principles can be extracted from the text of s 601FD(1)(c) and the authorities.

69. ***Principle 1:*** It is necessary to look firstly at the scope and reach of s 601FD(1)(c). By the text of s 601FD(1)(c), Parliament chose to expressly provide what is to happen only in the event that one type of conflict arises, that is a conflict of interest and duty. The special treatment of interest/duty conflicts means, if there is an interest/duty conflict, the section expressly requires that the officer give priority to the members' interests. A contravention of that second limb occurs when an officer prioritises the interests of the responsible entity over the members' interests.[106]

70. The section does not otherwise expressly deal with conflicts. It does not separately deal with conflicts of duty and duty, and it does not expressly provide for a priority in the event of a duty/duty conflict. Those conflicts are comprehended by the general duty to act in the best interests of the members.

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105 *Australian Securities and Investments Commission v Lewski & Ors* [2018] HCA 63, 362 ALR 286 per the Court (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) at [71]. See also Prof Hanrahan "*Conflicts of Duties in Statutory Contexts: Managed Investments, Superannuation and Financial Services*" a paper delivered at the Supreme Court of NSW Annual Commercial and Corporate Law Conference, Sydney, 15 Nov 2017 at p12

106 *Ibid* at [72]. Nor does it proscribe the acts of a director which put herself or himself in a position of conflict.

71. Thus, the Parliament chose not to require officers to give priority to the interests of the members over their other duties.[107] The position is the same for the responsible entity under the equivalent provision in s 601FC(1)(c).

72. Of course, all of the duties in s 601FD(1) override any conflicting duty the officer has under Part 2D.1[108] However, that merely gives the officer's duties to the members a status above the duties the officer owes to the responsible entity. It does not detract from the proposition that Parliament has declined to prescribe a priority where there is a conflict of duty and duty.

73. So, for the purposes of this case, in so far as there is a potential conflict of duty and duty, the relevant obligation under s 601FD(1)(c) is the general obligation that the officer must act in the best interests of the members.

74. ***Principle 2:*** It is necessary to look at the foundations of the 'best interests' duty. The duties imposed by ss 601FC(1)(c) and 601FD(1)(c) are grounded upon, and correspond with, the test applied at general law and in equity.[109] The duties under those sections have been described as *"essentially fiduciary in nature"*.[110]

75. Moreover, those sections have been treated as not extending the general law boundaries. As Murphy J concluded in the *Lewski* case at first instance, after analysing the heritage and history of the sections:[111]

> *I conclude that the imposition of a duty to act in the best interests of the members in ss 601FC(1)(c) and 601FD(1)(c) does not extend its content beyond previously understood general law boundaries. I see the best interest duty as foundational and operating in combination with other duties. It encompasses the fundamental duty of undivided loyalty which in the present case required APCHL and the Directors to use their best efforts to pursue solely the members' interests, to act honestly and to exercise care, competence and prudence in doing so, and to eschew any conflict of interests between the members' interests and its own.*

76. This treatment of the sections is consistent with principles of statutory interpretation. The relevant principle in this regard is, in the absence of an unambiguous contrary intention, statutes

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107 An example where the legislature has chosen to deal with duty/duty conflicts is s 52(2) of the *Superannuation Industry (Supervision) Act 1993* (Cth) which is discussed by Prof Hanrahan "*Conflicts of Duties in Statutory Contexts: Managed Investments, Superannuation and Financial Services*" a paper delivered at the Supreme Court of NSW Annual Commercial and Corporate Law Conference, Sydney, 15 Nov 2017 at p15.

108 Section 601FD(2). Note however that s 601FD(2) is enlivened only where there is a conflict between the duty owed by an officer to members of the scheme and a duty owed by a director to the responsible entity itself: Hanrahan (supra) at p13; see also *Allco Funds Management Limited (Receivers and Managers Appointed) (In Liquidation) v Trust Company (RE Services) Limited* [2014] NSWSC 1251 at [189].

109 The same conclusion has been applied in context of the 'best interests' duty imposed by s 52(2) of the *Superannuation Industry (Supervision) Act* 1993 (Cth): *Manglicmot v Commonwealth Bank Officers Superannuation Corporation Pty Ltd* (2011) 282 ALR 167 per Giles JA at [119] – [120].

110 *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd* [2005] WASC 189; *Australian Securities and Investments Commission v Avestra Asset Management Ltd (In Liq)* (2017) 120 ACSR 247; [2017] FCA 497 at [184] (Beach J).

111 *ASIC v APCHL (No. 3)* (2013) 31 ACLC 13-073 per Murphy J at [484]. Murphy J also analysed the duty of undivided loyalty in a trustee context, see [471] – [474].

should be interpreted in consonance with equitable rights and principles.[112] In *Minister for Lands and Forests v McPherson,*[113] Kirby P said:

> *Many cases, especially of late, demonstrate, both in the High Court and in this Court, the strength of the presumption that basic common law rules endure, notwithstanding statutory provisions which, on a superficial impression, might be thought to have replaced them... Parliament can derogate from such basic rights, provided to do so is otherwise within its legislative competence. But it must do so clearly, either by express language or inference which is "unambiguously clear"*
>
> ...
>
> *Does a similar principle apply in relation to basic principles of equity, where those principles have been developed over the centuries to safeguard the achievement of justice in particular cases where the assertion of legal rights, according to their letter, would be unconscionable? In principle, there would seem to be no reason why a similar approach should not be taken to basic rules of equity.*

77. The plaintiff's assertion that s601FD(1)(c) overrides any other equitable right would need clear language.

78. ***Principle 3:*** Next, it is relevant to look at the test under s 601FD(1)(c). In assessing whether the duty under the first limb of the 'best interests' duty has been breached, the test is neither purely subjective nor purely objective. As recently confirmed by the High Court in *Lewksi*:[114]

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

79. Thus, *Lewski* confirms that the first limb is satisfied where the officer's conduct can be seen to be both honest and reasonable. This is to be contrasted with the second limb (conflict between the members' interests and the interests of the responsible entity), about which the court said that:

> *A contravention occurs ... no matter how honest or reasonable the director was ...*[115]

80. ***Principle 4:*** The High Court's reference to the test as being *"not **purely** subjective"* in *Lewski* also indicates that, while the test is not solely subjective, it may be predominately subjective. This echoes the analysis in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No. 3)*, where Carr AJA observed:

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112 *Minister for Lands and Forests and Anor v McPherson and Anor* (1991) 22 NSWLR 687 per Kirby P (Meagher JA agreeing) at pp. 699-701.

113 *Ibid* at pp. 699-700.

114 *Australian Securities and Investments Commission v Lewski & Ors* [2018] HCA 63, 362 ALR 286 per the Court (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) at [70] – [72].

115 *Ibid* at [72].

> *The authorities show that, in the absence of irrationality, the test is not whether the director's belief is based on reasonable grounds. It is a subjective test. In this matter, did Aspinall, not acting irrationally (in the Hutton v West Cork Railway Company (1883) 23 Ch D 654, 671 sense*[116]*) honestly believe that entering into the Transactions was in the best interests of each of the companies of the Bell group?* [117]

81. His Honour said further that:

> *... a transaction designed to deprive the company of funds that would otherwise be available to creditors would be a breach of the duty to act for a proper purpose. However, if the directors bona fide believe that a transaction is in the best interests of the company and will in fact improve its financial position and that in fact their purpose, there will be no breach of fiduciary duty merely because the transaction will not enable all creditors to be dealt with pari passu or because there is a prospect of the directors being wrong and creditors suffering as a result.* [118]

82. Probably that approach is part of the courts' reluctance to intervene where the challenge is to the wisdom of business and commercial decisions. In *Re Gunns Plantations Limited (in liq) (Receivers and Managers Apptd) (No. 4)*[119] there were complaints of breaches of ss 601FC(1) and 601FD(1) made against a liquidator. The claims were dismissed on the grounds that the court was satisfied that the impugned transaction between the liquidator and the receivers *"was arm's length, robust and produced a commercially justifiable agreement"*.[120] In reaching that conclusion, Judd J analysed a number of cases where courts had expressed reluctance to scrutinise commercial decisions. This included analysis of *Re Mineral Securities Australia Ltd (in liq)*, where Street CJ had said:[121]

> *When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyer's disclaimer of expert qualifications in matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision.*

83. Judd J observed directly:[122]

> *The challenge advanced by Gunns Growers was a good example of the difficulty confronting a court ... when asked to investigate the exercise of commercial judgment. Gunns Growers attempted to dissect the negotiation process. It would also have the Court direct the liquidators and receivers to reopen the negotiations and proceed to reach agreement on a different footing. Such a course would be an impermissible exercise of power.*

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116 This referenced Bowen LJ's example of the honest lunatic, cited in *Australian Securities and Investments Commission v Lewski & Ors* [2018] HCA 63, 362 ALR 286 per the Court (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) at [71].

117 (2012) 44 WAR 1 per Carr AJA at [2,772]. See also Lee AJA at [923], Drummond AJA at [1,983].

118 *Westpac Banking Corporation v Bell Group Ltd (in liq) (No. 3)* (2012) 44 WAR 1 per Carr AJA at [2,772]

119 (2014) 32 ACLC 14-046.

120 *Re Gunns Plantations Limited (in liq) (Receivers and Managers Apptd) (No. 4)* (2014) 32 ACLC 14-046 per Judd J at p. 587 [87].

121 [1973] 2 NSWLR 207 at p. 232.

122 *Re Gunns Plantations Limited (in liq) (Receivers and Managers Apptd) (No. 4)* (2014) 32 ACLC 14-046 per Judd J at p. 586 [83].

84. The decision in *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd*[123] (discussed in more detail below) provides a further example. In this decision, Byrne J noted: [124]

> *[T]he trustee has formed the view that its duty to members with respect to the surplus, having regard to the nature of the trust, is to make a payment which is generous but not extravagant and that this payment would consume only $36m of the surplus. No criticism is directed to this decision.*

85. His Honour said at [118]:[125]

> *In so far as the APRA concerns are directed to the amount of surplus to be paid to the employers, I express no views upon the trustee's decision. If it be accepted that the trustee might, in the circumstances of this case and consistent with its obligations under the s 52(2)(c) covenant, make some payment to the employers where this is, in the reasonable opinion of the trustee, in the best interests of the members, the court will not enter upon a consideration of the amount of such payment.*

86. Thus, to use the facts of the present case as an example, the Court would be reluctant to enter into a dispute as to whether the appropriate apportionment between the FMIF and the MPF ought to be 65/35 or 75/25.

87. ***Principle 5:*** A feature of the duty is to *"act in the best **interests** of the members rather than a duty to secure the best **outcome** for members"* (emphasis added).[126] The High Court in *Lewski* added that: [127]

> *Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than "the success or otherwise of a transaction or other course of action".*
>
> [citations omitted]

88. ***Principle 6:*** The duty to act in the 'best interests' of the members does not have an absolute or superlative flavour.

89. The expression *"best interests"* received a broad examination by Barrett J in *Charlton v Baber.*[128] The context was the use of the expression in s 237(2)(c) of the Act, which requires the Court to grant leave to intervene if it was satisfied, *inter alia*, that *"it is in the **best interests** of the company that the applicant be granted leave".*

90. Barrett J commenced his analysis by observing generally: [129]

> *The expression "best interests", taken literally, is apt to create a false impression that some absolute or superlative is in contemplation. Its true meaning emerges from a consideration of other contexts in which it is used.*

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123 (2006) 15 VR 87

124 *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at p. 109 [112].

125 *Ibid* at pp. 110 – 111.

126 *Ibid* at [71].

127 *Ibid.*

128 [2003] NSWSC 745.

129 *Charlton v Baber* [2003] NSWSC 745 at [46].

91. His Honour proceeded to analyse a number of disparate contexts involving duties to act in the best interests of another,[130] each of which involves its own balancing considerations. His Honour concluded generally: [131]

> *"Best interests" is thus an expression concerned with a person's separate and independent welfare. Where the concern to which the "best interests" assessment is relevant centres upon possibilities of undue influence and, perhaps, improper purpose, the task is to consider what the putative victim would have done in seeking to protect his or her own position and promote his or her own advantages with such a degree of selfishness as the circumstances will admit.*

92. Thus, the meaning of the expression "*best interests*" always depends on the context. However, nothing in the context of s 601FD(1)(c) suggests that, in pursuing the best interests of the members, the officers of responsible entities are required to cause their responsible entity to give priority to the interests of the members at the expense of the members of other responsible entities or the beneficiaries of other trusts.[132] The legislature, as explained, declined to require that, and the underlying fiduciary principles do not require it.

93. ***Principle 7:*** No case suggests the 'best interests' duty (whether in s 601FC(1)(c) or s 601FD(1)(c)) requires officers of responsible entities to ignore or suppress any other duty owed by the responsible entity and requires all moneys from an available fund be paid to the members of the responsible entity. The cases are to the contrary. Some case examples can be given.

94. **Case example 1**: A common trustee of a group of trusts is required to treat each trust separately and to act in the best interests of each trust. This principle was stated as follows in *Parbery v ACT Superannuation Management Pty Ltd*:[133]

> *...beneficiaries of a group of trusts are, in law, entitled to insist that the common trustee, or common administrators or liquidators of a common trustee, treat each trust separately and act in the best interests of each trust. The general equitable right of fiduciary loyalty in such a situation is clearly and expressly recognised in s 601FC(1)(c) of the CA, which provides that a responsible entity must act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, it must give priority to the members' interests.*
>
> *It is clear that the trustee of several separate trusts cannot charge the beneficiaries of one trust with the costs and expenses incurred in relation to work done for the benefit of another trust. If the trustee cannot, with some accuracy, apportion the expenses of administration between the various trusts, 'the maxim that equality is equity should provide the solution to the problem of apportionment'*[134]*...*

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130 *Charlton v Baber* [2003] NSWSC 745 at paras [47]–[51], where his Honour considered the courts' *parens patriae* jurisdiction, the requirement upon the Family Court to act in the best interests of children, the best interests of trustees and company directors.

131 *Charlton v Baber* [2003] NSWSC 745 at [52].

132 Note that, in para 25AC of their Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, the plaintiff contends that "*if taking those steps* [i.e. agreeing to the releases for no consideration] *would have been contrary to LMIM's duties as trustee of the MPF...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*".

133 (2010) 79 ACSR 425 per Palmer J at [33]; also cited as *Trio Capital Limited (Admin App) v ACT Superannuation Management Pty Ltd & Ors* [2010] NSWS 941.

134 *Ibid* per Palmer J at [33]. Applied in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 per Jackson J at [95].

95. Thus, the common trustee must act in the best interests of each trust within a group. Whilst *Parbery* was an application for directions under s 447D of the Act concerning the trustee/administrators' remuneration, the above statement concerning a common trustee's duty is of general application.

96. The facts of *Parbery* make it a useful analogy. If the trustee had proposed to apportion the costs and expenses accurately or fairly between the various trusts in the group, then there would have been no prospect of a failure to act in the best interests of any of the group trusts. The potential breach of the 'best interests' duty arose because the trustee/administrators (who it was accepted owed fiduciary duties to the members of each trust) proposed they be permitted to recoup their costs and expenses as they sought fit. That would have meant they could recoup more of their costs from the solvent trusts in the group, to compensate for their inability to recoup their costs from the insolvent trusts.

97. So, the potential breach of the 'best interests' duty arose because of the trustee's proposal to unfairly apportion the costs as between the trusts. Here, of course, the apportionment of the proceeds of the settlement is in accordance with independent expert advice.

98. **Case Example 2**: The bests interests of scheme members may sometimes be served by payments to persons outside the scheme. Examples of this have arisen in the superannuation context.

99. It is fair to ask, in the present case, how payment to anyone other than the members of the FMIF might be in the interest of those members. Though, as Byrne J noted in respect of the materially identical question in *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd*,[135] there may be many answers to this.[136]

100. The facts in *Invensys* have some similarity to the present case. *Invensys* concerned s 52(2)(c) of the *Superannuation Industry (Supervision) Act* 1993 (Cth), by which superannuation entities were required *"to ensure that the trustee's duties and powers are performed and exercised in the best interests of the beneficiaries"*. In 2005, the fund was found to have a surplus of $89.2m, of which the trustee proposed to distribute $49.8m to the principal employer (not a member of the fund) and $36m to present and past members. The trustee sought court approval to amend the trust deed to enable the proposed distribution. In allowing the amendment, Byrne J concluded the intended distribution did not amount to a failure to perform its duties and powers in the best interests of the beneficiaries.

101. His Honour's analysis commenced with an acceptance that the trustee's duty was to act in the interests of the members of the fund only.[137] His Honour proceeded: [138]

> *But this does not mean that the trustee might not confer a benefit on the employers, if, in the opinion of the trustee, this would be of benefit to the members. In the present case there is no certainty that the members might do better if less than $49.8m were distributed to the employers. It may be that, if the proposal involved a reduction in this payment, the employers would withdraw their support, with the consequence that there would be no distribution of surplus to anybody or that there would be a lengthy and expensive and uncertain litigation to resolve the impasse. The evidence before me shows that the trustee has good grounds for such an apprehension. If only for this reason, I conclude that the trustee is entitled, consistent with its proper concern for*

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135 (2006) 15 VR 87.

136 *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at p. 109 [111].

137 *Ibid.*

138 *Ibid.*

the best interests of the beneficiaries, to make a payment of part of the surplus to the employers.

102. His Honour returned to the issue a little later, saying: [139]

The payment is part of a package which, on the evidence, will produce a substantial benefit to members. This is a benefit with which they, through their representatives, have expressed themselves to be content. It is a benefit which is greater than their entitlement under the unamended trust deed. It is a benefit which, on the evidence, is greater than they might reasonably hope to extract by further negotiation with the employers. Finally, I accept that it is a benefit which the trustee in the circumstances and after due and proper consideration has concluded is a proper one for it to confer upon the members having regard to the nature and objectives of the trust.

103. *Invensys* demonstrates, in closely analogous circumstances to the present, there can be circumstances where the member/beneficiary best interests are served by a sharing of an available fund.

104. **Case Example 3**: In *Invensys*, Byrne J referred to *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd*[140] for the proposition that the trustee had to act in the interests of the members of the fund only. Beach J said in *Asea Brown Boveri*: [141]

In my opinion trustees of a superannuation fund owe a duty of loyalty exclusively to the members. It does not follow from that, however, that a trust deed can never be altered to meet the interest of the employer. Trustees are free to negotiate with an employer for a package of amendments that may include benefits to the employer if in the opinion of the trustees that would benefit the members.

105. **Case Example 4**: In *Timbercorp Securities Limited (in liq) v WA Chip & Pulp Co Pty Ltd*, Finkelstein J said:[142]

The Corporations Act also imposes duties upon an officer (which would include a liquidator) of a responsible entity: see s 601FD. The duties are similar to those owed by the responsible entity. Like the obligations of the responsible entity, the duties of an officer override any conflicting duty the officer has under Pt 2D.1: s 601FD(2).

The liquidators seem to be of the opinion that by reason of ss 601FC and 601FD they are required to look after the interests of investors even if that be at the expense of other creditors. In my view that is wrong. There is nothing in ss 601FC or 601FD that overrides the liquidator's duty to those interested in the winding up. It would be quite extraordinary were that to be the case. I think the liquidators should readjust their priorities.

106. **Case Example 5:** In *Re Dalewon Pty Ltd (in liquidation)*,[143] where the liquidators sought declarations that they were entitled to a lien and a charge over the assets of the company. McMurdo J said, relevantly, at [22]:

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139 *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at p. 111 [118].

140 [1999] 1 VR 144.

141 *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* [1999] 1 VR 144 at p. 161 [65] per Beach J.

142 [2009] FCA 901 at [10]-[11].

143 79 ACSR 530; [2010] QSC 311. This was cited by Jackson J in *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 2* [2017] QSC 229 at [85].

> *On any view, it would not be appropriate to make the declarations which are sought, because they fail to recognise the distinct interests of the respective trusts and the required connection between the liquidators' fees and expenses and the administration of one trust or the other. In these circumstances, the amended application of the liquidators, in so far as it seeks the declarations set out in paragraphs 6, 7, 8 and 8A of that application, must be dismissed.*

107. ***Principle 8:*** No other analogous area of law requires an officer or a trustee to deal other than fairly where there are two or more duties. Certainly, no other area requires a trustee to prefer or give priority to the interests of one beneficiary where duties are owed to two or more beneficiaries.

108. For example, the nature of the directors' decision here was analogous to a trustee's duty to treat beneficiaries equally where they have similar rights, and fairly where they have dissimilar rights.[144]

109. ***In summary***, the words of s 601FD(1)(c) does not provide that the 'best interests' duty requires that an officer of a responsible entity act so as to cause the responsible entity to breach its equitable obligations as trustee of other trusts. The content of the duty and the cases do not support this idea. In fact, the predominance of authority is to the effect that the obligation of officers and trustees in this situation treat separate trusts separately.

110. This is not surprising. Some clear legislative words would be required in order to impose such an impractical duty.

111. One further point. If there is a real and sensible possibility that the duties a fiduciary owes to two or more principals will conflict, then the fiduciary can proceed only to the extent the terms of its appointment allow it, or with the fully informed consent of its principals.[145] Most trust deeds will contain provisions allowing the trustee to act as trustee of other trusts, which may be sufficient to allow the trustee to act despite the potential for the interests of the beneficiaries of those trusts to conflict.[146]

112. In this case, both the constitution of the FMIF[147] and the constitution of the MPF[148] allow the responsible entity/trustee to manage other funds.

Analysis

113. The plaintiff's complaint is that the director defendants, in their capacity as officers of LMIM as RE of the FMIF, breached their duty under s 601FD(1)(c) by causing or permitting the settlement payment of $15.5m to be paid to the MPF.[149]

114. This complaint is contrary to the above principles in a number of ways.

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144 Finn, P., *Fiduciary Obligations*, 40th Anniversary Republication, 2016, The Federation Press, Sydney, at p. 16 [28]. See also Heydon & Leeming, '*Jacobs' Law of Trusts in Australia*' (7th ed) at [1711]; Dal Pont, '*Equity & Trusts in Australia*' (5th ed) at [22.120].

145 Prof Hanrahan "*Conflicts of Duties in Statutory Contexts: Managed Investments, Superannuation and Financial Services*" a paper delivered at the Supreme Court of NSW Annual Commercial and Corporate Law Conference, Sydney, 15 Nov 2017 at p4

146 See Prof Hanrahan's paper, at p4; *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75; [2016] FCA 1552 at [354] (Edelman J)

147 FMIF Constitution (Exhibit 118) **[FMIF.100.005.7639]**.

148 MPF Trust Deed signed 25 November 2009 **[FMIF.400.001.0116].** This document is not yet in evidence, however, the parties have agreed it will go into evidence subject to the Court's discretion.

149 Statement of Claim **[FMIF.PLE.013.0001]**, paras 44(b) and 45(b).

115. ***First***, the plaintiff's case is really preoccupied with a perceived adverse outcome. The perceived adverse outcome is the fact that FMIF did not receive the full sum paid by Gujarat upon settlement of the proceedings. Yet, as observed by the High Court in *Lewski* (discussed in Principle 5 above), compliance with the duty is not measured in terms of the perceived success or otherwise of a transaction or course of action.

116. ***Second***, and in any event, the perception of an adverse outcome is not the reality. That perception is based on the fallacy that FMIF was entitled to the full proceeds of the settlement. The plaintiff pleads that the settlement sum was FMIF's scheme property.[150] In fact, until the settlement was effected on 21 June 2011, the settlement sum was the property of Gujarat. Upon settlement, the money (i.e. bank cheques) was paid by Gujarat to PTAL and LMIM as trustee for the MPF.[151] The money was paid in accordance with the agreed split. In return for the payments, MPF and PTAL gave releases that came into operation immediately. The settlement included signed discontinuances.

117. Similarly, at settlement PTAL contracted to sell the land to Gujarat for $10m.

118. The plaintiff did not contend that, in entering into the settlement, FMIF and MPF 'gave up the farm'. Both funds gave up their valuable claims in the litigation, and the land, but they received $32m and $15m respectively in return.

119. The adverse outcome contended for by the plaintiff involves the assumption that the plaintiff was entitled to receive the entire $45.5m. That was never the case. The settlement proceeds were not moneys subject of the Deed of Priority. They were monies payable by Gujarat, a third party, as the price of releases from the claims in the NSW proceedings, including the MPF's damages claim. They were not monies paid by the debtor, Bellpac, in respect of the security. In any event, the plaintiff does not plead in reliance on cl 3.2 of the Deed of Priority.

120. ***Third***, the directors rightly considered that the agreement of both the MPF and the FMIF was essential if the proposed settlement with Gujarat was to occur at all. This is because:

    (a) Gujarat required a settlement with all parties to the litigation. That is evident from the form in which the settlement documents were prepared after some 2 years of litigation.[152] The requirement that there be an *"immediate release for all parties"* was also expressly stated by Gujarat's lawyers as something they wanted in the settlement;[153]

    (b) the MPF was a party to the Bellpac proceedings, as the plaintiff now concedes;[154]

    (c) obviously enough, LMIM as RE of FMIF did not have power or authority to compromise the Bellpac proceedings on behalf of the MPF; and

    (d) the MPF required a reasonable recompense for having funded the Bellpac proceedings. It will be recalled that all of the directors who gave evidence deposed to the existence of an informal understanding that the MPF's contribution to funding the proceedings would be recognised by a share of the proceeds resulting from them. Again, whether that was so is,

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150 Statement of Claim **[FMIF.PLE.013.0021]**, para 37.

151 Cheques (Exhibit 321) **[FMIF.003.003.0053]**.

152 In particular, the Deed of Release (Exhibit 85) **[FMIF.003.003.0198]** contemplated and required the execution of a consent ***dismissal*** by all parties to the Bellpac proceedings, expressly including LMIM as trustee for the MPF **[FMIF.003.003.0198 at .0236]**.

153 Email from Brian Gillard to Bruce Wacker (Allens) dated 28 April 2011 (Exhibit 316) **[FMIF.200.012.7079]**.

154 See Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para 8(c).

ultimately, not material. It is sufficient that, by August 2010, Mr Tickner was asking whether they had *"documented"* an agreement between the funds *"for the litigation funding"*.[155] By November 2011, Ms Darcy was also expressing support for an inter-fund agreement regarding the breakdown between the funds.[156] So by 2010, the two directors with carriage of the Bellpac matter were both indicating an agreement with the MPF was necessary to record what was evidently their view - the MPF's contribution should be recognised in the form of a share of the settlement proceeds. Thus, regardless of any historical understanding, by the end of 2010, it was clear from the view of these directors that the MPF would require some payment for its contribution. This escalated or developed resulting in the procurement of the Allens Advice and the WMS Report and, ultimately, the entry into the Deed Poll (executed by all of LMIM's directors) recording the agreement to split the proceeds 65/35; and

(e) by reason of the above, it was essential for the FMIF to come to terms with the MPF if the FMIF was to obtain anything *at all* by way of settlement.

121. The plaintiff now admits the MPF's consent was required. The plaintiff's case has shifted again to now assert the MPF should have agreed to the settlement for no payment or other consideration.

122. Ultimately, there are three important facts as follows. Without the MPF's funding of the proceeding, including the provision of an undertaking as to damages, there would have been no settlement at all. MPF's consent had to be obtained if there was to be any settlement with Gujarat. Also, MPF was entitled to (and did) nominate a price for its consent.

123. On a proper analysis, the directors, in their capacity as officers of the RE of the FMIF, did not have to choose between a settlement payment of $32m or $45m. The binary choice was, rather, to do a fair deal with the MPF, or to continue with the Bellpac proceedings. As it happened, the FMIF could not afford to litigate. Its only realistic choice was to settle or to try to continue to litigate without the MPF's support.

124. After receipt of the WMS Report and the Allens Advice, the only decision for the FMIF was whether or not to settle for $32m. The directors' decision to accept the settlement in those circumstances was honest and reasonably justifiable in the best interests of the FMIF and its members.

125. ***Fourth***, the directors did not breach their 'best interests' duty merely by having regard to the interests of the MPF. In accordance with *Parbery* (discussed as part of ***Principle 7*** above), the directors, in their capacity as officers of the trustee of the MPF, were entitled to have separate regard for the interests of the MPF in requiring appropriate recompense for the MPF having paid the costs of the Bellpac proceedings. Certainly, contrary to the plaintiff's pleaded case,[157] the authorities do not require directors in this position to give priority to the interests of the FMIF.

126. ***Fifth***, the fact that s 601FD(1) applies in respect of the FMIF but not to the MPF does not matter. As discussed in ***Principle 2***, the section does not extend or alter the general law principles. It does not require or permit the directors to cause LMIM as trustee for the MPF to breach its own equitable duty.

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155 Email from Tickner to Fischer copied to Darcy dated 17 August 2010 (Exhibit 12) **[FMIF.200.009.8909]**; Affidavit of Tickner **[SJT.LAY.001.0001]**, para 143.

156 Email from Darcy to Monaghan and van der Hoven copied to Tickner and Petrik dated 22 November 2010 (Exhibit 23) **[FMIF.100.002.9889]**; Affidavit of Tickner **[SJT.LAY.001.0001]**, para 176.

157 See, for example, paras 22(b)(ii) and 25AA(c) of Reply to Third Defendant **[FMF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**.

127. ***Sixth***, once it is accepted the MPF, as a party to the Bellpac proceedings, was entitled to refuse to consent or participate in the settlement with Gujarat, the decision to share the settlement proceeds is readily justified. In accordance with ***Principle 7***, and *Invensys* in particular, it all depends on the context, which may dictate the best interests of members are served by a payment outside the fund.

128. It is useful to compare the present case with the facts and decision in the *Invensys* case. In *Invensys*, similar to here, there was a real risk that a failure to adequately recognise the employer's contribution would lead to a withdrawal of the employer's support and consent (which the employer contended was required).[158] The apprehension was then, if an agreement was not reached with the employer, the distribution would either not occur at all or would be embroiled in lengthy, expensive and uncertain litigation.[159]

129. Those facts broadly mirrors the circumstances confronting the directors here in dealing with Gujarat and managing their responsibilities for both funds. The realistic alternative to a settlement with Gujarat based on sharing of the proceeds was no settlement, and a continuation of the Bellpac proceedings, which the FMIF could not afford to do without support from the MPF. The directors had been told, as was the fact, that the outcome of that litigation was uncertain, and the litigation had already proven to be lengthy and expensive. Against this, the receipt of a cash sum of $32 million paid in the short term was a far superior prospect.

130. It is submitted here, as in *Invensys*, that the directors were justified in paying an amount to the MPF in order to secure a substantial benefit for the FMIF, which otherwise would not have been obtained. It is submitted the Court should find make that finding.

131. There are two noteworthy points of distinction between *Invensys* and the present case. *Firstly*, in *Invensys*, the proportion of contributions from members (employees) compared to the employers was unknown.[160] Here, we know that the MPF contributed more than 90% of the costs of the litigation, which led to the creation of the settlement funds. *Secondly*, there was no dispute in *Invensys* that the money in issue was trust money. In the present, and for the reasons discussed below, it is submitted the settlement payment was not part of any trust and was money which the FMIF had no greater claim or title to than the MPF (except for the land component).

132. ***Seventh***, and having regard to ***Principle 4***, the decision to accept the settlement in these circumstances was not lunacy.[161] It was a decision made bona fide and with the belief that a transaction was in the best interests of the FMIF. This is not a case, like *Lewski*, where the directors had no reasonable basis for their conduct.[162] On the contrary, here, the directors clearly believed they were entitled to have separate regard to the interests of the MPF. They had received independent legal advice to that effect, as well as accounting advice. They acted consistently with both pieces of advice.

133. The quantum of the 65/35 split is not criticised in this case (as distinct from the fact of the split). Also relevant is the fact that the directors' conduct was not questioned by Monaghan or his firm. Further, there is no evidence of any complaint from any member of either fund concerning the

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158 *Invensys Australia Superannuation Fund Pty Ltd v Austrac Investments Ltd* (2006) 15 VR 87 at p. 98 [60].

159 *Ibid* at p. 109 [111].

160 *Ibid* at p. 101 [72].

161 See *Hutton v West Cork Railway Company* (1883) 23 Ch D 654 per Bowen LJ at 671; referred to in *Australian Securities and Investments Commission v Lewski & Ors* [2018] HCA 63, 362 ALR 286 at [71].

162 *Australian Securities and Investments Commission v Lewski & Ors* [2018] HCA 63, 362 ALR 286 per the Court (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) at [73]. See also the conclusion at first instance in *Australian Securities and Investments Commission v APCHL* (2013) 31 ACLC 13-073 per Murphy J at [617]. The case also involved an identified conflict between the interests of the responsible entity and the members of the scheme; see: *Australian Securities and Investments Commission v APCHL* (2013) 31 ACLC 13-073 per Murphy J at [619].

split of the settlement proceeds. For their part specifically, the evidence of each of Mr van der Hoven[163] and Ms Mulder[164] as to their deliberations and conclusions about the proceeds split (including those recorded in the Deed Poll) establishes they acted honestly and reasonably.

134. Further, once it is accepted the directors, as the officers of the MPF, could and did decide the MPF required some reasonable payment as part of the settlement package, then the only choice the directors, in their capacity as officers of the RE of the FMIF, were required to make was whether or not to accept the Bellpac settlement subject to the 65/35 split.

135. In accordance with ***Principle 4***, the Court should not intervene in what was essentially a commercial decision of the directors to operate the funds in a fair and reasonable way. The evidence of Mr van der Hoven and Ms Mulder was they had regard to what they believed was a fair and reasonable arrangement between the funds.[165] It cannot be said that no reasonable director in the defendants' position would have so acted.

136. The obligation to act in the best interests of the members is not an obligation to exploit all economic opportunities, however perverse or unethical. Nor is the obligation an absolute obligation to single-mindedly pursue each opportunity without considering the rights of others. It would be obtuse for a duty – which is based upon the principles of equity – to be applied in such a manner.[166]

137. It is submitted that it was open and reasonable for the directors to approve the proceeds split. It cannot be concluded that this decision, which resulted in the FMIF receiving more than $30 million, was conduct in breach of s 601FD(1)(c).

138. ***Eighth,*** nothing in the purpose and terms of the relevant scheme, here embodied in the terms of the *"Replacement Constitution"*,[167] contradicts the reasoning set out above. Having regard to that constitution, it is accepted that the broad purpose of the scheme was to provide financial benefits to the unitholders. The split of settlement proceeds was consistent with this. It was the key by which the settlement could occur, resulting in the FMIF obtaining the $32 million.

139. The terms of the *Replacement Constitution*[168] also do not prescribe any particular method for achieving or assessing that purpose. Rather, they confer extremely broad power upon the RE, including to act as though it were the absolute owner of the Scheme Property and acting in a personal capacity.[169] The RE is expressly permitted to operate multiple trusts.[170] Plainly, the unitholders intended to confer upon the RE the broadest possible latitude in carrying out its business. This included the power to determine what was in the best interests of the fund and its members, which in turn included scope to enable the RE to make decisions on a principled and fair basis.

140. Following *Lewski*, therefore, the Court should dismiss the plaintiff's claim.

141. ***Ninth***, if the 'best interests' duty applies with some absolute/supreme strictness, the FMIF should insist on receiving every cent. Presumably, MPF was obliged to do the same. The result would

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163 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 336–349

164 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 200–223.

165 See Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 341, 347 and 348; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 200–220.

166 See the discussion of this topic at first instance in *Australian Securities and Investments Commission v APCHL* (2013) 31 ACLC 13-073 per Murphy J at [462]-[490]. See, in particular, His Honour's reference at [465] to *Cowan v Scargill* [1985] Ch 270 at 295.

167 Replacement Constitution (Exhibit 118) **[FMIF.100.005.7639]**.

168 Replacement Constitution (Exhibit 118) **[FMIF.100.005.7639]**.

169 Replacement Constitution (Exhibit 118) **[FMIF.100.005.7639]**, para 13.1(c).

170 Replacement Constitution (Exhibit 118) **[FMIF.100.005.7639]**, cl 29.1(c).

be a trustee and the RE each insisting on receiving every cent from a settlement, and doing so on the basis of a duty they owed. There would be no prospect of any commercial solution and, ultimately, no settlement funds available.

142. On a wider view, the plaintiff's case allows no room for a scheme operator to make sensible concessions in order to achieve a commercial outcome. Taking that to its logical end, the operator of a registered scheme could never make compromises on its absolute best outcome out of concern for breaching the duty under ss 601FC(1)(c) and 601FD(1)(c). Such a view, were it to be accepted, would cause serious difficulty for scheme operators in the everyday management of scheme business. On the facts of this case, there is a reasonable basis to apprehend the FMIF would have been at risk of claims for breach of contract, or in estoppel, or even simply member complaints or bad publicity, had it sought to retain for itself all of the settlement proceeds.

143. ***Tenth***, and as the plaintiff asserts, the duty of loyalty under s 601FD(1)(c) applies to persons, relevantly acting *"in their capacity as officers of LMIM as RE of the FMIF"*.[171] It is a duty concerned with conflicts of interest and requires the officers, when acting as officers of the scheme, to resolve conflicts in the best interests of the members of the scheme. Here there was, in truth, no conflict.

144. What happened was the directors sought independent advice on what was the appropriate apportionment. All then considered and accepted that advice. They recorded their approval in the Deed Poll. There is no challenge to the apportionment itself.

145. Then, the only issue for the directors on behalf of FMIF was whether to accept $32m or whether to proceed with the litigation.

146. Cl 3.1(a) of the Deed Poll[172] is readily explicable on this analysis.

147. Ultimately, in the absence of any entitlement in the FMIF to receive all (or, in fact, any part) of the moneys paid at settlement, there can be no breach of s 601FD(1)(c). At worst, neither the MPF nor the FMIF had any greater claim or title to the money than the other. The appropriate division of the total proceeds had to be determined having regard to the MPF's entitlement to withhold consent from the settlement, and in light of its funding of the litigation, and the basis on which it did so. The directors made that determination in a methodical way and in accordance with independent advice from WMS confirming the reasonableness of the split.

Submission

148. By reason of the foregoing, it is submitted that the plaintiff's case under the first limb of s 601FD(1)(c) should be dismissed.

Proposed Findings

1. The duties under s 601FC(1)(c) and s 601FD(1)(c) do not override the RE's duty:

   (a) to treat separately each trust of which it is a trustee; and

   (b) as trustee of any other trust.

2. Section 601FD(1)(c) did not oblige the directors to cause the MPF to consent to the settlement for no payment or consideration.

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171 Statement of Claim **[FMIF.PLE.013.0001]**, para 44.

172 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**.

3. The settlement proceeds were not scheme property.

4. There was no conflict of interest or duty as, accepting that the MPF could require consideration for its consent, the settlement subject to the proceeds split was in the best interest of each fund.

5. The duty to act in the best interests of the members of the FMIF did not require the directors to cause all of the settlement proceeds to be paid to the FMIF.

6. In the premises, the split of the settlement proceeds between the FMIF and MPF was not a breach of duty under s 601FD(1)(c).

The Second Limb of s 601FD(1)(c) – the priority duty

149. The second limb of s 601FD(1)(c) addresses conflicts between the interests of a fund's members and the separate interests of the responsible entity.[173] As Hammerschlag J said in *Allco Funds Management Limited (Receivers and Managers Appointed) (In Liquidation) v Trust Company (RE Services) Limited (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)*:[174]

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

150. The operation of the second limb, therefore, depends upon there being a contest between the interests of the members and the interests of the responsible entity. Thus, the section has no application where, as is the case here, the conflict of interest is between the interests of the members of one fund and the interests of another fund in circumstances where both funds are controlled by the same directors.

151. The statement of claim does not assert or plead:

    (a) any fact to identify any relevant interest of LMIM;

    (b) the existence of any conflict between any interest of LMIM and the interests of the members of the FMIF; and

    (c) that the existence of a relevant conflict may, or is, to be inferred from the pleaded facts.

152. For clarity, the defences of each of Mr van der Hoven and Ms Mulder assert as a fact:[175]

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173 The second limb requires a conflict between the members' interests and "*the interests of the responsible entity*". In the context of the section, that expression must refer to the RE's own separate interests. See also *ASIC v APCHL (No. 3)* (2013) 31 ACLC 13-073; [2013] FCA 1342 per Murphy J at [484].

174 [2014] NSWSC 1251 per Hammerschlag J at [189]. See also *ASIC v APCHL* (No. 3) (2013) 31 ACLC 13-073; [2013] FCA 1342 per Murphy J at [484].

175 Defence of the Third Defendant to the Fifth Further Amended Statement of Claim (hereafter referred to as "Defence of van der Hoven") **[EVH.PLE.002.0001]**, para 53; Defence of the Fourth Defendant to the Fifth Further Amended Statement of Claim (hereafter referred to as "Defence of Mulder")

... there was no conflict between the interests of the members of the FMIF and LMIM within the meaning of section 601FD(1)(c).

153. The plaintiff, in its replies, fails to plead in response to this allegation and is deemed, therefore, to have admitted that no relevant conflict existed.[176]

154. In any event, the statement of claim discloses no cause of action for breach of the second limb of s 601FD(1)(c), and no such action is sustainable on the facts.

155. Alternatively, by reason of the matters submitted above, the directors clearly gave priority to the interests of the members of the FMIF.

PART F: THE REASONABLE CARE ALLEGATION

The Duty under s 601FD(1)(b)

156. Each of the third and fourth defendants admits, in their capacity as directors of LMIM as RE of the FMIF, they were required to act as required by s 601FD(1)(b).[177]

157. Section 601FD(1)(b) provides, in relation to responsible entities:

> *(1) An officer of the responsible entity of a registered scheme must:*
>
> (a) ...
>
> *(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; ...*

158. As with the duty under s 180(1) of the Act, the test is objective. That is, did the officer exercise the degree of care and diligence a reasonable person in a like position in a corporation would exercise in the corporation's circumstances.[178]

159. The objective test is based on what a reasonable person would do to ensure compliance. This objective element is qualified, in that the reasonable person is taken to be in the particular officer's position,[179] having reference to the surrounding circumstances.[180] The relevant duty is not merely to take reasonable steps, but to take all steps the hypothetical reasonable person would take in that particular officer's position.[181] The emphasis on the particular person's position confirms that compliance with the duty is not to be assessed based upon what an expert financial analyst, barrister or solicitor, or even a judge, might make of the situation.[182] This is a relevant

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[FMM.PLE.002.0001], para 54(b).

176 *Uniform Civil Procedure Rules* 1999 (Qld), Rule 166(1).

177 Statement of Claim **[FMIF.PLE.013.0001]**, para 44(a); Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]**, para 53.

178 *ASIC v Healey* (2011) 196 FCR 291; 278 ALR 618; 83 ACSR 484; [2011] FCA 717; *Hickie v ASIC* [2013] AATA 853.

179 *Shafron v ASIC* (2012) 247 CLR 465 per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ, at p. 476 and per Heydon J at p. 483; *ASIC v Rich* [2009] NSWSC 1299 per Austin J at [7196] and [7202]; *ASIC v Healey* (2011) 196 FCR 291; [2011] 83 ACSR 484 per Middleton J at p. 523.

180 *ASIC v Maxwell* (2006) 59 ACSR 373 at p. 397; *Trilogy Funds Management Limited v Sullivan (No 2)* (2015) 331 ALR 185 per Wigney J at [201]; *ASIC v Adler* (2002) 168 FLR 253 at [372].

181 *ASIC v Healey* (2011) 196 FCR 291; [2011] 278 ALR 618 per Middleton J at [182]; *ASIC v Avestra Asset Management Ltd (in liq)* (2017) 120 ACSR 247; 348 ALR 525; [2017] FCA 497 at [207]; *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185; 111 ACSR 1; [2015] FCA 1452; 331 ALR 185 at [221].

182 *Harkness v Commonwealth Bank of Australia Ltd* (1993) 32 NSWLR 543 at p. 546 per Young J, albeit

observation, given the analysis of the Allens Advice by the plaintiff's lawyers.

160. While the subsection must be construed and applied according to its terms, several judges have concluded that, save for some patent differences, the duty of care and diligence owed by an officer of a responsible entity under s 601FD(1)(b) of the Act corresponds with the general duty of care and diligence owed by officers of all corporations under s 180(1) of the Act.[183] The duty in s 180(1), in turn, is akin to the common law duty of care and it reflects, and to some extent refines, corresponding obligations under the general law.[184]

161. The recognised differences between s 180(1) and s 601FD(1)(b) include:

(a) the duty under Part 2D.1 of the Act is owed to the company, whereas the duties under Part 5C.2 are owed to scheme members;[185]

(b) there is some suggestion that the directors of a professional trustee company owe a higher or more demanding duty of care[186], although, in fact, the strength of the directors' duty to scheme members is likely to be influenced by the nature of the duty owed to scheme members (as opposed to the company). Thus, the duty will be considered in light of the vulnerabilities inherent in the position of the members and beneficiaries of a trust and the fact the RE holds itself out to the public and is paid as a professional trustee;[187] and

(c) there is no express business judgment rule under Part 5C.2, although equivalent considerations under such a rule will nonetheless arise when considering whether the actions of an officer of a responsible entity involving a business judgment failed to meet the standard of care and diligence required.[188]

162. In *ASIC v APCHL (No. 3)*,[189] after explaining his view that the business judgment rule did not apply in relation to s 601FD, Murphy J said:

> *Even so, the wide range of practical business and management considerations that a director is often required to take into account in deciding where the corporation's interests lie and how they are to be served are relevant to understanding the appropriate standard of care. I should be careful not to merely substitute my opinion for the opinion of the Directors on management decisions, and I do not. But it is important to remember that the business judgment rule relates to decisions made in the corporation's interests. I do not see how the fact that a director of an RE has made a 'business judgement' in the corporation's interests offers any protection to the director in relation to a failure to act*

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with reference to the reasonable person test under s 588FG(2) of the Act.

183 *ASIC v Healey* (2011) 196 FCR 291; 278 ALR 618 per Middleton J at at p. 662 [191]; *Trilogy Funds Management Limited v Sullivan (No 2)* (2015) 331 ALR 185 per Wigney J at [199]. Recognised differences include that the duty under Part 2D.1 is owed to the company, whereas duties under Part 5C.2 are owed to scheme members. It is also said that duties of trusteeship of the responsible entity company can inform the standard of care and diligence imposed on officers: *ASIC v APCHL* (2013) *(No. 3)* 31 ACLC 13-073 per Murphy J at [524]-[526].

184 *Trilogy Funds Management Limited v Sullivan (No 2)* (2015) 331 ALR 185 per Wigney J at [200] and the authorities cited therein.

185 *ASIC v APCHL* (2013) *(No. 3)* 31 ACLC 13-073 per Murphy J at [523]; *Trilogy Funds Management Limited v Sullivan (No 2)* (2015) 331 ALR 185 per Wigney J at [214].

186 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 (ASIC v Adler) at [372]; *ASC v AS Nominees Ltd* (1995) 62 FCR 504 per Finn J at pp. 517 – 518 by way of *obiter*; *ASIC v APCHL (No. 3)* (2013) 31 ACLC 13-073 per Murphy J at [524].

187 See *ASIC v APCHL (No. 3) (2013) 31 ACLC 13-073* per Murphy J at [526].

188 *ASIC v Rich* (2009) 75 ACSR 1 per Austin J at [7250] – [7253]; *Trilogy Funds Management Limited v Sullivan (No 2)* (2015) 331 ALR 185 per Wigney J at [215] – [217]; *ASIC v APCHL* (2013) *(No. 3)* 31 ACLC 13-073 per Murphy J at [529].

189 (2013) 31 ACLC 13-073 at [529].

in the members' best interests as required by s 601FD(1)(c) [i.e. the best interests duty], *especially where the director fails to prioritise the members' interests in the event of a conflict of interest.*

163. The conflict of interest considered by His Honour, in that case, was a conflict between the interests of the members (on the one hand) and the personal interests of the directors and the RE's own corporate interests (on the other hand).

164. In *Trilogy Funds Management Limited v Sullivan (No. 2)* Wigney J said:[190]

> *There is again, with respect, much to be said for Murphy J's conclusion that the statutory business judgment rule in s 180(2) of the Corporations Act does not apply in respect of the duties the subject of s 601FD of the Corporations Act. Nevertheless, even if the statutory business judgment rule does not expressly apply in the case of s 601FD(1)(b), in considering whether the actions of an officer of a responsible entity which involved a business judgment failed to meet the standard of care and diligence required by s 601FD(1)(b), it is likely that regard would in any event be had to the types of matters referred to in s 180(2) if they existed in the particular circumstances of the case. Whilst the existence of such matters might not operate to deem the s 601FD(1)(b) standard to be met, they would nonetheless be relevant to a consideration of whether the standard was in fact met. As Murphy J put it in ASIC v APCH (at [529]), "the wide range of practical business and management considerations that a director is often required to take into account in deciding where the corporation's interests lie and how they are to be served are relevant to understanding the appropriate standard of care.*

165. Thus, it can be accepted that:

(a) the 'business judgments' rule does not apply to the duties under s 601FD;

(b) nevertheless, the appropriate standard of care will take into account the wide range of practical business and management considerations that a director is often required to take into account in deciding where the corporation's interests lie and how they are to be served;

(c) also relevant to the standard of care is the nature of the duty being exercised by the directors;

(d) if the directors' decision involves a conflict between, on the one hand, the interests of the members and, on the other hand, their own personal interests or the interests of the RE corporation, there is little or no room for practical business and management considerations;

(e) however, if the decision does not involve such a conflict of duty and interest, there is some room for practical business and management considerations;

(f) situations of conflict of duty and duty are discussed in more detail above.

166. In this case, the context of the decision was that LMIM, as the trustee of the MPF and as the second mortgagee, had embarked on complex litigation. PTAL, as the custodian for the FMIF, was later joined to the proceedings and the proceedings were thereafter conducted by LMIM on behalf of both the MPF and the FMIF. The joint litigation was largely funded by the MPF because it had access to funds. The litigation was successfully compromised and that compromise involved the sale of the land to Gujarat for $10m and a payment of $35.5m to LMIM.

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190 (2015) 331 ALR 185; [2015] FCA 1452 at [217].

The total of $45.5m represented a significant and successful outcome to the litigation.[191]

167. In that context, LMIM had to decide how the proceeds of the settlement were to be distributed. LMIM took independent legal and accounting advice. In accordance with that advice, the proceeds were split 65% to the FMIF and 35% to the MPF.

168. Now the nature of that directors' decision was entirely different from the decision Murphy J had to consider in *ASIC v APCHL (No. 3)*.[192] The LMIM apportionment decision did not involve a balancing of the members' interests against the personal interests of the directors, or against the interests of the RE corporation. The decision required the directors to make a fair decision on an apportionment of the proceeds of the settlement as between the two funds.

169. In essence, the nature of the directors' decision here was analogous to a trustee's duty to treat beneficiaries equally where they have similar rights and fairly where they have dissimilar rights.[193]

170. In considering the fairness of the apportionment it was relevant to consider, at the least, the respective debts owed to each fund, the priorities, and the respective contributions to the funding of the proceedings. Those were matters properly considered by the directors.

171. There was no legally binding agreement which specified the apportionment. Nor was LMIM obliged to pay the settlement proceeds entirely to FMIF (see the discussion above).

172. Thus, the decision was a matter of judgment upon which different minds may differ. Plainly, however, the apportionment was within the range of fair apportionments.

173. Consider four important factors. ***First***, the litigation may have been unsuccessful. In that event, the MPF would have borne the lion's share of the loss of LMIM's own costs. It had undertaken to pay the plaintiffs' costs in the Bellpac proceedings.[194] Of course, both the FMIF and the MPF had security interests over the land. However, the true value of the land is, and was, uncertain. There was also an obligation to remediate the land, an issue which was part of the litigation. In the case of unsuccessful litigation, would it have been fair to impose upon the FMIF the entire burden of the costs? Plainly not. It was right for the directors to take advice and to consider all of the various factors – arriving at a fair apportionment.

174. ***Second***, reaching a decision that was fair and consistent with independent advice was important. If the members of either fund considered the apportionment to be unfair, the directors would be in a position of a conflict and a resolution of that conflict was likely to involve the appointment of a new RE to the FMIF and a new trustee to the MPF.

175. ***Third***, there is no evidence that any member of either fund complained the apportionment was unfair. This is not a case brought by a regulator to vindicate the rights of members.

176. ***Fourth***, the directors made this decision based on some legal and accounting advice. The advice, whether accurate or not, was advice that reasonable directors in the position of Mr van der Hoven and Ms Mulder were entitled to rely on.

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191 The evidence was that one reason for delaying an agreement recording the funding relationship between the two funds was that in the early stages it was not clear what would be recovered, or indeed whether anything would be recovered.

192 (2015) 331 ALR 185; [2015] FCA 1452.

193 Finn, P., *Fiduciary Obligations*, 40th Anniversary Republication, 2016, The Federation Press, Sydney, at p. 16 [28]. See also Heydon & Leeming, '*Jacobs' Law of Trusts in Australia*' (7th ed) at [1711]; Dal Pont, '*Equity & Trusts in Australia*' (5th ed) at [22.120].

194 Undertaking – Case Number 2009/298727 (Exhibit 152) **[MPF.001.004.6243]**.

The Plaintiff's Reasonable Care Allegations

177. The plaintiff contends each of the director defendants breached s 601FD(1)(b) by causing LMIM to agree to pay the sum of $15,546,147 from the settlement proceeds to the MPF.[195] That is, what is impugned is the defendant/directors' decision to agree to make the settlement payment to the MPF.

178. It is clear the plaintiff challenges the decision made by the director defendants to agree to the 'split' of the proceeds and to pay $15,546,147 to the MPF in accordance with that 'split'.

179. The plaintiff challenges the decision on the following grounds:

(a) the directors failed to adequately read or consider the content of the Allens Advice;[196]

(b) the directors failed to have proper regard or give adequate consideration to the fact that:

i. PTAL sold the property to Gujarat as a mortgagee exercising power of sale;[197]

ii. the FMIF had priority;[198] and

iii. the MPF could not have prevented the sale of the property to Gujarat under the Gujarat Contract by refusing to provide a release of the MPF Mortgage over the property;[199]

(c) the directors failed to have proper regard or give adequate consideration to the fact that there was no necessity for the FMIF to reach agreement with the MPF about sharing the proceeds to PTAL because:

i. the MPF was not a party to the Deed of Release or the Gujarat Contract;[200]

ii. there was no binding agreement;[201] and

iii. the agreement of the MPF was not required in order for the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract;[202]

(d) the directors failed to have proper regard or give adequate consideration to the fact that:

i. the MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac;[203]

ii. the MPF had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF Bellpac loan;[204] and

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195 Statement of Claim **[FMIF.PLE.013.0001]**, para 45(a).
196 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(aa).
197 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(i).
198 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(ii).
199 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(iii).
200 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(b)(i).
201 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(b)(ia).
202 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(b)(ii).
203 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(i).
204 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(iii).

iii. PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;[205]

iv. PTAL was, as at 22 June 2011, owed $52M by Bellpac.[206]

(e) the directors failed to consider whether the MPF could be treated as if it was an arms-length litigation funder when it was a second registered mortgagee with second priority;[207]

(f) the directors failed to consider whether it was appropriate to split the Bellpac Settlement proceeds ($45.5m) in accordance with the 'Proceeds Split' (i.e. 65/35);[208]

(g) the directors failed to obtain independent legal advice or other independent advice as to whether in the circumstances outlined above:

i. the MPF could be treated as if it were an arms-length litigation funder;

ii. it was reasonable for the MPF to be paid in accordance with the split – an amount above the sum it had paid, or any amount at all;

iii. it was in the interests of FMIF to agree that the MPF would be paid as per the split (an amount above what it had paid) or any amount at all.[209]

(h) the directors took into account the Allens Advice and the WMS Report which, as they ought to have known, did not constitute the advice identified above;[210]

(i) in the circumstances, the directors failed to have proper regard or give adequate consideration to the different interests of the FMIF and the MPF;[211]

(j) the directors, acting reasonably, ought to have concluded the settlement of the Deed of Release and Gujarat Contract could occur without the agreement of the MPF;[212]

(k) the directors ought to have concluded that they need not reach an agreement with the MPF about the sharing of proceeds for the settlement to occur;[213]

(l) the directors ought not to have concluded the proceeds split was fair to the FMIF;[214]

(m) the directors ought not to have concluded the proceeds split was in the best interests of the FMIF's members;[215]

(n) the directors ought not to have concluded the proceeds split was reasonable;[216]

(o) the directors ought not to have concluded the MPF was in an analogous position to a

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205 Statement of Claim [**FMIF.PLE.013.0001**], para 34(c)(iv).
206 Statement of Claim [**FMIF.PLE.013.0001**], para 34(c)(v).
207 Statement of Claim [**FMIF.PLE.013.0001**], para 34(d) (first line).
208 Statement of Claim [**FMIF.PLE.013.0001**], para 34(d) (second line).
209 Statement of Claim [**FMIF.PLE.013.0001**], para 34(e).
210 Statement of Claim [**FMIF.PLE.013.0001**], para 34(f).
211 Statement of Claim [**FMIF.PLE.013.0001**], para 34(g).
212 Statement of Claim [**FMIF.PLE.013.0001**], para 37A(aa)(i).
213 Statement of Claim [**FMIF.PLE.013.0001**], para 37A(aa)(ii).
214 Statement of Claim [**FMIF.PLE.013.0001**], para 37A(aa)(iii).
215 Statement of Claim [**FMIF.PLE.013.0001**], para 37A(aa)(iv).
216 Statement of Claim [**FMIF.PLE.013.0001**], para 37A(aa)(v) [double negative deleted].

litigation funder and that the settlement proposals would not be reasonable on an arms-length basis;[217]

(p) the directors ought not to have concluded the WMS Report or the Allens Advice justified the payment of any part of the settlement to the MPF;[218]

(q) the directors ought to have determined that the MPF had no entitlement to be paid the settlement, or no entitlement beyond reimbursement;[219]

(r) the directors ought to have determined that the settlement payment was not in the interests of the members of the FMIF;[220]

(s) the directors ought to have determined that the settlement payment would cause detriment, in the form of depletion of assets, to the FMIF (either if the payment was made at all or if the payment was beyond reimbursement);[221]and

(t) the directors ought to have decided not to split the proceeds at all and would have paid all the proceeds to FMIF.[222]

180. Before distilling and examining those 20 or so criticisms of the decision, it is worth making these observations.

181. ***First***, the criticisms are in the form that the directors *"failed to have proper regard or give adequate consideration"* to a particular fact. That formula, or a substantially similar formula, is used for every one of the 20 or so criticisms of the directors' decision.

182. The use of that formula makes clear that the plaintiff does not contend that the directors:

(a) failed to consider a relevant factor; or

(b) considered an irrelevant factor.

183. Thus, the plaintiff accepts the directors considered the relevant factors. Howver, the plaintiff quibbles with the weight which the directors attached to some of the factors considered by the directors. Of course, that is very close to saying the plaintiff would have assessed the factors differently and, therefore, would have made a different decision. This reflects the true nature of the decision confronting the directors, which was a business decision requiring the exercise of commercial judgment.

184. ***Second***, all of the 20 criticisms are directed to all of the six of the director defendants. All six of those directors are said to have failed to adequately consider all 20 factors. In reality, of course, some directors are entitled to rely on others.

185. We turn, then, to deal with all 20 criticisms. Where possible, similar allegations have been grouped together.

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217 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(v) – second (v) [note problem with numbering].
218 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(vi).
219 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(i).
220 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(ii).
221 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(a)(iii).
222 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(b).

Criticism 1: The Independent Experts' Advice

The Different Categories of Allegations

186. There are different types of allegations about the advice of the independent experts.

187. **One** category is:

(a) the directors failed to adequately read or consider the content of the Allens Advice;[223] and

(b) the directors, (presumably, did read the Allens Advice and) took into account the Allens Advice and the WMS Report which, they ought to have known, did not constitute the advice identified above (i.e. independent advice as to whether, in the circumstances, MPF could be treated as if it were an arm's length litigation funder, as to whether the proceeds split was reasonable and whether it was in the interests of the FMIF to agree to the proceeds split).[224]

188. Thus far, there is, at the least, a partial inconsistency. The former is an allegation the directors did not read or pay proper regard to the Allens Advice. The latter is an allegation they had regard to the Allens Advice when they ought to have known that it was not appropriate advice or was flawed.

189. The **second** category of complaints concerning the independent experts is the directors failed to actually obtain independent legal advice, or other independent advice, as to whether, in the circumstances:

(a) the MPF could be treated as if it were an arms-length litigation funder;

(b) it was reasonable for the MPF to be paid in accordance with the split – an amount above the sum it had paid, or any amount at all; and

(c) it was in the interests of the FMIF to agree that the MPF would be paid as per the split (an amount above what it had paid) or any amount at all.[225]

190. In other words, the complaint here is that the directors ought to have obtained, but did not obtain, independent expert advice on the three topics: – whether the MPF could be treated as being in an analogous position to an arms-length litigation funder; whether it was reasonable for the MPF to be paid in accordance with the 65/35 split; and whether it was in the interests of the FMIF for the MPF to be paid in accordance with the split, or to be paid at all.

191. The **third** category of complaint concerning the experts is the directors ought not to have concluded the WMS Report or the Allens Advice justified the payment of any part of the settlement to the MPF.[226]

192. In other words, this allegation is that the directors did obtain relevant independent expert advice but they drew the wrong conclusions from that advice.

The Independent Expert Advice

193. Before analysing the plaintiff's contentions, it is necessary to look at the facts.

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223 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(aa).
224 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(f).
225 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(e).
226 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(vi).

194. The WMS Report was obtained on 7 March 2011.[227] WMS, a firm of chartered accountants, were asked for their opinion as to a fair and reasonable split of the likely litigation proceeds to be received by FMIF and MPF. WMS concluded: [228]

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

195. Allens Advice was emailed to LMIM on 28 March 2011.[229] The question asked of Allens is stated in the advice: [230]

> *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).*

196. The answer given by Allens was: [231]

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

197. So, Allens' answer to the question was that the proposed split was legally acceptable – despite the position of conflict.

198. Allens did not warn of any risks (which was, of course, one of the obligations Allens implicitly undertook in providing the advice[232]). The qualifications to the advice were as follows (with commentary in square brackets:[233]

(a) *We assume that in its capacity as responsible entity of the FMIF, the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of FMIF members (see paragraphs 25, 27, 53 and 56 below).*

[The directors were of the view that the proposed settlement represented the best possible result.[234] In any event, the plaintiff does not challenge the decision to enter into the settlement. The plaintiff's challenge is limited to the split of the proceeds.]

(b) *We assume that in its capacity as trustee of the MPF, the RE has considered all feasible options for the recovery of the loan advanced by MPF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of MPF members (see paragraphs 35 and 37 below.)*

[Comments as above]

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227 WMS Report (Exhibit 32) **[FMIF.100.003.6807]**.

228 WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6811]**.

229 Allens Advice (Exhibit 35) [**FMIF.100.003.6995** at. **6997**].

230 *Ibid.*

231 *Ibid.*

232 See, for example, *Fox v Everingham* [1983] FCA 258; (1983) 76 FLR 170 ("*In cases such as the present a solicitor is paid not only for what he in fact does, but also for the responsibility he assumes in trying to protect clients from financial loss if things go wrong. It is easy enough to act for people if things go as they are expected to. But it is because the unexpected will sometimes happen that solicitors are rightly paid the fees which they command.*")

233 Allens Advice (Exhibit 35) **[FMIF.100.003.6995** at **.6997]**.

234 See Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, Recital K.

(c) *We assume that the decision by the RE in respect of the split will not be made in order to benefit the RE (or any of its associates) personally, for example, by ensuring that the effect of splitting the proceeds in a certain way results in the RE receiving more fees or some other benefit that would not have occurred had the split been done in a different way (see paragraphs 28 and 38 below).*

[There is no suggestion the split was designed to or in fact had any impact on the fees and benefits flowing to LMIM or any of its associates.]

(d) *The directors must be satisfied that the proposed split of settlement proceeds and associated releases of securities by the RE would be reasonable in the circumstances if the RE as responsible entity of the FMIF and the RE as trustee of the MPF were dealing at arm's length. The WMS Chartered Accountants report makes it clear that "there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF". Consequently, the conclusion in the WMS Chartered Accountants report will be an important factor in the RE's decision in respect of the split of the litigation proceeds. However, the RE should not rely solely on the report. The directors of the RE must make "their own independent assessment of the relevant matters, and the advice from WMS Chartered Accountants does not replace "careful judgement by the directors". They should also consider the relevant factors referred to by ASIC In CP 142. See paragraphs 46 to 50 below.*

[Of course, the directors with direct knowledge of the circumstances, such as Ms Darcy and Mr Tickner, and Mr Monaghan, did independently consider whether the proposed split was fair and reasonable. The other directors, whilst forming their own view, also relied on the views of those three directors as well as the independent advice of WMS and Allens.]

(e) *The RE should ensure that it complies with any procedures in the FMIF compliance plan (or with any other procedures it has in place) in respect of conflicts of interest (see paragraphs 54 and 57 below).*

[There is no suggestion of non-compliance or that any non-compliance with procedures has any relevance.]

(f) *We assume that the RE has not made any representations to the members in the FMIF or the MPF which are inconsistent with the proposal to split the litigation proceeds in the manner outlined in the report of WMS Chartered Accountants.*

[There is no suggestion of any such representations.]

(g) *The directors of the RE must comply with their general law and statutory duties under the Corporations Act (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed).*

[The relevant statutory duties are set out in paragraphs [61] to [65] of the Allens Advice. Having referenced those duties, Allens say that they are not aware of any reason why the proposed split would raise any issues, provided to assumptions in paragraph [16(a) to (f)] of the advice were confirmed.]

(h) *We assume that the RE will disclose the conflict to members in the FMIF and MPF in due course in accordance with its usual conflicts disclosure policies.*

[This qualification required that the RE, as a matter of procedure, disclose the conflict to members 'in due course'. Thus, it was conduct that was required after the decision was taken.]

199. It is now necessary to return to the three categories of criticisms in relation to the independent experts.

Obtaining Relevant Expert Advice

200. It will be recalled that one category of complaints concerning the independent experts is that the directors ought to have obtained, but did not obtain, independent expert advice on the three topics: – whether the MPF could be treated as being in an analogous position to an arms-length litigation funder; whether it was reasonable for the MPF to be paid in accordance with the 65/35 split; and whether it was in the interests of the FMIF for the MPF to be paid in accordance with the split, or to be paid at all.

201. In fact, both independent expert legal and accounting advice was obtained.

202. WMS made inquiries and ascertained that the rates charged by litigation funders were between 20 and 45% for IMF and between 30 and 45% for Hillcrest. WMS offered the opinion that a rate between 30 and 40% was reasonable.

203. WMS addressed the question of why the rates charged by litigation funders was analogous. After summarising the facts, WMS referred to ASIC Consultation Paper 142 regarding Related Party Transactions. They also referred to s 210 of the *Corporations Act* which made relevant the benefit that would be reasonable if the parties were dealing with each other on arm's length terms.

204. WMS then stated: [235]

> *"Based on the background section of our report, we note the following pertinent points:*
>
> - *The matter became very complicated and the litigation was highly complex and the prospects uncertain. In our opinion, litigation by its nature is difficult to predict with absolute certainty.*
> - *FMIF was in the position of being unable to provide additional funding, and of being unable to satisfy any adverse costs orders that might have been made against LM.*
> - *The burden of funding the litigation fell largely on MPF.*
>
> *The funding in the litigation by FMIF and MPF is summarised at Table 2 above being $1,638,438 by MPF and $161,471 by FMIF. As noted above, this does not include the $1.3M to another party Coalfields, to secure the withdrawal of certain caveats.*
>
> *In our opinion, based on the information provided and our discussions with Monaghan Lawyers a commercial decision was undertaken by MPF to fund the litigation to attempt to preserve the capital entitlements under the loan documents. In affect* [sic] *MPF's role was not dissimilar to a litigation funder."*

205. The logic of that approach does not appear to be seriously challenged. WMS' statement of the facts is not said to be mistaken. The relevance of the ASIC guidelines and s 210 is not attacked. Further, the plaintiff does not identify why the analogy is erroneous. The plaintiff has not adduced any expert opinion to the effect that WMS' opinion was unreasonable.

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235 WMS Report (Exhibit 32) **[FMIF.100.003.6807]** at page 10, section 4.0.

206. It was plainly valid and reasonable for WMS to express the opinion that the rates charged by litigation funders were relevant because they are "*comparable transactions*".[236]

207. More importantly, it was reasonable for the directors to rely on the opinion of WMS as independent accounting experts. It was also reasonable for them to do so in circumstances where Allens, their independent legal experts, accepted and adopted the opinion of WMS.

208. The advices reflect an acceptance that the MPF could be treated as being in an analogous position to an arm's length litigation funder.

209. Similarly, both WMS and Allens did, in fact, advise on whether it was reasonable for the MPF to be paid in accordance with the 65/35 split. In particular:

(a) the WMS Report concluded:[237]

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

(b) the Allens Advice did not cavil with that conclusion and, moreover, concluded, subject to certain matters:[238]

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

210. Neither of WMS or Allens directly expressed the view that the split was in the interests of the FMIF. That was a matter they, rightly, left to the directors. In this regard, the Allens Advice stated:

(a) at [16](a):[239]

> *We assume that in its capacity as responsible entity of the FMIF, the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of FMIF members (see paragraphs 25, 27, 53 and 56 below)"*

(b) at [25]:[240]

> *The RE therefore needs to always act in the best interests of the members of the FMIF when making any decision regarding the split of the litigation proceeds and the terms of the Gujarat settlement. We assume that the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the result of the litigation with Gujarat, being the terms of the proposed settlement, are in the best interest of FMIF members. In addition, we assume that the RE is satisfied that there is a need to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF (because the overall settlement cannot occur without the agreement of the MPF trustee – for example, it needs to release its security and pay Coalfields to withdraw its caveats).*

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236 WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6818]**.
237 WMS Report (Exhibit 32) **[FMIF.100.003.6807]** at p. 5, section [1.0].
238 Allens Advice (Exhibit 35) **[FMIF.100.003.6995** at **.6997]**.
239 Allens Advice (Exhibit 35) **[FMIF.100.003.6995** at **.6997]**.
240 Allens Advice (Exhibit 35) **[FMIF.100.003.6995** at **.6999** and **.7004]**.

(c) made similar observations at paragraphs 27, 53 and 56.[241]

211. The WMS advice did not make any comment upon whether the split was in the interest of the FMIF.

212. While neither advice ventured a view as to whether the split was in the FMIF's interests, the plaintiff's contention that the directors should have obtained such advice is misplaced for two reasons. ***First***, it overlooks the fact LMIM, and each of the directors, reasonably relied on Monaghan, Allens and WMS to provide the necessary advice. In respect of the Allens Advice, it is difficult to conceive a broader question than whether the proceeds split was *"legally acceptable"*. This was apt to enable Allens to provide all advice as were necessary and proper for lawyers to provide. The directors were entitled to proceed accordingly.

213. ***Second***, and in any event, the determination of what was in the best interests of the FMIF members is a matter of commercial, corporate and ethical judgment of the RE. As a general proposition, lawyers are not required to venture opinions about financial, commercial or other matters that are beyond their qualifications and experience.[242] It is for clients, not lawyers, to make commercial decisions.[243] As Professor Finn notes, *"the fiduciary obligation leaves it to the fiduciary to make his own choices"*.[244]

214. Thus, the advice adopted the conventional approach of reserving the matter to the directors' commercial judgment. From the perspective of the directors, there can have been nothing untoward in the lawyers leaving that decision for the directors to determine for themselves.

215. Having considered the matter, the directors concluded the settlement was in the interests of the members of both funds.[245] This was because the settlement sum would provide a significant sum to both funds and the uncertainty of the complex litigation would be resolved. The complexity and uncertainty of the litigation were well-known to the directors. From the outset, Monaghan was advising them that the proceedings were complicated and uncertain in all respects, save that they would be very expensive.

216. In an email of 6 July 2009 to the directors,[246] Monaghan informed them the proceedings were complicated and LMIM's position against Gujarat was uncertain, even if the proceedings were successful.[247] He told them that from his discussions with LMIM's QC, LMIM had significant problems to overcome in the litigation. In a subsequent email, of 29 July 2009,[248] Monaghan warned the directors that the litigation would be a *"long hard fight"* but observed there were not many alternatives open to LMIM. The email also advised that he thought the cost of the litigation

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241 Allens Advice (Exhibit 35) **[FMIF.100.003.6995** at **.6997]**.

242 *Citicorp Ltd v O'Brien* (1998) 40 NSWLR 398 per Sheller JA (Meagher JA and Abadee A-JA agreeing) at p. 418(F).

243 *Lucantonio v Kleinert* [2011] NSWSC 753 per Brereton J at [130].

244 Finn, P., *Fiduciary Obligations*, 40th Anniversary Republication, 2016, The Federation Press, Sydney, at p. 17 [31] and p. 49 [96].

245 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cl 3.1(h).

246 Email from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner dated 6 July 2009 **[FMIF.200.014.1488]**; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 144; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 113. See also Affidavit of Tickner, para 131 referencing email in chain **[FMIF.040.004.0113]**.

247 *Ibid.*

248 Email from Monaghan to Mulder dated 29 July 2009 **[FMIF.200.009.5397]**; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 150; Email from Monaghan to Drake, Darcy, van der Hoven, Fran Gordon and Tickner dated 29 July 2009 **[FMIF.200.014.1489]**; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 119; Affidavit of Tickner **[SJT.LAY.001.0001]**, para 136.

would more likely reach $2 million. Monaghan again told the directors that the proceedings were *"quite complex"* in his email update of 4 August 2010.[249]

217. The directors were mindful the litigation would be complex, uncertain and expensive.[250]

218. Thus, even if advice had been obtained as to whether it was in the interests of the FMIF for the MPF to share in the settlement proceeds, that advice would have not reached a conclusion different to the conclusion arrived at by the directors. Such advice may have concluded, somewhat presciently,[251] that, having regard to the relevant constitution of the FMIF, the members' interests were essentially economic. Clearly, the directors knew they were making a decision concerning the economic interests of the members of the FMIF. There is no suggestion the directors thought otherwise, nor was that suggestion put to the directors during cross-examination.

219. That advice should reasonably have concluded that the interests of the FMIF investors were best served by obtaining a settlement with Gujarat, even at the cost of sharing with the MPF to obtain the MPF's cooperation and consent.

Reading and Considering the Expert Advice

220. The directors with carriage of the litigation did read and consider the WMS and Allens advices.[252]

221. Ms Mulder's evidence is that she did not have carriage of the litigation[253] but relied on her co-directors.[254] She was entitled to do so.

222. At the time Ms Mulder executed the Deed Poll, she was aware that WMS' opinion was the proposed split of funds, 65% to the FMIF and 35% to the MPF, was fair and reasonable, having regard to comparable arm's length transactions.[255] Mr Monaghan had also given her a summary of the Allens Advice at the meeting on 14 June 2011. Monaghan also discussed the WMS advice at this meeting. Ms Mulder's understanding was the advices were to the effect that the *"proposed split of the settlement funds between the FMIF and the MPF could occur from both a legal perspective and in respect of the amount of the split"*. Her view was that the settlement with Bellpac, including the proceeds split, had to be in the interests of the members of each of the FMIF and the MPF. She believed it was.[256]

223. Mr van der Hoven similarly relied on his fellow directors and Monaghan.[257] He simply can no longer recall whether he read the Allens Advice.[258] At the time he executed the Deed Poll, he

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249 Email from Monaghan to Drake, Darcy, van der Hoven, Mulder, Tickner dated 4 August 2010 **[FMIF.011.001.0011]**; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 186; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 132; Affidavit of Tickner **[SJT.LAY.001.0001]**, para 156 citing **[FMIF.100.003.2530]**.

250 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 341(e); Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 214 and 218(b); Affidavit of Tickner **[SJT.LAY.001.0001]**, para 147; Affidavit of Darcy **[LMD.LAY.001.0001]**, para 164.

251 Noting that Murphy J's consideration of the issue in 2013 appears to have been the first such judicial consideration in the context of s 601FD(1)(c). See *ASIC v APCHL* (2013) 31 ACLC 13-073 at p. 1,141 [455].

252 Affidavit of Tickner **[SJT.LAY.001.0001]**, paras 217–220; Affidavit of Darcy **[LMD.LAY.001.0001]**, paras 203 and 221.

253 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 95 – 101; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 123–129, 343-346.

254 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 102, 179, 205, 220(i), 221 and 223.

255 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 176.

256 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 200 – 220.

257 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 116, 118, 125–129, 341–346.

258 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 297.

knew that LMIM had obtained the advices from Allens and WMS, which he regarded as well-known, competent and independent firms.[259] His understanding was that the advices received were favourable to the proposed split of the settlement proceeds.[260]

224. It is apparent from the evidence of each of Mr van der Hoven and Ms Mulder that they listened to and assessed the information presented to them and brought their own minds to bear in approving the split of the settlement proceeds. They, therefore, exercised their own independent judgment on the issue.[261]

A Flawed Allens Advice?

225. Now we turn to the allegation that the directors had regard to the Allens Advice when, it is said, they ought to have known that it was flawed.

226. This matter requires some analysis. By way of *precis* of the following, it is submitted that:

(a) the Allens advice was **not** flawed as alleged by the plaintiff;

(b) the directors had no reason to know or consider the advice was wrong, inadequate or inept to the transaction; and

(c) even if it were otherwise, the Allens Advice was one factor in the 'multi-factorial' decision to split the settlement proceeds.

227. The specific allegations are that the defendants failed to adequately read or consider the content of the Allens Advice[262] and, had they done so, they would not have concluded the Allens Advice justified making any payment to the MPF from the settlement proceeds.[263]

228. That last allegation mischaracterises the treatment of the Allens Advice. Neither Mr van der Hoven nor Ms Mulder simply decided the Allens Advice justified the splitting of the settlement payment. The fact that favourable advice from Allens had been received was a factor – albeit a persuasive and material one – in their approval of the proceeds split. However, each of Ms Mulder and Mr van der Hoven can be seen to have exercised an independent mind on the question.

229. Returning to the plaintiff's contentions, the plaintiff particularises, and relies upon, three grounds for the allegation that the defendants failed to read or consider the content of the Allens Advice, *viz*:

(a) the alleged failure to identify the matters pleaded in paragraph 30H of the statement of claim;[264]

(b) the absence of any reference in the Deed Poll to the Allens Advice, a Conflicts Management Policy and ss 601FC and 601FD of the Act;[265] and

(c) the alleged fact that the draft Deed Poll was circulated by Mr Monaghan and Ms Kingston to the director defendants on or about 10 June 2011, ahead of its execution on 14 June 2011 (the implication being that the Deed Poll was only considered in a perfunctory way).

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259 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 341(g) and 346.
260 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 348(c).
261 *Southern Resources Ltd v Residues Treatment & Trading Co Ltd* (1990) 56 SASR 455.
262 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(aa).
263 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(vi).
264 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(aa), particulars (i).
265 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(aa), particulars (ii), and para 32A.

Inadequate Consideration of the Deed Poll

230. Dealing, ***first***, with the last of those contentions, there was no evidence the Deed Poll was circulated on 10 June 2011. The basis for allegation appears to have been an email from Monaghan to Ms Kingston asking her to circulate the Deed Poll,[266] but it is not clear whether she did so. There is no email to the effect that she did. In any event, the point is immaterial as Mr van der Hoven's evidence and Ms Mulder's evidence shows the execution of the Deed Poll and the approval of the proceeds split was not a superficial exercise.

231. Their evidence was that a meeting was convened at LMIM's boardroom at Beach Road on 14 June 2011. During that meeting, Mr Monaghan went over the Bellpac proceedings and settlement and took the directors through the terms of the Deed Poll. There was discussion and consideration of the contents of the Deed Poll.

232. For their part, each of the third and fourth defendants deposes to having attended such a meeting.[267] They both describe a serious meeting where the directors were seated in the boardroom at Beach Road and listened to Mr Monaghan's presentation about the Deed Poll.

233. Mr van der Hoven recalls the boardroom as being full, or nearly full.[268] As there were no more than six directors, there must have been other staff from LMIM to occupy the boardroom that fitted between 10 to 12 people.[269] Aside from the directors, Mr van der Hoven recalls Mr Monaghan and Ms Chalmers as being present, as well as other persons he can no longer recall.[270]

234. Mr van der Hoven's recollection of the meeting was as follows:[271]

> *[I]t was not simply a five-minute meeting for us to sign the Deed Poll. The meeting was a substantial meeting in which Monaghan addressed the directors about the Deed Poll and Bellpac Proceedings. This was followed by discussion. My recollection of the meeting is otherwise now limited. As best I recall, Monaghan went through the contents of the Deed Poll with us.*

235. Ms Mulder recalls Mr Monaghan discussing the background to the Bellpac dispute and its settlement and then talking through and explaining the Deed Poll. She recalls both the advice from WMS and the legal advice from Allens was discussed at the meeting. Mr Monaghan gave a summary of the Allens Advice.[272]

236. A meeting of the nature described would have been more significant to the directors who were not involved with the Bellpac recovery on a day to day basis. Understandably, the recollections about this meeting of Mr Tickner and Ms Darcy, who had continuous involvement in the Bellpac recovery, are more limited. Mr Tickner recalls a meeting with either Mr Monaghan or Mr Fenwick where he each of the paragraphs of the Deed Poll was explained to him.[273] He does not recall who else was at the meeting, but accepts that *"Darcy and others may have also been in this meeting"*.[274] Despite having told Mr Monaghan by email that there would have to be a

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266 Email from Monaghan to Kingston dated 10 June 2011 **[FMIF.400.001.0011]**.

267 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 339; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 202–203.

268 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 322.

269 *Ibid.*

270 *Ibid.*

271 *Ibid.*

272 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 206.

273 Affidavit of Tickner **[SJT.LAY.001.0001]**, para 255. Under cross-examination, Mr Tickner recalled that either Mr Monaghan or Mr Fenwick had taken him through the Deed Poll, see: T3-81, ln 36 – 46.

274 *Ibid.*

meeting of the whole board to resolve the proceeds split,[275] Ms Darcy appears to recall very little about the execution of the Deed Poll. She does not recall the day she executed the Deed Poll,[276] or whether she did so at the same time as the other directors. Referencing the fact Ms Kingston witnessed the execution of all of the directors, apart from John O'Sullivan, she believes she may have executed the Deed Poll at the same time as the other directors.[277]

237. In summary, and contrary to the plaintiff's implied contention, the consideration of the proceeds split was not a mere formality. On the contrary, the execution of the Deed Poll was considered sufficiently serious and important for a meeting of the Board to be convened so that LMIM's lawyer, Mr Monaghan, could address the directors on the Bellpac settlement generally and, specifically, as to the contents of the Deed Poll. There was discussion amongst the directors at that meeting.

238. Each of Mr van der Hoven and Ms Mulder also deposes to the effect that they would not have signed the Deed Poll if they were not satisfied its contents were true and correct as they understood them.[278] They also, as far as their recollections now enable them, outline their broad considerations in entering the Deed Poll and approving the split of the proceeds.[279] Their evidence, together with the Deed Poll, shows they gave the proceeds split proper attention.

239. Of course, both Mr van der Hoven and Ms Mulder indicate they placed heavy reliance on the management and instruction of Mr Monaghan, Mr Tickner and Ms Darcy. There is nothing surprising or untoward in them doing so. In the context of LMIM, it was both necessary and appropriate for each of Mr van der Hoven and Ms Mulder to rely on the expertise of and information from the other directors and Monaghan, as well as the external advisers, WMS and Allens.

240. LMIM was a large organisation, which had hundreds of millions of funds under management.[280] It was structured so each director operated largely within their own area of expertise.[281] Neither Mr van der Hoven nor Ms Mulder was involved in managing the Bellpac litigation or settlement.[282] The facts do not disclose any reason why it was inappropriate for Ms Mulder and Mr van der Hoven to repose their trust and reliance on the conduct of the persons and advisers directly involved in the Bellpac proceedings. The decided cases recognise the appropriateness of such reliance.[283]

241. What Mr van der Hoven and Ms Mulder did ***not*** do was to abdicate their role as directors. The evidence of both Mr van der Hoven and Ms Mulder showed that they were kept up to date and

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275 Email from Petrick to Darcy, van der Hoven, Monaghan and Drake dated 2 December 2010 **[FMIF.100.002.9294]**; Affidavit of Darcy **[LMD.LAY.001.0001]**, para 187.

276 Affidavit of Darcy **[LMD.LAY.001.0001]**, para 217.

277 Affidavit of Darcy **[LMD.LAY.001.0001]**, para 218.

278 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 323; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 223.

279 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 324–332; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 223–226.

280 Affidavit of Simon Jeremy Tickner sworn 21 March 2019, para 40.

281 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 66-74; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 32.

282 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 118–130; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 91–97.

283 *In re National Bank of Wales Ltd* [1899] 2 Ch 629 per the Court comprising of Lindley M.R., Sir F.H Jeune and Romder L.J., at p. 673; *Re City Equitable Fire Insurance Co* [1925] Ch 407 at p. 429; *ASIC v Flugge & Geary* (2016) 342 ALR 1; [2016] VSC 779 per Robson J at [1872]–[1874] referencing: *AWA Ltd v Daniels* (1992) 7 ACSR 759 (Rogers CJ in Comm Div) as qualified by Clarke and Sheller JJA in *Daniels v Anderson* (1995) 37 NSWLR 438 at p. 502 – 505. See also *Vrisakis v ASIC* (1993) 9 WAR 395, 404-406; *ASIC v Loiterton* [2004] NSWSC 172, [19]; and *Re City Equitable Fire Insurance Co* [1925] Ch 407 (Romer J); *ASIC v Healey* [2011] 278 ALR 618; 83 ACSR 484 per Middleton J at [167]–[169].

monitored the Bellpac proceedings and negotiations at an appropriate level.[284] They had seen and considered the necessary steps and processes were being followed in respect of the Bellpac settlement, including the split of the settlement proceeds.[285] When it came to approving the proceeds split, each of Mr van der Hoven and Ms Mulder gave independent consideration to that decision, in context of the information they had received from those managing the Bellpac matter.[286] Mr van der Hoven and Ms Mulder each formed and applied their own views that the settlement and the split of the proceeds were in the best interests of the members of each fund.[287]

242. The suggestion that the Deed Poll was executed without due consideration is contrary to the evidence and should be rejected.

Deed Poll had Inadequate References

243. We turn now to the complaint that the Deed Poll did not expressly reference the Allens Advice, or the conflicts management policy, or ss 601FC and 601FD of the Act. This is a pernickety observation that neither reflects the substance of the Deed Poll, nor the reality of the processes that LMIM followed in deciding to split the settlement proceeds between the FMIF and the MPF. At most, the criticism highlights some deficiency in drafting technique, rather than any real or substantive deficiency in the directors' deliberations.

244. The criticism is apt to mislead because the Deed Poll does reference such matters, albeit at a higher level of abstraction. In this regard, the Deed Poll:

(a) refers generally to *"independent expert advice"* in concluding that the *"Settlement Proposals"* were fair and reasonable ***and*** in approving those proposals (which included the split of the settlement proceeds).[288] This is broad enough to reference the Allens Advice, which everyone knew of, in any event, and which is separately recorded in the company's records;

(b) refers to consideration having been given to *"procedures in the Constitution, the Trust Deed and the Compliance Plans (and any other procedures that are in place) in respect of conflicts of interest"*.[289] This is apt to cover LMIM's conflicts management policy. In any event, it is not contended that the company breached that policy; and

(c) the Deed Poll does refer to consideration having been given to *"general law and statutory duties that relate to directors under the Corporations Act 2001"*.[290] This encompasses ss 601FD and 601FC (the latter of which is not alleged to have been breached).

245. In light of the above matters, it is not momentous that the Deed Poll does not expressly reference the Allens Advice, a conflicts management policy or any particular section of the Act. It is the substance that matters.

246. Moreover, the Deed Poll was prepared in circumstances where the directors knew of the existence and the general effect of the Allens Advice. Mr van der Hoven and Ms Mulder took this into

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284 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, at para 128 and generally at paras 135–323; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 97–98 and generally at paras 104–221.

285 *Ibid.*

286 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 319–332; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 203–226.

287 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 324–332; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 223–224.

288 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, clause 3.1(n).

289 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, clause 3.1(n).

290 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, clause 2.1(d).

account.[291] The Deed Poll was also prepared as part of the company's procedures for dealing with identified conflicts, as a basic record of the directors' decision.[292] These were self-evident facts that did not require express, or any, reference in the Deed Poll. The Deed Poll is only a few clauses long and was, self-evidently, not intended to expressly record the minutiae of every step taken or internal procedure of LMIM. It was designed to record the substantive decision.

247. Ultimately, just because the drafter of the Deed Poll omitted to expressly reference the Allens Advice does not alter the reality that the advice was obtained by LMIM, and taken into account by its directors in approving the split of the settlement proceeds. Further, any perceived errors in the drafting of the Deed Poll hardly requires that the directors conclude that the Allens Advice did not support the payment of the settlement payment to the MPF.

Failure to Adequately Consider the Allens Advice

248. This leaves the final basis on which the plaintiff contends that the directors failed to adequately read or consider the content of the Allens Advice; the analysis of the advice at paragraph 30H of the statement of claim. This analysis has no validity, for the following reasons.

Complaint 1: Allens did not say how the proceeds split was in best interests of FMIF members

249. The first substantive criticism is the Allens Advice:[293]

> *at [25] and [27] referred to the need for LMIM as RE of the FMIF to act in the best interests of members of the FMIF, but did not state how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with that obligation.*

250. With respect, this critique is misdirected. Allens did not have to provide advice of that nature. As submitted at paragraph 213 above, the determination of what is in the best interests of the FMIF members is a matter of commercial, corporate and ethical judgment of the RE. Nor was the issue within the scope of Allens retainer.

251. The scope of the solicitor's duty is generally determined by the retainer.[294] Here, as recorded in the Allens Advice, Allens were specifically asked to advise:[295]

> *"... whether it is **legally acceptable** for the RE to split the litigation proceeds between the FMIF and the 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)."* (emphasis added)

252. It can immediately be seen that Allens were asked to provide legal advice.

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291 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 324 and 329; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 221.

292 As recorded in Monaghan's email of 18 April 2011 **[FMIF.200.003.7064]**, the Deed Poll was prepared by TF (Trevor Fenwick) of Monaghan Lawyers for audit purposes. See Affidavit of Tickner **[SJT.LAY.001.0001]**, para 36. See also Affidavit of Darcy **[LMD.LAY.001.0001]**, para 138.

293 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(c).

294 *Citicorp Ltd v O'Brien* (1998) 40 NSWLR 398 per Sheller JA (Meagher JA and Abadee A-JA agreeing) at p. 412(F); citing *Hawkins v Clayton* (1988) 164 CLR 539. It is accepted that matters may be learnt during the discharge of a retainer that may affect how the retainer is properly discharged: *Dominic v Riz* [2009] NSWCA 216 at [90]-[91].

295 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 15.

253. The instructions were given in an email of 14 March 2011 from Monaghan to John Beckinsale, the partner at Allens who gave the advice. The email said: [296]

> *John*
>
> *As discussed, I attach:*
>
> 1. *My original email to Aaron Lavell of WMS setting out the facts and attaching relevant documents;*
>
> 2. *An email from Aaron attaching his final report (his report is expressed to be "final", however the transaction has not yet settled, so to that extent it is still draft and is likely to require amendment as Gujarat is now proposing to vary the settlement terms by purchasing the Bellpac land for cash rather than paying for it over time);*
>
> 3. *An email from Lisa Darcy to Gujarat, sent today, setting out the broad terms of the proposed cash purchase of the Bellpac land by Gujarat.*
>
> *Please note that Alf Pappalardo and Bruce Wacker are acting in relation to documenting the settlement with Gujarat. Draft documents have been prepared, but these will need to be amended to reflect the proposed cash purchase, should that proceed.*
>
> *I am seeking an advice confirming that the proposed split of proceeds between the funds is legally acceptable given that LM is in a position of conflict, being the trustee of both the FMIF and the MPF. I am happy to discuss the scope of the required advice with you further.*

254. Allens had a long history in acting for LMIM in respect of the Bellpac matter generally.[297] The retainer as at 14 March 2011 (the date of the instructions to Allens) between LMIM and Allens had, in fact, commenced on or around 1 December 2010, pursuant to an engagement letter[298] sent to Monaghan Lawyers of that date stating:

> ***1. Our Role***
>
> *Allens Arthur Robinson will be acting for LM Investment Management Limited as responsible entity of the LM First Mortgage Income Fund and you will instruct us in this matter.*
>
> *The work we are to do is advise LM in relation to the proposed settlement of litigation with Gujarat. The scope of the work may expand beyond this at your request.*
>
> *We will look to LM (and not your firm) for payment of our fees and outlays.*
>
> ***2. Lawyers Who Will be Working With You***
>
> *Allens Arthur Robinson's team will be Alf Pappalardo (Partner), John Gallimore (Partner), Bruce Wacker (Senior Associate) and Eibhlin McBride (Lawyer).*
>
> *Whilst your work will always be supervised by a partner, when appropriate, we may arrange for other lawyers with relevant skills and experience to work on the matter.*

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296 Email from Monaghan to Beckinsale dated 14 March 2011 **[FMIF.300.004.2880]**.

297 Affidavit of Darcy **[LMD.LAY.001.0001]**, paras 77–83.

298 Appointment Letter dated 1 December 2010 (Exhibit 302) **[FMIF.043.002.0001]**.

> *In this way, we are confident that we can provide you with the most cost effective service.*
>
> ...
>
> *You may accept the offer in writing but if you do not, your continued instructions to us will constitute your acceptance of the offer.*

255. Allens continued to act for LMIM from 1 December 2010 until the settlement of the Bellpac proceedings was achieved. Allens had previously acted for LMIM in respect of the Bellpac recovery (including in the proceedings) between April 2009 and November 2009.[299] Allens had also acted for LMIM well before that time and had been sent the Deed of Priority[300] on multiple occasions.[301]

256. Importantly, nothing within the scope of the Allens retainer required Allens to offer any analysis or opinion of what is in the best interests of the FMIF. It required Allens to provide legal, not commercial or other, advice.

257. The next thing to note about the Allens Advice is that it did answer how the sharing of the proceeds of the settlement could proceed harmoniously with the duties under ss 601FC and 601FD. The Allens Advice, on this complex matter, was naturally subject to several assumptions being confirmed. Relevantly, the advice concluded:

(a) in respect of LMIM as RE of the FMIF:[302]

> *We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and the MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict, subject to the following matters:*
>
> *(a) We assume that in its capacity as responsible entity of the FMIF, the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of FMIF members (see paragraphs 25, 27, 53 and 56 below).*
>
> *(b) We assume that in its capacity as trustee of the MPF, the RE has considered all feasible options for the recovery of the loan advanced by MPF to Bellpac, and is satisfied that the terms of the proposed settlement are in the best interests of MPF members (see paragraphs 35 and 37 below)* ... and

(b) later, with respect to the directors of LMIM:[303]

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299 This is not in contest. See Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at para 31(b)(iv)(A). See also Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant [**FMIF.PLE.011.0001]** at para 14(b)((iv)(A).

300 Priority Deed **[FMIF.009.003.0043]**.

301 This is admitted by the plaintiff. See Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at paragraph 31(d). See also Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant [**FMIF.PLE.011.0001]** at paragraph 14(d)(i). The Deed of Priority had been provided to Allens on at least four occasions by email, including: Email to Alf Pappalardo on 19 April 2001 **[FMIF.100.006.6709; FMIF.100.006.6710]**, Email to Brett Cook (Senior Associate) on 6 June 2007 **[FMIF.100.006.6814; FMIF.100.006.6815]**, Email to Brett Cook on 8 May 2008 **[FMIF.040.003.0001; FMIF.040.003.0036]** and Email to Brett Cook on 11 June 2008 **[FMIF.049.006.0197; FMIF.049.006.0201]**. See also Affidavit of Tickner **[SJT.LAY.001.0001]**, para 68.

302 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 16 and 16(a)-(b).

303 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 16(g).

> *The directors of the RE must comply with their general law and statutory duties under the Corporations Act (see paragraphs 61 to 65 below). We are not aware of any reason why agreeing to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants would raise any issues in this regard (assuming the matters in paragraphs (a) to (f) above are confirmed).*

258. Analysis of the other paragraphs referenced at subparagraphs 16(a) and (b) of the Allens Advice (paras 25, 27 and 53, for example) clarify that Allens' references to *"the terms of the proposed settlement"* were references to both the terms of the settlement with Gujarat and the proposed split of settlement proceeds between the FMIF and the MPF. Paragraph 25 of the Allens Advice, for example, was all about the proceeds split. It stated:[304]

> *The RE ... needs to always act in the best interests of the members of the FMIF when making any decision regarding the split of the litigation proceeds and the terms of the Gujarat settlement. We assume that the RE has considered all feasible options for the recovery of the loan advanced by FMIF to Bellpac, and is satisfied that the result of the litigation with Gujarat, being the terms of the proposed settlement, are in the best interests of FMIF members. In addition, we assume that the RE is satisfied that there is a need to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF (because the overall settlement cannot occur without the agreement of the MPF trustee – for example, it needs to release its security and pay Coalfields to withdraw its caveats.*

259. Similarly, at paragraph 27, the Allens Advice stated:[305]

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

260. At paragraph 53, the Allens Advice stated, with reference to the duties of the RE under s 601FC (see paras 51 – 52):[306]

> *The RE will ... need to conclude that the proposed split of the litigation proceeds* ***and*** *the terms of the Gujarat settlement are in the best interests of the members of the FMIF.*
>
> [emphasis added]

261. The simple and logical answer provided by the Allens Advice was the proceeds split was *"legally acceptable"* provided that LMIM, separately in each of its representative capacities, was satisfied that the proceeds split was in the best interests of the members of each of the FMIF and the MPF. These conclusions followed an examination and discussion of the duties applicable to a responsible entity under s 601FC,[307] and to the directors of such an entity under s 601FD.[308]

262. Remembering that it was not for Allens to decide what was in the members' best interests, the advice can be seen to directly answer the question of whether it was *"legally acceptable for the*

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304 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 25.
305 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 27.
306 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 53.
307 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, paras 51–54.
308 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, paras 61–62.

RE to split the litigation proceeds between the FMIF and the MPF".[309] Further, even though it was unnecessary to do so, Allens expressly noted its assumption that the RE was satisfied that there was a need to reach an agreement with the MPF because the overall settlement could not occur without that agreement.

263. Allens' assumption accorded with the facts. As the plaintiff now admits,[310] LMIM as trustee of the MPF was a plaintiff in the Bellpac proceedings. The MPF's status as a party to the litigation necessitated its consent if there was to be any full and final settlement including releases of claims made in the proceedings. The fact that the MPF's consent was required (including by Gujarat) is confirmed by the fact the settlement involved the execution of consent orders for the dismissal of the entire proceedings.[311]

264. Nothing within the Allens Advice warns that it would be wrong for the directors or LMIM to respond to these circumstances by reaching an accommodation between the FMIF's interest in achieving a settlement of the protracted and expensive litigation and the MPF's interest in ensuring it obtained something for having funded and underwritten the costs of the litigation. On the contrary, the evident point of Allens stating this assumption was to indicate a circumstance where Allens considered that the proposed split of the settlement proceeds would be justified in the interests of the members of both the FMIF and the MPF.

265. Thus, the plaintiff's criticism of the Allens Advice as not explaining how the proceeds split could be in the interests of the members of the FMIF should be rejected.

Further Complaint

266. The plaintiff also now contends that matters identified in subparagraphs 16(a) to (g) were not established.[312] This is objectionable as:

(a) the contention is made for the first time ever in the replies filed on 12 March 2019; and

(b) despite the plaintiff's contention otherwise,[313] the statement of claim does not assert those matters were not established. The statement of claim makes no such allegation.

267. In any event, the evidence establishes the LMIM as RE of the FMIF:

(a) had considered the feasible options available to it for the recovery of its loan to Bellpac;[314] and

(b) was satisfied that the terms of the proposed settlement were in the best interests of the FMIF members.[315]

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309 This should be contrasted with the position in *ASIC v APCHL* (2013) 31 ACLC 13-073 at [593], where no answer was given to the specific question on which legal opinion was sought.

310 See Defence of van der Hoven **[EVH.PLE.002.0001]**, para 20 and Reply to Third Defendant **[FMIF.PLE.010.0001]**, para 8(a). See also Defence of Mulder **[FMM.PLE.002.0001]**, para 20 and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para 8(a).

311 As was required pursuant to both the Deed of Release (Exhibit 85) **[FMIF.003.003.0198]** (by cll 2, 1, 5, 6 and Annexure A) and the Deed of Settlement and Release **[FMIF.003.003.0118]** (by cll 5 and 6 and Schedule A).

312 Reply to Third Defendant **[FMF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, paras 16C(c)(iii) and 16C(g)(iii).

313 *Ibid.*

314 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 348(d) and (e); Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 215(c) and 220; see also Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cll 2.1(a), 2.1(e)(v) and (vi), 3.1(g) and 3.1(h).

315 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 348; Affidavit of Mulder **[FMM.LAY.001.0001]**,

268. The options then available to the FMIF were either were to settle with Gujarat, or to continue with the Bellpac proceedings in circumstances where it did not (without assistance from the MPF) have the financial capacity to do so. Those proceedings were expensive, risky and the outcome was uncertain. It was clear that it was in the FMIF's interests to settle with Gujarat, who as the holder of the mining lease covering most of the land subject of the proceedings, was the only entity who would realistically be interested in acquiring that land.

269. In all the circumstances, the continuation of the Bellpac proceedings was not a feasible option for the FMIF. If the FMIF wanted to settle the proceedings, the MPF's cooperation and agreement was required as a matter of commercial reality. An accommodation, therefore, had to be reached with the MPF. The proceeds split was struck on a fair and rational basis having regard to comparable litigation funding transactions and after independent advice was taken and the position was by the directors, as recorded in the Deed Poll.

Complaint 2: para 56 of the Allens Advice

270. The plaintiff next complains that the Allens Advice:[316]

> *at [56], stated that LMIM would need to be satisfied that the terms of the settlement and the proposed split of litigation proceeds did not unfairly put the interests of the FMIF ahead of the MPF, which misconstrued the effect of sections 601FC(1)(c) and 601FD(1)(c) of the Act.*

271. This criticism is also misdirected. Paragraph 56 of the Allens Advice is concerned with considerations for LMIM as an AFS licensee. The paragraph does not, and does not purport to, address the requirements of ss 601FC(1)(c) or 601FD(1)(c). Those sections are separately considered elsewhere in the Allens Advice. It is, therefore, wrong for the plaintiff to contend the paragraph misconstrues, or is inconsistent with, those sections of the Act.

272. Notwithstanding this, the plaintiff extends its criticism of paragraph 56 of the Allens Advice in these terms:

> *at [56], by the use of the term "vice versa", stated that LMIM would need to be satisfied that the terms of the settlement and the proposed split of litigation proceeds did not unfairly put the interests of the MPF ahead of the FMIF, but did not state how paying 35% of the Settlement proceeds to LMIM as trustee of the MPF would be consistent with that obligation.*

273. It is submitted that this criticism is merely a repetition of issues already addressed above. Paragraph 56 of the Allens Advice concerned an entirely separate issue and the conclusion of the Allens Advice is otherwise set out above. The criticism is also embarrassing in that it simultaneously complains that the advice wrongly identifies the duty upon LMIM as RE of the FMIF and but fails to state how that (alleged non-existent) duty would be satisfied.

274. The plaintiff then asserts the Allens Advice:[317]

> *was premised on an assumption (appearing at Recital 9) that there was* ***an existing agreement*** *between LMIM as RE of the FMIF and LMIM as trustee of the MPF, which the second to sixth defendants knew was not the case"*

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para 213, 214 and 220; Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cll 3.1(g) and (h).

316 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(d).

317 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(f).

[emphasis added]

275. This criticism misstates the terms of paragraph 9 (under the heading "*Background*") of the advice. Paragraph 9 states:[318]

> *The FMIF and the MPF* ***did not enter into any formal agreement*** *to split the proceeds recovered by the litigation* ***despite it being the understanding*** *of the RE's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation.*
>
> [emphasis added]

276. Contrary to the plaintiff's contention, paragraph 9 of the Allens Advice concedes that there was no prior agreement to split the settlement proceeds. Had there been such an agreement, the Allens Advice would not have been necessary; the whole issue would not have arisen. The insertion of the word "*formal*" ahead of "*agreement*" does not add anything. In any event, there is no premise or assumption there was some other, informal, agreement. The paragraph makes it clear there was something less than an agreement. There was an understanding that it was appropriate for the MPF's contribution to be recognised by a share of any proceeds recovered by the litigation.

277. For those reasons, the contention that the directors knew that the Allens Advice was premised on some false assumption as to the existence of an agreement should be rejected. The contention is objectionable when neither the Allens Advice, nor any of the directors, have ever said there was such an antecedent agreement. The plaintiff's contention also has no merit given that, as the plaintiff now admits,[319] the instructions given to Allens expressly informed Allens that the funds had not entered into an agreement concerning the proposed split of any proceeds from the proceedings.

Complaint 3: Alleged Inconsistent Conclusions

278. The plaintiff next asserts that the Allens Advice:

> *"set out inconsistent conclusions but did not state how those inconsistencies were to be reconciled".*

279. By its particulars, the contention is that paragraph 25 of the Allens Advice is irreconcilable with paragraph 35 and paragraph 27 is irreconcilable with paragraph 37.

280. The plaintiff now appears to have retreated from these contentions.[320]

281. The complaint in respect of paragraphs 25 and 35 appears to be that LMIM as both RE of the FMIF and trustee of the MPF had to act simultaneously in the best interests of the members of each fund. It is said, or was said, that these positions were irreconcilable. As a matter of logic, the plaintiff's contention cannot be correct. There is no reason why a transaction could not be in

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318 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 9.

319 Defence of van der Hoven **[EVH.PLE.002.0001]**, para 33C(f)(iv); reply 16C(f)(A). Defence of Mulder **[FMM.PLE.002.0001]**, para 33C(f)(iv); Reply to Third Defendant **[FMIF.PLE.010.0001]**, para 16C(f)(A); Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para 16C(f)(A).

320 The Statement of Claim asserts at paragraph 30C(g) that these paragraphs of the Allens Advice set *"inconsistent conclusions"*. In the plaintiff's Reply to Third Defendant and Reply to Fourth Defendant at paragraph 16C(g)(ii)(A) (in response to the third and fourth defendants' defences at paragraph 33C(g)), the plaintiff now admits that the matters in paragraphs 25, 35, 27 and 37 were not conclusions. The plaintiff also pleads in the Reply to Third Defendant and Reply to Fourth Defendant at paragraph 16C(g)(ii)(C)]a non-admission to the defendants' contention that the matters in those paragraphs were not irreconcilable as alleged or at all.

the interests of both the FMIF and the MPF. The split of the settlement proceeds was such a transaction. As already outlined, the Allens Advice dealt with the potential conflict by indicating that the proposed split of the settlement proceeds was legally acceptable provided, relevantly, that the directors were satisfied that it was in the interests of the members of both funds to do so.

282. The evidence is clear that the directors considered the interests of the members of each fund and concluded that the split of proceeds was in the interests of the members of each of the funds. This decision was readily justifiable on the basis that:

(a) the settlement on offer with Gujarat was undoubtedly in the interests of the FMIF;

(b) as a party to the Bellpac proceedings, the MPF's consent was necessary for that settlement to occur. It was entitled to state its price for doing so, mindful of the facts that the MPF had paid more than 90% of the costs of the litigation,[321] including for the benefit of the FMIF via its custodian, PTAL. It had done so on the basis of an understanding that it would participate in a share of any of the proceeds from the Bellpac proceedings.[322] The MPF had also provided an undertaking to pay the defendants' costs of Bellpac proceedings if required to do so;[323]

(c) in the circumstances, the directors decided that the MPF should still share in the settlement proceeds as previously understood;

(d) an independent trustee of the MPF would not have reached any different conclusion;

(e) the FMIF, therefore, before it had any prospect of obtaining any settlement with Gujarat, had to come to reasonable terms with the MPF so as to ensure its cooperation and consent to the settlement of the Bellpac proceedings;

(f) the quantum of the split was considered to be fair and reasonable by the directors, which was confirmed by the independent advice from WMS having regard to comparable arm's length transactions; and

(g) when considered as against the alternative of continuing the Bellpac proceedings, the settlement of the proceedings on the basis of the proceeds split remained in the best interests of the FMIF because it would finally resolve the dispute with Gujarat over the land and would provide the FMIF, in the immediate term, a cash sum exceeding $32 million.

283. There is also the fact that, leaving aside the sale of the land under the Gujarat contract, in respect of which the FMIF received the full $10 million, the FMIF had no greater title to the proceeds from the Bellpac settlement than the MPF. The plaintiff asserts, without reference to any facts, a legal conclusion that:[324]

The Settlement payment was scheme property which ought to have been held by

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321 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 230; Email from Petrick of 2 December 2010 **[FMIF.100.002.9315]** reporting as to the MPF's total funding contribution to the Bellpac proceedings and attaching a spreadsheet setting out the contribution **[FMIF.100.002.9314]**.

322 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 268, 324, 330, 331(b); Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 121, 122, 218(b), 221(c) and (d), 223(a) and (b); Affidavit of Tickner **[SJT.LAY.001.0001]**, paras 144, 149, 152, 153 and 191; Affidavit of Darcy **[LMD.LAY.001.0001]**, paras 164, 169 and 174.

323 Undertaking – Case Number 2009/298727 (Exhibit 152) **[MPF.001.004.6243]**. Also see admission in Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]** at para 25AC(a)(ii)(F).

324 Statement of Claim **[FMIF.PLE.013.0001]**, para 37.

LMIM as RE for the FMIF for the benefit of the members of the FMIF.

284. The contention has no basis. The Bellpac proceedings concerned securities respectively in favour of PTAL (as custodian for LMIM as RE of the FMIF) and LMIM as trustee of the MPF. The securities were given in respect of loans made by PTAL (as custodian)[325] and LMIM as trustee of the MPF. LMIM as trustee of the MPF commenced the proceedings.[326] PTAL (as custodian) was subsequently joined as a further plaintiff.[327] Again, aside from the proceeds from the sale of the land under the Gujarat contract, the moneys paid by Gujarat for the settlement were exactly that - moneys paid to acquire a settlement of litigation.

285. There was then a decision made, as recorded in the Deed Poll, that the settlement proceeds would be split 35% to the MPF and 65% to the FMIF. While the Deed of Release provided for Gujarat to pay the settlement sum of $35.5 million to PTAL, that was subject to the antecedent determination to share the settlement proceeds and did not signify any intention (as between the FMIF and the MPF) that PTAL or the FMIF was substantively entitled to all or any of the settlement proceeds.

286. The plaintiff now contends that the MPF should have freely given its consent to the settlement because to do otherwise would have been a breach of ss 601FC(1)(c) and 601FC(3).[328] Moreover, refusal of consent by the MPF would not have breached ss 601FC(1)(c) and 601FC(3). The plaintiff's contention otherwise, in effect, asserts that compliance with s 601FC(1)(c) [and FD(1)(c)] required the directors to force the MPF to consent to the settlement for no consideration. That is not the effect of the sections.

287. Further, in so far as the plaintiff now contends that s 601FD(1)(c) does require the directors to effectively override the duties of LMIM as trustee of the MPF, that construction is not in harmony with the operation of s 601FC(1)(c), as it has been considered in the authorities.[329]

Complaint 4: LMIM's Compliance Plan

288. The plaintiff next contends that the Allens Advice:[330]

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

289. This contention repeats the theme that the Allens Advice referenced the duty to act in the best interests of the members of the FMIF but did not advise how that could be achieved. This issue is addressed in detail above. In short, judgments about the best interests of the funds and their members was a corporate and commercial matter for LMIM, not a matter for legal opinion. The conclusion offered by the advice was that the transaction was legally acceptable provided that the directors had to be satisfied that the split of the settlement proceeds was in the best interests of the members of each fund.

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325 Statement of Claim **[FMIF.PLE.013.0001]**, paras 5 and 7.

326 This is not in contest. See Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at para 20(bb). Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]** at para 8(a).

327 *Ibid.*

328 Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para19(ba) [in response to Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at para 38(ba)]. See also paragraphs 45AA and 45AB of Statement of Claim.

329 See the analysis in Part E above.

330 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(h).

290. The plaintiff's contention is otherwise confusing as it conflates LMIM's Compliance Plan with the terms allegedly from LMIM's Conflicts Management Policy (as referred to in para 30G of the statement of claim). The excerpt quoted in paragraph 30G, purportedly from LMIM's Conflicts Management Policy, notes that the duties under ss 601FD and 601FC override any conflicting duty under Part 2D.1 of the Act. The plaintiff makes no contention of any conduct contrary to that.

291. The complaint is irrelevant.

Complaint 5: Conflicts Management Policy

292. The plaintiff next contends that the Allens Advice:[331]

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

293. This contention also has no relevance to the material facts in issue in this case. As the plaintiff is taken to admit,[332] there is no allegation of any failure by LMIM to follow and apply its processes for dealing with conflicts. Again, the allegation in paragraph 30G of the statement of claim is that LMIM's conflicts management policy makes the trite observation that the duties under ss 601FC and 601FD override the directors' duties in Part 2D.1 of the Act. Again, there is no contention about that matter in this case. In any event, Allens were asked to advise whether the proposed split of the settlement proceeds was legally acceptable. They were not asked to advise LMIM on compliance with its own internal policies or procedures. The plaintiff's criticism is of no relevance.

Complaint 6: Fiduciary Duties

294. The plaintiff next complains that the Allens Advice:[333]

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

295. Paragraph 63 of the Allens Advice merely observed a possible uncertainty in the law. It flags that s 601FD(2) might in future be taken to impose fiduciary duties directly between directors of a responsible entity and the members of the scheme. The paragraph observes, however, that the point was yet to be decided by the case law and the position, as it then was, was that the directors of a trustee company did not themselves owe direct fiduciary obligations to the beneficiaries of the trust.

296. Given the terms of paragraph 63, it was not necessary for Allens to speculate or opine further about what the duties would be if a court one day in the future decided to recognise some form of direct fiduciary relationship. There is no contention about that issue in this case, and the

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331 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(i).

332 The plaintiff does not plead to the allegation of fact in paragraph 33C(i)(ii)(C) of the defences of the third and fourth defendants and, by reason of r 166(1) of the *Uniform Civil Procedure Rules* 1999 (Qld).

333 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(j).

plaintiff expressly confines its claim to breach of statutory duty.[334]

297. The plaintiff's criticism is unfounded. The failure to explore a hypothetical scenario concerning a duty not recognised by law, or at least not yet recognised by law, is not cause for the directors to reject or ignore the Allens Advice. In any event, for the reasons already given, the split of the settlement proceeds was in the best interests of the members of the FMIF.

Complaint 7: No Concluded Opinion?

298. Finally, the plaintiff contends that the Allens Advice:[335]

> *"did not, when properly construed, reach an opinion that the proposed transaction was "legally acceptable"."*

299. This contention should be rejected as ignoring the express terms of the Allens Advice. Paragraph 16 of the Allens Advice concluded that the it was *"legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict"*. The conclusion of the advice is not a matter of construction; it is express.

300. While the stated conclusion was subject to the matters identified in the subparagraphs of paragraph 16, those matters do not negate the conclusion expressed in the paragraph. Legal opinions are commonly subject to some qualifications or conditions which have bearing upon, but do not eliminate, the opinion. The existence of the qualifications, again, does not justify the directors ignoring or rejecting the advice.

Summary

301. In summary, the plaintiff's criticisms of the Allens Advice do not establish or support the contentions that:

(a) the defendants failed to adequately read or consider the Allens Advice; or

(b) the defendants were wrong to accept or have regard to the Allens Advice in approving the split of the settlement proceeds.

302. The plaintiff's criticisms present a selective and distorted picture of the Allens Advice and appear themselves to be based on inadequate reading and consideration of the advice.

303. The plaintiff's criticisms of the Allens Advice also highlight two systemic problems in the plaintiff's case, *viz*:

(a) *first*, the plaintiff fails to identify any external factor that would deny the reasonableness of the directors' reliance on the Allens Advice; and

(b) *second*, the analysis made of the Allens Advice (apart from being wrong) is not an analysis that any reasonable director, let alone those in the position of Mr van der Hoven or Ms Mulder, could be expected to have made.

304. The relevant principles were summarised by Murphy J in *ASIC v APCHL*[336] in the following

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334 T1-13, ln 26 – 28 (cf: para 46 of the statement of claim). See also Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, para 28.

335 Statement of Claim **[FMIF.PLE.013.0001]**, para 30H(k).

336 (2013) 31 ACLC 13-073 per Murhpy J at [533(e)].

terms:

> *(e) A director's reliance on advice or information provided by others will be unreasonable where the director knows, or by the exercise of ordinary care should have known, any fact that would deny reliance on others ... The reasonableness of the reliance must be determined in each case but ... the following relevant matters may be important in determining reasonableness:*
>
> *(i) the risk involved in a transaction and the nature of the transaction ...;*
>
> *(ii) the extent to which the director is put on inquiry or, given the facts of a case should have been put on inquiry ...;*
>
> *(iii) whether the position of the director is executive or non-executive ...*

305. The operative question here is whether any facts existed to put the directors on inquiry about the advices received.

306. Save for the issue of instructions (addressed below), the plaintiff does not allege that there were any external factors by which the directors were on inquiry. On the contrary, the external factors all support the reliability of the Allens Advice. That advice was given by a senior lawyer (John Beckinsale, partner) of an eminent national commercial law firm. The defendants knew Allens to be a highly regarded firm.[337]

307. The director defendants are not said to have shopped for accommodating advice, or to have deliberately or knowingly failed to properly instruct Allens.[338] Nor is there any allegation that the director defendants sought to skew or influence the Allens Advice in any way.[339] The advice was prepared on instruction from Mr Monaghan, whom both Mr van der Hoven and Ms Mulder knew to be an experienced commercial lawyer who was meticulous in his work.[340] He was the person who had principal carriage of the Bellpac recovery, including the Bellpac proceedings.[341]

Deficient Instructions to Allens?

308. The plaintiffs contend that the instructions to Allens were deficient.[342] This contention does not assist the plaintiff, as it is not alleged that the directors should have known or been aware of any such deficiency. In any event, the plaintiff's allegations do not withstand examination.

309. The instructions to Allens were sent in the email from Mr Monaghan to John Beckinsale,[343] referred to at paragraph 251 above. All of the defendants are entitled to assume that Monaghan, an experienced commercial lawyer and the person running the proceedings, gave the necessary

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337 Affidavit of Darcy **[LMD.LAY.001.0001]**, paras 81 and 82; Affidavit of Tickner **[SJT.LAY.001.0001]**, para 220; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 341(g) and 346; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 218 and 223(c).

338 C.f. cases such as *ASIC v Adler* (2002) 41 ACSR 71, where Santow J found at [307] that the lawyers had been given materially false information; or *ASIC v Hobbs* (2012) NSWSC 1276, where the Court found at [2474] - [2475] that Mr Hobbs had sought advice from a junior solicitor and had provided incomplete information to procure the advice he wanted.

339 *Ibid.*

340 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 116; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 80 – 85.

341 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 124 - 125; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 95.

342 See Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]** at para 16(b)(iv). See also para 30C of the statement of claim.

343 Email from Monaghan to Beckinsale dated 14 March 2011 **[FMIF.300.004.2880]**.

and proper instructions. The alleged deficiencies were that the instructions (with commentary in square brackets):

(a) did not include copies of the Gujarat Contract, the Deed of Release or the Deed of Release and Settlement.[344]

[This was not a deficiency. As the plaintiff now admits,[345] those documents were in the process of being negotiated and drafted ***by Allens***. As such they did not then exist in final form,[346] but in any event the omission to instruct lawyers about the very documents they are negotiating and drafting is not a deficiency];

(b) did not state that the settlement was to be effected by those same documents which Allens were engaged to negotiate and draft.[347]

[Again, this is not a deficiency in instruction. This allegation is now also struck out of the statement of claim];

(c) did not state that the consent of LMIM as trustee of the MPF was ***not*** required in order for LMIM as RE of FMIF or PTAL to settle the Bellpac proceedings.[348]

[The plaintiff now concedes this and no longer pleads paragraph 30C(b)(ii) of the statement of claim. Of course, the consent of LMIM as trustee of the MPF was always required. There was never any deficiency as the factual premise of the allegation is wrong. Further, and in any event, Allens were the lawyers engaged to act for LMIM in the prosecution and settlement of the Bellpac proceedings.[349] It would have been reasonable to assume that they were aware of which entities were required to agree to the settlement. There was no deficiency in instruction];

(d) did not include a copy of the Deed of Priority or state that such document included the terms as pleaded in paragraph 12 of the statement of claim.

[It was not necessary to do so because, as noted in paragraph 255 above, Allens had been provided copies of that Deed on no less than four previous occasions.[350] Further, and in any event, the terms of the Deed of Priority did not contain terms as alleged in paragraph 12 of the statement of claim. That paragraph contends that the Deed of Priority, by cl 3.1(1), provided that LMIM as RE of the FMIF was granted first priority under that Deed. This is wrong. Under cl 3.1(1), first priority is granted to the *"First Mortgagee on the First Mortgagee's Securities"*. The *"First Mortgagee"* was defined as either PTAL or LMIM as RE of the FMIF. The *"First Mortgagee's Securities"* was defined by reference to PTAL securities including PTAL's registered mortgage 9481438 and the PTAL charge. As LMIM as RE of the FMIF was not a *"Mortgagee"* under the Deed of Priority, there was no deficiency in not instructing Allens as specified in paragraph 12 of the statement of claim. On the contrary, it would have been misleading to instruct Allens to that effect. Further, the terms of the Deed of Priority are superseded by the decision of the directors to share the

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344 Statement of Claim **[FMIF.PLE.013.0001]**, para 30C(a).

345 See Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]** at para 14(b)(iv)(BB) (in response to para 31(b)(iv)(BB) of Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]**).

346 See Defence of van der Hoven **[EVH.PLE.002.0001]** and Defence of Mulder **[FMM.PLE.002.0001]** at para 31(a)(ii). See also Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]** at para 14(a)(ii).

347 Statement of Claim **[FMIF.PLE.013.0001]**, para 30C(b)(i).

348 Statement of Claim **[FMIF.PLE.013.0001]**, para 30C(b)(ii).

349 See paragraph 252 above referencing **[MPF.905.014.0001]**.

350 Affidavit of Tickner **[SJT.LAY.001.0001]**, para 68

proceeds as between the FMIF and the MPF, which decision constitutes an agreement between those funds contrary to the terms of the Deed of Priority];[351]

(e) did not state that LMIM as trustee of the MPF had funded the Bellpac proceedings as registered mortgagee with second priority under the Deed of Priority.[352] A further alleged deficiency is that the instructions did not state that LMIM as trustee of the MPF drew down the funding against the MPF Bellpac Loan.[353]

[These alleged deficiencies are subject to the same analysis as set out in the preceding subparagraph. These are not matters that the directors would have known to specifically instruct Allens about. The plaintiff does not contend that they should have known to provide such instructions. The directors were also each relied on Monaghan to instruct Allens as to all necessary matters.[354] Given the directors' knew Monaghan to be an experienced commercial litigation lawyer[355] who had carriage of the Bellpac proceedings, the directors' reliance was reasonable. Further, and in any event, there was no deficiency as the evidence was that the MPF funded the proceeding not as, or merely as, a second mortgagee.[356] It funded the proceedings on the basis of the understanding that it would receive a share of any proceeds from the litigation]; and

(f) did not state that there was no binding express prior arrangement for the MPF to be paid any amount if the amount recovered in the litigation did not cover the whole of the debt owing to the FMIF.[357]

[This was not a deficiency as, firstly, the FMIF was not owed any debt. The loan was made by PTAL (albeit as custodian); a separate legal entity. Moreover, in alleging the deficiency, the plaintiff ignores that Allens were specifically instructed (as is recorded in their advice) that:[358]

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

It is clear from that passage that Allens had been made aware that there was no binding agreement at that point but that the funding had been provided on the understanding that there would be a sharing of the litigation proceeds. With respect, the proposition that any client would have instructed their lawyers in terms that there was *"no binding express prior arrangement"* about something is unrealistic.]

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351 It is recognised that a party may contract with itself in different capacities: *Australand Holdings Limited, Australand Property Limited, Australand Wholesale Investments Limited, Australand Wholesale Investments Limited* [2005] NSWSC 835 at [20]; *Rakmy Pty Ltd v Commissioner of State Revenue* [2017] VSC 237 per Croft J at [50].

352 Statement of Claim **[FMIF.PLE.013.0001]**, para 30C(d)(i).

353 Statement of Claim **[FMIF.PLE.013.0001]**, para 30C(b)(ii).

354 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 179 and 223; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 278; Affidavit of Tickner **[SJT.LAY.001.0001]**, para 214; Affidavit of Darcy **[LMD.LAY.001.0001]**, paras 195–198 and 210.

355 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 110–116; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 80 – 85; Affidavit of Darcy **[LMD.LAY.001.0001]**, paras 59–64;

356 Affidavit of Darcy **[LMD.LAY.001.0001]**, para 169; Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 341(c); Affidavit of Mulder **[FMM.LAY.001.0001]**, para 218(d); Affidavit of Tickner **[SJT.LAY.001.0001]**, paras 144–153.

357 Statement of Claim **[FMIF.PLE.013.0001]**, para 30C(b)(iii).

358 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**, para 9.

310. It is submitted that the plaintiff's attack on the instructions is unsubstantiated and reflects an overly officious approach that does not reflect commercial reality. Even if the instructions were somehow deficient, that is not something the directors can be responsible for or ought reasonably to have realised. Again, it was reasonable for them to repose their trust and confidence in Mr Monaghan as an experienced lawyer who had carriage of the Bellpac matter. Certainly, it would be unreasonable to expect either Mr van der Hoven and Ms Mulder, who did not have close involvement in or responsibility for the Bellpac matter, to have recognised the type of deficiencies alleged. Neither Mr van der Hoven nor Ms Mulder was even aware of the existence or terms of the Deed of Priority.[359] They did not otherwise know the details around the MPF's funding of the Bellpac proceedings, other than that it was on the basis that the MPF would receive a share of any proceeds from that litigation.[360]

The Directors are not Lawyers

311. In the absence of any external factors that would deny the reasonableness of Mr van der Hoven or Ms Mulder's reliance on the Allens Advice, the plaintiff is left to the invalid analysis it applies to the text of the advice. Mr van der Hoven and Ms Mulder are not lawyers. Their position as directors does not require them to be; nor is it incumbent on company directors to make such an analysis of the legal opinions they receive.

312. The critique of the Allens Advice was ventured, for the first time in the Third Further Amended Statement of Claim[361]. Given that it has taken the plaintiff's team of lawyers more than four years following the filing of the claim in these proceedings, to articulate this critique, it is unreasonable for the plaintiff to expect the defendant directors – with no legal training or experience – to have made any similar analysis in the comparatively brief time they had to consider the matter, and mindful also of the high-pressure environment in which they operated post-GFC.[362]

313. The nature of the critique is technical and is not of a nature that a reasonable director in the position of Mr van der Hoven or Ms Mulder would, or could reasonably be expected to, have appreciated. The plaintiff's contention otherwise should be rejected. It should also be noted that not even Mr Monaghan voiced any concern about the advice. His reading of the advice was that *"the conclusion is that the transaction is OK"*.[363]

314. The Allens Advice did not otherwise warn or advise the defendants that any further advice was necessary or prudent to obtain.

315. It is submitted that directors in the position of all of the defendant directors would have read and understood the advice as indicating that the proceeds split was *"legally acceptable"* subject to the directors being satisfied that it was in the interests of the members of each of the funds to do so. Not surprisingly, that is the approach LMIM applied to the matter.

316. It is submitted, in particular, that none of the contentions concerning the Allens Advice were or should have been apparent to Mr van der Hoven or Ms Mulder who were not directly involved

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359 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 135; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 105.

360 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 154, 161 and 266; Affidavit of Mulder **[FMM.LAY.001.0001]**, para 121-122.

361 Third Amended Statement of Claim **[FMIF.PLE.002.0001]**.

362 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 31–37, 53–54, 102 and generally; Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 100–101 and 109.

363 Affidavit of van der Hoven **[EVH.LAY.002.0001]**, para 300 referring to an email from Fischer to Fenwick copied to Darcy, van der Hoven and Tickner dated 7 April 2011 (Exhibit 91) **[FMIF.200.011.5748]**. Fischer forwards an email from Monaghan dated 29 March 2011 and states with respect to the Allens Advice, *"There is a lot to wade through, but the conclusion is that the transaction is OK"*.

in the Bellpac matter. They were entitled to accept the reports of the Allens Advice unless there was some warning or circumstances which ought to have alerted them to flaws in that advice.

317. But, even if Mr van der Hoven and Ms Mulder were wrong to take into account the Allens Advice, their doing so caused no loss to the FMIF or its members as, for the reasons explained above, the split of the settlement proceeds was in the interests of those members and was something about which Mr van der Hoven and Ms Mulder exercised their own independent judgment.

Wrong Conclusion from the Expert Reports

318. The plaintiff, it will be recalled, alleges that the directors ought not to have concluded that the WMS Report or the Allens Advice justified the payment of any part of the settlement to MPF.[364]

319. A fair and literal interpretation of the independent expert reports justified the conclusion that the proposed 65/35 split was fair and reasonable, provided the directors were satisfied that the proposed settlement was in the best interests of the members of both funds.

320. That is because of the plain words of the reports, namely:

(a) the WMS Report concluded that:

> *"In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions."*[365]

(b) the Allens Advice concluded (on the basis of the stated assumptions) that:

> *"We consider that it is legally acceptable for the RE to split the litigation proceeds between FMIF and MPF on the basis of the opinion provided by WMS Chartered Accountants, despite the RE being in a position of conflict ..."*[366]

321. The reports were unambiguously supportive of the proposed split. No other reasonable interpretation is available.

Criticism 2: The Priorities

322. The plaintiff complains that the directors failed to have proper regard or give adequate consideration to the fact that PTAL sold the property to Gujarat as a mortgagee exercising power of sale,[367] and that FMIF had priority.[368]

323. The plaintiff makes that same complaint in a different way later in its pleading. The plaintiff says that the directors failed to have proper regard or give adequate consideration to the fact that:

(a) MPF was a subsequent mortgagee and a subsequent charge holder over the assets of Bellpac;[369]

(b) MPF had originally funded the Proceedings as registered mortgagee with second priority under the Deed of Priority and was drawing down the funding against the MPF Bellpac loan;[370]

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364 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(vi).
365 WMS Report (Exhibit 32) **[FMIF.100.003.6807]** at p. 5, section [1.0].
366 Allens Advice (Exhibit 35) **[FMIF.100.003.6995** at **6997]**.
367 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(i).
368 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(a)(ii).
369 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(i).
370 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(iii).

(c) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;[371] and

(d) PTAL was, as at 22 June 2011, owed $52M by Bellpac.[372]

324. A number of points can be made here.

325. ***First***, the directors plainly did know of, and recognise, the basic fact that FMIF had a priority interest in the security. The Deed Poll, for example, expressly states that PTAL's loan was secured by a first registered mortgage and that MPF's loans was secured by a second registered mortgage.[373] Each of Mr van der Hoven and Ms Mulder were broadly aware of the position between the FMIF and the MPF as first and subsequent registered mortgagees.[374] Further, it was never put to any of the directors that they were ignorant of the priority position.

326. ***Second***, the real complaint that lies behind this criticism is an assertion that, because FMIF held a first ranking mortgage, it was entitled to all of the proceeds of the settlement. This is an arid lawyer's complaint. Even if the settlement proceeds could be correctly characterised as entirely the proceeds of the sale of a secured property by a mortgagee exercising a power of sale (see below) and, even if the FMIF was legally entitled to all of the proceeds, the directors were justified in making a decision based on more than simply the strict legal rights of the parties.

327. The directors were obliged to act reasonably. Acting reasonably, they were entitled to consider the circumstances in which MPF has contributed to the successful recovery of $45.5m.

328. The decisions of directors may legitimately involve many different considerations. For example, the directors of a clothing retailer may decline to purchase its products from an overseas supplier that does not pay its workers a fair wage. The directors may instead authorize purchases at a higher price from another supplier. The directors may do so on the basis that the more expensive supplier treats its workers fairly.[375] That decision of the directors is not a breach of the directors' duties. In making their business decisions, the directors are entitled to consider, and often do consider, factors other than price and short-term economic gain.

329. A decision like the one described above may legitimately be influenced by ethical considerations. Of course, a principled decision like that may indirectly benefit the company, sometimes over a longer period. A decision based on ethical considerations may, for example, enhance the company's reputation in the marketplace. However, that is not essential. The directors are merely bound to take reasonable care.[376] Reasonable care does not require strict adherence to cost or economic principles.

330. Nor does a director's obligation to exercise reasonable care require strict adherence to legal principles or strict legal rights. Let's assume that, in this case for example, the directors were given legal advice to the effect that, as a matter of law, FMIF was entitled to the whole of the proceeds of the settlement. In our submission, the directors would still be entitled to decide that, whilst the FMIF held a legal entitlement to 100% of the proceeds, some other apportionment was fair and equitable given the parties' respective contributions to the recovery of the settlement proceeds. The directors are bound to act reasonably; they are not required to act strictly in

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371 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(iv).

372 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(c)(v).

373 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, recital B.

374 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 8, 118 and 341(c); Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 4(a), 94 and 218(d).

375 In *ASIC v Cassimatis (No. 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [485] Edelman J posed an example of conduct which was unreasonable although it was a financially beneficial decision for the company.

376 *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

accordance with legal rights.

331. Acting reasonably may include, for example, acting on advice as to what is fair, or acting to, in effect, make an 'ex gratia' payment or a donation where appropriate. Indeed, it is accepted that directors are entitled to display entrepreneurial flair and are entitled to take commercial risks, and are even entitled to embark on a high-risk strategy.[377] They are not susceptible to criticism merely because a lawyer or an accountant would not have made that decision.

332. Thus, it is wrong to view directors' decisions as necessarily dictated by economic or legal considerations. Of course, in some situations, legal obligations may **require** a specific payment. That is not the case here.[378] The two funds were free to agree to vary the priorities to take into account MPF's contribution.

333. In *ASIC v Cassimatis (No. 8)*[379] Edelman J referred to the judgment of Ipp J in *Vrisakis v Australian Securities Commission*:[380]

> *No act of commission or omission is capable of constituting a failure to exercise care and diligence under s 229(2) unless at the time thereof it was reasonably foreseeable that harm to the interests of the company might be caused thereby. That is because the duty of a director to exercise a reasonable degree of care and diligence cannot be defined without reference to the nature and extent of the foreseeable risk of harm to the company that would otherwise arise.*
>
> *Further, the mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to the interests of the company will not necessarily mean that he has failed to exercise a reasonable degree of care and diligence in the discharge of his duties. The management and direction of companies involve taking decisions and embarking upon actions which may promise much, on the one hand, but which are, at the same time, fraught with risk on the other. That is inherent in the life of industry and commerce. The legislature undoubtedly did not intend by s 229(2) to dampen business enterprise and penalise legitimate but unsuccessful entrepreneurial activity. Accordingly, the question whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.*

334. The focus of that quote is the balancing of the foreseeable risks of harm against the potential benefits of a commercial decision. However, the idea that a director 'balances' various factors is not confined. The foreseeable risk of harm to the corporation which falls to be considered in s 180(1) [or, by analogy, s 601FD(1)(b)] is not confined to financial harm. It includes harm to all the interests of the corporation.[381] The factors to be considered are not to be balanced or weighed as though by a common metric, and, in weighing the factors of likelihood of injury, seriousness of potential injury, and interest to be sacrificed to avoid the risk, the considerations are practically not susceptible of any quantitative estimate and a solution always involves some preference or choice between incommensurables.[382]

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377 *Ingot Capital Investments v Macquarie Equity Capital Markets (No. 6)* (2007) 63 ACSR 1; [2007] NSWSC 124 at [1426] - [1437].

378 Even if the priorities give a bank, for example, first priority the bank and a lower ranked mortgagee are free to agree to vary the priorities. The rules as to priority are not mandatory. Parties are free to agree to vary them.

379 (2016) 336 ALR 209; [2016] FCA 1023 at [485].

380 (1993) 9 WAR 395 at (449-450)

381 *ASIC v Cassimatis (No. 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [483]

382 *ASIC v Cassimatis (No. 8)* (2016) 336 ALR 209; [2016] FCA 1023 at [485], citing *Vrisakis v Australian Securities and Investments Commission* (1993) 9 WAR 395 and *Conway v O'Brien* 111 F 2d 611, 612 (2nd

335. Of course, the nature of the directors' decision here did not involve a conventional balancing of a commercial risk against foreseeable risk of harm to either fund. Instead, the choice for the directors was whether both funds could agree on a fair split of the proceeds, which recognised the circumstances of the litigation and the MPF's contribution, and thereby enable both funds to share in the proceeds of $45.5m.[383] In other words, the risk of harm was that, if they could not agree, they would remain committed to complex and expensive litigation with an uncertain outcome. And, the directors must have been conscious that, if a split of the proceeds was perceived to be unfair, members of either fund would complain or litigate.

336. ***Third***, whilst it may be accurate to describe the proposed sale of the land as a sale by PTAL as a mortgagee exercising its power of sale under its mortgage, that sale of the land was only part of the settlement. The land sale contract expressly sold the land for a purchase price of $10m. The balance of the settlement sum, namely $35.5m, was attributable to, and the price of:

(a) the releases given in the deed of settlement and release and in the deed of release; and

(b) the plaintiffs (including LMIM as RE of the MPF and PTAL) agreeing to the dismissal of their claims in the proceedings.

337. Thus, it is wrong to characterise the settlement as merely the exercise of a mortgagee's power of sale.

Criticism 3: MPF was Not Essential

338. Several criticisms of the decision are based on the assertion that an agreement with the MPF was not essential in order for the settlement to proceed. For example, paragraph 34(b) of the statement of claim alleges that the directors failed to have proper regard or consideration to the (alleged) fact that there was no necessity for the FMIF to reach agreement with the MPF about sharing the amounts payable to PTAL because:

(a) the MPF was not a party to the Deed of Release nor the Gujarat Contract;

(b) there was no binding agreement to share the settlement proceeds; and

(c) the agreement of the MPF was not required in order for the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract.

339. A similar allegation was made in paragraph 37A(aa)(i) but is now deleted, as is a similar allegation in paragraph 30C(b).

340. However, paragraph 37A(aa)(ii) remains and alleges this:

> *The directors ought to have concluded that they need not reach agreement with MPF about the sharing of proceeds for the settlement to occur.*

341. Thus, the reasons stated by the plaintiff as to why the MPF had no say in the settlement are said to be that:

(a) the MPF was not a party to the Deed of Release or Gujarat Contract;

(b) there was no binding agreement; and

Cir, 1940) (Learned Hand J).

383 For reasons which will be explained later, the agreement of both FMIF and MPF was required.

(c) the MPF's agreement was not required for the FMIF and PTAL to perform their obligations under the Deed of Release and the Gujarat Contract, or for the settlement to occur.

342. The plaintiff's criticisms are incorrect. These submissions are made.

343. ***First***, it can be accepted that there was no prior agreement that bound either fund to a particular apportionment of the settlement proceeds. However, recording an agreement on the split of the proceeds was the objective of the Deed Poll. The fact that the agreement occurred once the settlement was imminent made it relatively easy to assess the respective contributions to the litigation and the likely quantum of the proceeds. There were advantages and disadvantages to agreeing a split early in the process, or later.

344. ***Second***, it is the ultimate agreement on the split of the proceeds that the plaintiff challenges.

345. ***Third***, the absence of a legally binding agreement merely means that, in June 2011, when the settlement was imminent, the trustee/RE of the funds was not bound by a contract to share the proceeds in a particular way.

346. ***Fourth***, as explained in paragraph 30 above, the Bellpac proceedings were commenced by LMIM in its capacity as trustee of the MPF. Those proceedings asserted the rights of the MPF as chargee/mortgagee over Bellpac. In those circumstances, the Bellpac proceedings could not be settled or discontinued without the MPF having agreed – expressly or implicitly – to relinquish and forgo its rights to continue.

347. No aspect of the duties under s 601FD could compel the directors to force the MPF to agree to release its rights for no consideration.

348. There is no evidence to suggest that Gujarat would have been willing to proceed with a settlement without obtaining a release from MPF. The exchange of releases and the dismissal of the whole Bellpac proceedings was a crucial part of the settlement agreements. There is no suggestion on the evidence that Gujarat would have agreed to the settlement without obtaining a release from the MPF and dismissal of the entire proceedings.

349. ***Fifth***, it is immaterial whether the MPF was, or was not, formally a party to the Deed of Release or Gujarat Contract. The Deed of Release (and also the Deed of Settlement and Release[384]) expressly contemplated that the compromise was to affect a full and final settlement and discontinuance of all of the claims in the proceedings. The better view is that those documents, comprehending a full and final settlement of all claims, could not have been entered on 21 June 2011, had the Deed Poll not first been executed on or about 14 June 2011.[385] At the very least, Gujarat could not have settled with the MPF absent agreement from the MPF.

350. Once the MPF's agreement was secured via the Deed Poll, the terms of the settlement deeds were irrelevant, as between the FMIF and the MPF. In any event, the plaintiff's position is now confused on this matter. It now contends that the MPF was bound to the Deed of Release and the Deed of Settlement and Release without being a party to either of those documents.[386]

351. ***Sixth***, it is immaterial that the MPF's agreement was not required for the FMIF and PTAL to perform their obligations under the settlement documents (including the Gujarat contract). This

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384 Deed of Settlement and Release dated 21 June 2011 (Exhibit 86) **[FMIF.003.003.0118]**.

385 Hand delivered letter dated 14 June 2011 from Kingston addressed to Monaghan, Monaghan Lawyers (Exhibit 320) **[FMIF.008.001.0125]**. The letter enclosed the Deed Poll (in duplicate) signed by all Australian Directors (Exhibit 36) **[FMIF.008.001.0126]** and signed by John O'Sullivan **[FMIF.008.001.0137]**.

386 Reply to Third Defendant **[FMIF.PLE.010.0001]** and Reply to Fourth Defendant **[FMIF.PLE.011.0001]**, paras 11A(c)(x)(B) and 11A(dd)(viii)(B).

is for the same reasons as set out above. Once the settlement had been struck, and the MPF had agreed to release its claims made in the proceeding, the inability for the MPF to impede other parties from performing was inconsequential. Whether the FMIF and PTAL could perform their obligations under the settlement documents is irrelevant in any event and overlooks the fact that there could have been no complete settlement without the participation of the MPF.

352. ***Seventh***, and in any event, LMIM as trustee for the MPF was a party to each of the Deed of Release[387] and Deed of Settlement and Release,[388] properly construed. Certainly, it is true that clause 22.1 of the Deed of Release states that:

> ***22.1 Responsible Entity***
> *LM enters into this Deed and the other parties to this Deed acknowledge that they are aware that LM enters into this Deed in its capacity as the Responsible Entity of the Fund* [i.e. FMIF] *pursuant to the constitution of the Fund ("the* ***Constitution****") and the other parties to this Deed are aware of the limited scope of LM's obligations and powers under such Fund.*

353. The evident objective of that clause was to ensure that LM's capacity as the RE of FMIF is acknowledged. It is true that there is no equivalent provision regarding LM's capacity as the Trustee of the MPF. However, that omission is likely to be a mistake. The substance of the deed makes clear that the objective of the settlement is to resolve the claims by and against both funds/mortgagees.

354. In particular:

(a) Recital C to the Deed of Release states that:

> *LM [a reference to LMIM] and PTAL [as custodian of LMIM as RE of the FMIF] have substantial* ***sums*** *to Bellpac and* ***both*** *hold:*
>
> *(i) registered* ***mortgages*** *over the Bellpac land (or most of it); and*
>
> *(ii) registered fixed and floating* ***charges*** *over all of the assets of Bellpac.* [emphasis added]

Note, in particular the use of plural language [emphasized above] which makes clear that the intention is to refer to both mortgages, that is the mortgage held by PTAL and by LMIM as Trustee for MPF. No other two mortgages could possibly be referred to.

(b) Recital E states that: "*Bellpac is in default of its obligations to LM and PTAL and that PTAL proposes to sell the Bellpac land as mortgagee in possession.*"

That language again suggests two separate defaults and that one of the lenders, or at least its custodian, is intending to sell as mortgagee in possession. The likelihood is that the draftsperson is, inaccurately, assuming that PTAL holds the first mortgage and that LM holds the MPF (second) mortgage;

(c) Recital F states that:

> *Disputes have arisen between LM, Bellpac and PTAL and Gujarat and Coalfields regarding their rights, obligations and liabilities under the 2004 Agreements and:*

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387 Deed of Release (Exhibit 85) **[FMIF.003.003.0198]**.

388 Deed of Settlement and Release (Exhibit 86) **[FMIF.003.003.0118]**.

(a) *LM, PTAL and Bellpac commenced proceedings in the Supreme Court of New South Wales against Gujarat, Coalfields, Bounty and GPC Equipment, which were allocated Proceedings number 2009/298727* ***(the LM Proceedings)***

(b) *Gujarat commenced proceedings in the Supreme Court of New South Wales against Bellpac which were allocated proceedings number 2009/298733* ***(the Gujarat Proceedings).***"

As explained above, the Bellpac proceedings were commenced by, and involved claims by, the MPF, including for damages against Gujarat;[389]

(d) Recital H in in these terms:

By consent of the parties, the LM Proceedings and the Gujarat Proceedings were mediated before the Hon. Michael McHugh AC QC on 9 November 2010 and LM, PTAL and Bellpac and Gujarat have agreed between them the terms for the settlement of ***all of their disputes****, including the disputes in the LM Proceedings and the Gujarat Proceedings, and to regulate their relationship.*" [emphasis added]

Thus, the intention was to settle all disputes, including those in the proceedings commenced by the MPF.

(e) that is made clear in the operative part of the Deed. Clauses 5 and 6 of the Deed provide for full releases between, *inter alia*, LMIM and Gujarat in the following terms:

5. RELEASE BY PTAL, LM AND BELLPAC

5.1 With effect from the date of this Deed, ***LM, PTAL*** *and Bellpac each release each of Gujarat and Southbulli from all Claims which any one or more of them has or had or may have against Gujarat or Southbulli made in, arising out of or related in any way either directly or indirectly to:*

5.1.1 the ***LM Proceedings****;*[390]

5.1.2 the ***subject matter of the LM Proceedings****;*

5.1.3 the ***Gujarat Proceedings****;*

5.1.4 the ***subject matter of the Gujarat Proceedings****;*

5.1.5 the events and documents referred to in the recitals to this Deed; and

whether arising before or after the execution of this Deed or completion under this Deed save for any Claim arising pursuant to a Transaction Document.

5.2 ***PTAL, LM*** *and Bellpac hereby acknowledge that they are aware that they or their legal representatives, agents or servants may discover*

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389 Amended Commercial List Summons – Case Number 2009-298727 (Exhibit 144) **[FMIF.005.006.0001 at .0055]** [45].

390 The term '*LM Proceedings*' is defined in the recitals as proceeding number 2009/298727. As explained above at paragraph 30, that was the proceeding in which both MPF and FMIF made claims.

facts different from or in addition to the facts which they know now or believes to be true with respect to any of the matters referred to in clause 5.1 but that it is their intention to, and they do hereby, finally absolutely settle according to the terms of this Deed, any Claims the subject of the release and discharge in clause 5.1.

5.3 ***PTAL, LM*** *and Bellpac agree that this Deed may be pleaded by Gujarat and Southbulli as a bar to any Claims instituted by PTAL, LM or Bellpac (save proceedings instituted for breach of the Sale Contract) with respect to any Claims the subject of the release and discharge in clause 5.1.*

6. RELEASE BY GUJARAT & SOUTHBULLI

6.1 *With effect from the date of this Deed, Gujarat and Southbulli each release each of* ***PTAL, LM*** *and Bellpac from all Claims which it has or had or may have against any of PTAL, LM or Bellpac made in, arising out of or related in any way either either directly or indirectly to:*

6.1.1 *the* ***LM Proceedings****;*

6.1.2 *the* ***subject matter of the LM Proceedings****;*

6.1.3 *the Gujarat Proceedings;*

6.1.4 *the subject matter of the Gujarat Proceedings;*

6.1.5 *the events and documents referred to in the recitals to this Deed; and*

whether arising before or after the execution of this Deed or completion under this Deed save for any Claim arising pursuant to a Transaction Document.

6.2 *Gujarat and Southbulli hereby acknowledge that they are aware that they or their legal representatives, agents or servants may discover facts different from or in addition to the facts which they know now or believe to be true with respect to any of the matters referred to in clause 6.1 but that it is their intention to, and they do hereby, finally absolutely settle according to the terms of this Deed, any Claims the subject of the release and discharge in clause 6.1.*

6.3 *Gujarat and Southbulli agree that this Deed may be pleaded by* ***PTAL, LM*** *and Bellpac as a bar to any Claims instituted by Gujarat or Southbulli (save proceedings instituted for breach of the Sale Contract) with respect to any Claims the subject of the release and discharge in clause 6.1.* [emphasis added]

(f) the separate Deed of Release and Settlement also provided for mutual releases and consent orders in the following terms:

4. RELEASE BY PTAL, BELLPAC AND LM

4.1 *With effect from Completion,* ***PTAL****, Bellpac and* ***LM each*** *release*

Coalfields from all Claims arising in any way directly or indirectly from any of the following:

(a) the Proceedings;[391]

(b) the conduct of the Proceedings;

(c) the circumstances or allegations giving rise to or referred to in the Proceedings;

(d) the 2004 Agreements;

(e) the 2005 Agreements;

(f) the Deed of Settlement;

(g) the Amended Deed;

(h) the Restated Settlement Deed;

(i) any dealings between the parties concerning the Coal Mine and the Coal Mine Land (including the Venture Agreement); and

(j) entitlement to costs:

(i) under the Court rules, consequent on the dismissal of the Proceedings or otherwise; and

(ii) under any unsatisfied orders for costs made in the Proceedings.

4.2 For the avoidance of doubt, Bellpac and Coalfields hereby agree that any agreement or steps taken to sell or transfer the Coal Mine Land (or any part of it) from Bellpac to Coalfields is hereby rescinded and is of no force or effect and Coalfields surrenders any Claim to the Coal Mine Land.

5. RELEASE BY COALFIELDS

5.1 With effect from Completion, Coalfields surrenders all right, title and interest in the Coalfields Land.

5.2 With effect from Completion, Coalfields releases each of GNCCL and Bellpac from all Claims arising in any way directly or indirectly from any of the following:

(a) the Proceedings;

(b) the conduct of the Proceedings;

(c) the circumstances or allegations giving rise to or referred to in

391 The term '*the Proceedings*' is defined as '*the First Proceedings and the Second Proceedings*'. Each of those terms are defined as (respectively) '*Plaint number 2009/298733 in the Equity Division of the Supreme Court of New South Wales*' and '*Plaint Numbers 2009/298727 and 2009/298736*'.

the Proceedings;

(d) the 2004 Agreements;

(e) the 2005 Agreements;

(f) the Deed of Settlement;

(g) the Amended Deed;

(h) the Restated Settlement Deed;

(i) any dealings between the parties concerning the Coal Mine and the Coal Mine Land (including the Venture Agreement); and

(j) entitlement to costs:

(i) under the Court rules, consequent on the dismissal of the Proceedings or otherwise; and

(ii) under any unsatisfied orders for costs made in the Proceedings.

(k) Coalfields agrees to indemnify GNCCL and Gujarat NRE Coke Limited against any Claim for costs by Highfields (Denman) Pty Limited.

6. DISPOSAL OF PROCEEDINGS

6.1 Dismissal of the Proceedings

*On the execution of this Deed, PTAL, Bellpac, LM, GNCCL and Southbulli will deliver to Scott Friedman Consent Orders signed by each of them in the form of the orders annexed in "**Schedule A**" hereto to be held in escrow. Within 7 days of Completion, Coalfields will file and serve on each of the other parties the Consent Orders.*

(g) the Deed of Release also contemplated simultaneous entry into the Deed of Release and Settlement,[392] which also contemplated mutual releases amongst all relevant parties and, in particular, execution of consent orders for the dismissal of the proceedings, including of the summons in the Bellpac proceedings; and

(h) the parties entering into the Deed of Release and Deed of Release and Settlement must be taken to have known upon entering those documents that the entry into those documents and into the consent dismissal of the Bellpac proceedings would compromise and extinguish the rights of the MPF as asserted in those proceedings.

355. The execution page of the Deed of Release provides that it was executed by LMIM. It is not executed expressly in its capacity either as RE of the FMIF or as trustee of the MPF.

356. Consequently, despite the plaintiff's pleading, the settlement of the Bellpac proceedings needed the concurrence of LMIM as trustee of the MPF.

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392 Deed of Release and Settlement dated 21 June 2011 (Exhibit 86) [**FMIF.003.003.0118**].

357. Nothing in the above concedes that the payment to PTAL provided for in the Deed of Release signified that, as between the FMIF and the MPF, the FMIF was to receive all of the settlement proceeds. That was always subject to the agreement as recorded in the Deed Poll, as to the split of the settlement proceeds between the FMIF and the MPF. In accordance with that, the settlement payment in the sum of $15,546,147.85, was paid directly from Gujarat to LMIM as trustee for the MPF.[393]

358. In any event, even if PTAL was entitled to receive and retain all of the settlement money, the subsequent direction of funds to the MPF would not be a breach of duty by either Mr van der Hoven or Ms Mulder. Their involvement ceased upon executing the Deed Poll.

Criticism 4: Litigation Funding Analogy

359. The plaintiff complains that the use by the directors (directly or indirectly through their advisers) of the litigation funding analogy was invalid. Again, the allegation is put in a repetitive way:

(a) the directors failed to consider whether the MPF could be treated as if it was an arm's-length litigation funder when it was a second registered mortgagee with second priority;[394]

(b) the directors failed to obtain independent legal advice or other independent advice as to whether, in the circumstances outlined above, the MPF could be treated as if it were an arm's-length litigation funder;[395] and

(c) the directors ought not to have concluded that the MPF was in an analogous position to a litigation funder and that the settlement proposals would not be reasonable on an arm's-length basis.[396]

360. Each of those contentions should be rejected.

361. ***First***, the directors plainly did consider the analogy with litigation funders. Clause 3.1 of the Deed Poll records the directors' considerations as including (as the 13th consideration):

> *(m) the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length - the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous - in giving consideration to this issue, the Directors considered the litigation funding practices in the open market.* [397]

362. WMS's report of 7 March 2011 recorded WMS's view that: "*In affect* (sic) *MPF's role was not dissimilar to a litigation funder.*"[398] WMS continued:

> *Based on our inquiries, there are a number of organisations providing litigation funding. The terms of funding are typically established on a case by case base.*
>
> *We note that IMF is a public listed company providing funding of legal claims and other related services in Australia and in other jurisdictions, where the claim size is over AUS*

393 This is not in contest. See Statement of Claim **[FMIF.PLE.013.0001]**, para 35.
394 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(d) (first line).
395 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(e).
396 Statement of Claim **[FMIF.PLE.013.0001]**, para 37A(aa)(v) – second (v) [note problem with numbering].
397 Deed Poll (Exhibit 36) **[FMIF.008.001.0126** at **.0131** to **.0132]**.
398 WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6816]**.

$2million.

A document from IMF entitled "Apply for Funding" states:

IMF's commission normally ranges between 20% and 45%. Factors affecting the percentage include:

i. the level of legal fees and disbursements expected to be incurred;

ii. the strength of the case;

iii. the likely capacity of the defendant to meet a judgment; and

iv. the time it will take for the case to be completed." [399]

363. The WMS report also referred to another listed company, Hillcrest Litigation Services Limited, which stated that the percentage was subject to negotiation but that the percentage will normally be in the range 30 to 45%.[400]

364. WMS concluded that:

> *In our opinion, there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF. Accordingly, a range of MPF's entitlement between 30% to 40% would appear reasonable given the complexities in the matter and the fact it appears to be close to settling pre trial.*
>
> *Based on our inquiries above, in our opinion, 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. The same percentage split should also apply to the interest income to be received (i.e. BBSY plus 1% over 10 years).*[401]

365. LMIM had also made its own inquiries[402] and had sought Allens view as to the rates charged by litigation funders.[403]

366. ***Second***, the directors were plainly correct to consider the analogy with litigation funders. That is an analogous commercial relationship where a party funds the litigation of another. The plaintiff has proposed no evidence that identifies why the analogy is inappropriate. Of course, the reason why the directors, and their advisors, placed some emphasis on finding an analogous arm's length transaction was that ASIC's guidelines concerning conflict suggested reference to equivalent arm's length transactions.[404]

367. ***Third***, the directors considered the analogy because it was raised by their independent experts as an appropriate consideration. They were plainly correct about that because it was a useful analogy. It was just an analogy and used as such.

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399 WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6816** to **.6817]**.

400 WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6817]**.

401 WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6818]**.

402 Email from Petrick to Tickner copied to Darcy, Monaghan, Drake and van der Hoven dated 2 December 2010 (Exhibit 29) **[FMIF.100.002.9294]**. The email indicates, with reference to IMF, that litigation funding fees ranged between 20-40% of settlement or judgment.

403 Email from Monaghan to Tickner dated 1 December 2010, confirming that Allens' view was that litigation funding was usually between 30-35% of the recovered sum (Exhibit 26) **[FMIF.100.003.4665]**.

404 See the WMS Report (Exhibit 32) **[FMIF.100.003.6807** at **.6814-6816**.

368. ***Fourth***, there is no evidence to suggest that the directors considered this factor to the exclusion of all other factors, or that they gave it undue weight.

369. ***Fifth***, it is necessary to try to deal with the assertion in paragraph 34(e) of the statement of claim that: *"The directors failed to obtain independent legal advice or other independent advice as to whether, in the circumstances outlined above, ...MPF could be treated as if it were an arm's-length litigation funder."*

370. In fact, the directors did obtain independent legal and other (i.e. accounting) advice on whether MPF could be treated as being in an analogous situation. It was a factor expressly considered by WMS (see above). And, when Allens came to give their independent legal report, they referred to the WMS advice and its reliance on the arm's length analogy.[405]

Criticism 5: Failure to Have Proper Regard to the Different Interests

371. A pleaded criticism is based on a failure by the directors to have proper regard to the different interests of the two funds. The directors, it is said, failed to have proper regard or give adequate consideration to the different interests of FMIF and MPF.[406]

372. In fact, the directors did consider the different interests of the two funds. The Deed Poll records the fact that PTAL held a first registered in respect of different indebtedness to that of the MPF which was subject to the MPF mortgage.[407] The Deed Poll also observed that the consent of the MPF was required for the settlement of the Bellpac proceedings[408] and concluded that the *"Settlement Proposals are in the best interests of each Relevant Fund's members".*[409]

Criticism 6: Failure to Consider the Central Question

373. The plaintiff alleges a failure to properly consider the appropriateness of the apportionment. In paragraph 34(d) of the statement of claim, for example, the criticism is that the directors **failed to consider** whether it was appropriate to split the Bellpac Settlement proceeds ($45.5m) in accordance with the 'Proceeds Split' (i.e. 65/35).[410]

374. The directors plainly did properly consider the appropriate apportionment. That is why they sought independent advice from WMS and from Allens. They expressly record in the Deed Poll that:

    (a) their consideration extended to the matters listed it the Background recitals, including that WMS had reported that *"In our opinion, the proposed split of 65% to FMIF and 35% to MPF is fair and reasonable having regard to comparable arm's length transactions"*;[411]

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405 See WMS Report (Exhibit 32) **[FMIF.100.003.6995** at **.6997]**. The WMS Report makes it clear that *"there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF."* Consequently, the conclusion in the WMS Report will be an important factor in the RE's decision in respect of the split of the litigation proceeds. However, the RE should not rely solely on the report. The directors of the RE must make "*their own independent assessment*" of the relevant matters, and the advice from WMS does not replace "*careful judgement by the directors*". See also at **.7003**. The report also makes it clear that "*there is significant reliable data from comparable transactions between parties dealing at arm's length to positively conclude a fair and reasonable split of the litigation proceeds to FMIF and MPF*".

406 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(g).

407 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, recital B.

408 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cl 3.1(b).

409 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cl 3.1(h).

410 Statement of Claim **[FMIF.PLE.013.0001]**, para 34(d) (second line).

411 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, recital M.

(b) their considerations included the ASIC Regulatory Guide 76 dealing with related party dealings;[412]

(c) their conclusions, *inter alia*, that:

> *the acceptance of the Settlement Proposals will have no negative effect on either of the Relevant Funds' financial positions or performance that is not balanced by sufficient positive effects such that the terms of the Settlement Proposals are not unreasonable in the circumstances if the parties were dealing at arm's length"*[413]

and:

> *the Settlement Proposals would be reasonable in the circumstances if LM as RE of the FMIF and LM as Trustee of the MPF were dealing at arm's length - the Directors have come to this conclusion on the basis of their own experience and previous dealings in relation to comparable transactions as well as the WMS Report. The proposed Proceeds Split is similar to that which would prevail in the open market for similar transactions between unrelated parties and is not extraordinary or excessively generous - in giving consideration to this issue, the Directors considered the litigation funding practices in the open market.* [414]

375. Similar criticisms are made in these paragraphs of the statement of claim:

(a) in paragraph 37A(aa)(iii) the criticism is that the directors ought **not** to have concluded that the proceeds split was fair to the FMIF;

(b) paragraph 37A(aa)(v) asserts that the directors ought **not** to have concluded that the proceeds split was reasonable;

(c) paragraph 37A(a)(i) contends that the directors ought to have determined that the MPF had **no** entitlement to be paid the settlement, or no entitlement beyond reimbursement;

(d) paragraph 37A(a)(iii) says that the directors ought to have determined that the settlement payment would cause detriment, in the form of depletion of assets, to the FMIF (either if the payment was made at all or if the payment was beyond reimbursement);

(e) paragraph 37A(b) says that the directors ought to have decided **not** to split the proceeds at all, and would have paid all the proceeds to the FMIF;

(f) paragraph 37A(aa)(iv) says that he directors ought **not** to have concluded that the proceeds split was in the best interests of FMIF's members; and

(g) paragraph 37A(a)(ii) (a mirror image of the (f) above) says that the directors ought to have determined that the settlement payment was not in the interests of the members of the FMIF.

376. Those criticisms are directed to the directors' conclusions. There is no identifiable complaint about the process of reasoning. The complaint is that the directors got to the 'wrong' outcome in the sense of a different conclusion to the conclusion that would have been arrived at by the liquidator or his lawyers.

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412 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cl 2.1(e).
413 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, cl 3.1(l).
414 Deed Poll (Exhibit 36) **[FMIF.008.001.0126** at **.0131** to **.0132]**.

377. Lurking behind these complaints is an implicit assumption that the MPF was not entitled to any of the proceeds because it ranked lower in priority (see the discussion above). Possibly also the plaintiff takes the view that the MPF was not a necessary party to the settlement (see discussion above).

The Reasonable Person in the Directors' Position

378. As explained above, the objective element in s 601FD(1)(b) is qualified, in that the reasonable person is taken to be in the particular officer's position.

379. The standard imposed by s 180, and by analogy s 601FC(1), requires consideration of all of the circumstances of the officer's role (including job description and what others within the corporation expected the officer to do) including any special tasks or responsibilities that the officer had.[415]

380. Ms Mulder's evidence concerning her position in LMIM can be summarised as follows:

(a) she was the marketing director, within a large organisation in which each of the directors was responsible for a particular area of the operation;[416]

(b) she has a background in working at law firms, but is not a lawyer and her formal education did not extend to tertiary studies;[417]

(c) she headed what she referred to as the *"marketing team"*,[418] comprising of about 25 people, that was responsible for growing and maintaining relationships with financial advisers, nationally and internationally;[419]

(d) throughout the period of the Bellpac proceedings, Ms Mulder was fully occupied in dealing with the impact of the Global Financial Crisis, as detailed in paragraphs 100 to 101 of her affidavit, and otherwise evidenced generally from her affidavit. This included travelling internationally for about 4 months of every year between 2008 and throughout 2011.[420] Accordingly, Ms Mulder had no capacity to be across every other thing that was happening in the company.[421] This included the Bellpac recovery processes;[422]

(e) the Bellpac recovery, including the Bellpac proceedings, was managed by the Property Asset Management Team together with the in-house legal team. In practice, the Bellpac proceedings were managed by Mr Monaghan, Mr Tickner and Ms Darcy. (This is the evidence of Ms Mulder generally in her affidavit[423] and is supported by all of the documentation exhibited to that affidavit showing the progress of the Bellpac proceedings);

(f) Ms Mulder did not have substantive involvement in the Bellpac proceedings, or their settlement.[424] She informed herself appropriately by keeping an eye on updates as they were provided, either by email or at meetings;[425]

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415 *ASIC v Vines* (2005) 55 ACSR 617; 23 ACLC 1,387; [2005] NSWSC 738 (Austin J at [1057])
416 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 32 and 55.
417 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 13 and 14.
418 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 60.
419 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 61.
420 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 100.
421 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 101.
422 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 102.
423 See, in particular, Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 95 and 102.
424 As detailed in her affidavit, but see, in particular, Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 95 and 96.
425 As detailed in her affidavit, but see, in particular, Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 97 and 98.

(g) Ms Mulder placed her trust and confidence in Mr Tickner, Mr Monaghan and Ms Darcy, and she relied on them and on Allens and WMS to properly manage the Bellpac recovery processes (including as to the issues in the settlement of the Bellpac proceedings).[426] Her reliance in this regard was necessary and reasonable in the circumstances;

(h) she knew that advices had been sought and received from Allens and WMS, which she understood were favourable to the proposed split of the settlement proceeds;[427] and

(i) Ms Mulder had no reason to believe that those advices were in any way inadequate or inappropriate, or were not able to be reasonably relied upon.[428] Neither Mr Monaghan nor any of the independent advices expressed any particular warning to the directors that the proceeds split could not proceed without breaching duties under s 601FD of the Act.

381. Similarly, Mr van der Hoven's evidence concerning his role can be summarised as follows:

(a) he was the head of LMIM's foreign exchange team.[429] His background was in stockbroking[430] and he has tertiary qualifications in commerce and economics.[431] He is not a lawyer and has had no legal training;

(b) he led a team of three other staff, and was focussed on managing the cash flow requirements and foreign exchange exposure of LMIM's various funds;[432]

(c) this work required daily supervision, which intensified with the impact of the global financial crisis, such that, between 2010 to 2013 his work was mostly occupied managing the cash flow and foreign exchange positions;[433]

(d) he had regular travel commitments for up to 8 weeks a year, usually in about 2-week blocks;[434]

(e) he too was part of the organisational structure within LMIM, where each director was responsible for their own department consistent with their skills and experience;[435]

(f) he was not part of the team responsible for managing the Bellpac recovery, including the Bellpac proceedings.[436] That was Tickner, Monaghan and Darcy and the Property and Asset Management Team;[437]

(g) Mr van der Hoven did not have substantial involvement in the Bellpac proceedings or settlement negotiations. His involvement was limited effectively to assessing the sufficiency of available cash for drawings requested on the funds (including the MPF);[438]

(h) he would keep an eye on updates about the litigation, but had no detailed knowledge of it;[439]

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426 Affidavit of Mulder **[FMM.LAY.001.0001]**, paras 98, 102, 204, 205, 220(i) and 223(c).
427 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 220(i).
428 Affidavit of Mulder **[FMM.LAY.001.0001]**, para 223(c).
429 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 47.
430 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 26.
431 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 23.
432 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 48–49.
433 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 53–54 and 59.
434 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 56.
435 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 66 – 109.
436 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 118 – 123.
437 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 124 and 125.
438 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 126 and 127.
439 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 124 and 128.

(i) he too place trust in and relied upon Tickner, Darcy and Monaghan to properly manage all aspects of and processes concerning the Bellpac proceedings and settlement, including in respect of the split of settlement proceeds.[440] Again, this reliance was necessary and reasonable;

(j) Mr van der Hoven was also aware that independent legal and accounting advices had been obtained from Allens and WMS concerning the proceeds split and the conflict issues.[441] His understanding was that they were favourably inclined towards the proceeds split.[442] He relied on Monaghan, Darcy or Tickner to alert him if there was any difficulty with the proceeds split,[443] but no one said anything giving rise to any such concern.[444]

382. There is no serious dispute about the roles of either Mr van der Hoven or Ms Mulder. Neither were centrally or materially involved. In approving the proceeds split, they can both be seen to have relied on, listened to and carefully considered the information and opinions presented to them by their colleagues.

383. Mindful of their position, the reasonableness of their conduct cannot be doubted. Nor can it be seriously disputed that it was reasonable for them to leave to Ms Darcy, Mr Tickner and Mr Monaghan the responsibility of running the NSW litigation, and recommending the proposed settlement and split, especially in circumstances where the advice of competent lawyers and accountants were involved.

384. In *AWA Ltd v Daniels t/as Deloitte Haskins & Sells*[445] Rogers J accepted the test of permissible delegation contained in the *City Equitable* case namely that:

> *A director is entitled to rely without verification on the judgment, information and advice of the officers so entrusted. A director is also entitled to rely on management to go carefully through relevant financial and other information of the corporation and draw to the board's attention any matter requiring the board's consideration. The business of a corporation could not go on if directors could not trust those who are put into a position of trust for the express purpose of attending to details of management ... Reliance would only be unreasonable where the director was aware of circumstances of such character, so plain, so manifest and so simple of appreciation that no person, with any degree of prudence, acting on his behalf, would have relied on the particular judgment information and advice of the officers: Re City Equitable Fire Insurance Co Ltd [1925] Ch 407 at 428. A non-executive director does not have to turn him or herself into an auditor, managing director, chairman or other officer to find out whether management is deceiving him or her: Graham v Allis-Chalmers Manufacturing Co 188 A 2nd 125 at 130.*

385. In *Daniels t/as Deloitte Haskins & Sells v AWA Ltd*[446] the New South Wales Court of Appeal stated that the opinion of Rogers J did not accurately state the extent of the duty of directors. Rogers J had stated that 'reliance would only be unreasonable where the director was aware of circumstances of such a character, so plain, so manifest and so simple of appreciation that no person, with any degree of prudence, acting on his behalf, would have relied on the particular judgment information and advice of the officers'. However, the Court of Appeal drew upon

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440 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, paras 129, 341(f), 343–345.
441 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 346.
442 *Ibid.*
443 Affidavit of van der Hoven **[EVH.LAY.001.0001]**, para 341–346.
444 *Ibid.*
445 (1992) 7 ACSR 759 at 868.
446 (1995) 37 NSWLR 438; 16 ACSR 607 at 665-6; 13 ACLC 614.

United States authority which has held that where directors know, or by the exercise of ordinary care should have known, any facts that would deny reliance on others, then such reliance may lead to the imposition of liability.[447]

386. Here, no facts suggest that it was unreasonable for Ms Mulder and Mr van der Hoven to rely on the recommendations of the directors who were directly involved and whose views were supported by independent expert advice.

Proposed Findings

1. The directors' reliance on the Allens Advice and on the WMS advice was reasonable.

2. The directors did not breach their duty of care under s 601FD(1)(b).

PART F: ALLEGED LOSS & DAMAGE

387. The Court ***may*** make a compensation order under s 1317H if damage is shown to have resulted from the contravention.[448]

388. The plaintiff's case fails as it has made out the requisite causal connection between the alleged damage and alleged contravening conduct.

389. The approach to causation under s 1317H is said to be similar to that arising under s 82 of the *Trade Practices Act* 1974 [now *Compensation and Consumer Act* 2010 (Cth)].[449] The issue is one of fact and common sense. While the words of the statute have primacy, the cases have generally applied the negative *"but for"* criterion. This involves the court determining what action or inaction would have occurred if the contravening conduct had not occurred.[450] Similarly, damages in a negligence case involves the court determining what course events would have taken if the defendant had properly discharged his or her professional duty.[451]

390. In the present case, the contravening conduct is said to be the conduct in agreeing to make, cause, permit or direct the settlement payment be made to the MPF.[452] That agreement was made on or about the 14 June 2011, as recorded in the Deed Poll. The plaintiff does not contend for any counterfactual save to say that, had the defendant directors performed their duty the FMIF would have received the entire $45 million. That is premised on the MPF having freely given up its valuable rights against Gujarat (and they were valuable as they formed part of what Gujarat paid $45.5 million for). For the reasons already submitted, and as pleaded at paragraphs 54A, 54C and 56A of each of Mr van der Hoven's and Ms Mulder's defence, the MPF was not required to do. Nor was it prepared to do, nor was it realistic or reasonable to expect it to do so.

391. As explained above, and as a matter of common sense, because the MPF was a party to the NSW proceedings, the true counterfactual is that the FMIF would be mired in expensive and complex litigation which it could not have afforded to run. The directors were entitled to take the view

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447 *Federal Deposit Insurance Corp v Bierman* 2 F 3d 1424 (1993) citing *Rankin v Cooper* 149 F 1010 (1907) at 1013.

448 Section 1317H(1)(b) of the Act.

449 *Trilogy Funds Management Limited v Sullivan (No 2)* [2015] FCA 1452 per Wigney J at [713]; *Adler v ASIC* (2003) 179 FLR 1 per Giles JA at [709].

450 *Marks v GIO Australia Holdings* (1998) 196 CLR 494 per McHugh, Hayne and Callinan J at p. 512 [42]; *Adler v ASIC* (2003) 179 FLR 1 per Giles JA at pp. 158-9 [720] – [724]; *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1 per Edelman J at p. 85 [451] and pp. 87-88 [464]; *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 per Gummow, Hayne, Heydon and Kiefel JJ at [143].

451 *Jackson & Powell on Professional Negligence*, 4th ed at [1-117]

452 Statement of Claim **[FMIF.PLE.013.0001]**, para 45.

that that was a lesser position than the FMIF member's receipt of $32 million.

392. The directors' conduct can also be tested assuming a LMIM could have abandoned its role as trustee of the MPF, resulting in the appointment of an independent trustee to either or both of the FMIF and the MPF. This is not a counterfactual pleaded, or relied upon, by the plaintiff. However, in those circumstances, the independent trustee for the MPF would plainly have been justified in withholding its consent to the proposed settlement, in the absence of fair and reasonable compensation for its risk and expenditure on the proceedings, and for giving up its rights against Gujarat. The trustee would also have been justified in considering whether it ought to further fund the proceedings if they continued. The plaintiff has failed to show that it is any worse position than it would have been but for the conduct of LMIM's directors.

393. It is necessary to separately observe that the plaintiff's case should fail for lack of any proven counterfactual specifically as to what LMIM would have done had the directors acted with due care and diligence.

394. The plaintiff bears the onus of proving that there was a reasonably practicable alternative open to LMIM.[453] That onus is accepted in relation to negligence and s 180 of the Act and, it is submitted, applies equally to the duty under s 601FD(1)(b).

395. In this regard, the plaintiff asserts, in paragraph 37A of its statement of claim, that a reasonable person would not have made the conclusions the directors did and would not have agreed to, or caused, the settlement proceeds split to occur.

396. That is predicated, however, on the facts and matters pleaded in paragraph 34 of the statement of claim. Subparagraph 34(e), in particular, asserts that the director defendants failed to obtain independent legal or other advice as to whether:[454]

(a) LMIM as trustee of the MPF could be treated as it if was an arms-length litigation funder;

(b) it was reasonable for LMIM as trustee of the MPF to be paid in accordance with the proceeds split; and

(c) it was in the interests of the FMIF for it to agree to the MPF being paid in accordance with the proceeds split.

397. The difficulty for the plaintiff is that there is no pleading or evidence as to what would or could have happened had such advice been obtained.

398. The defendants' case is that there was no reasonable alternative to splitting the settlement proceeds, as the MPF's consent was necessary to any complete settlement and the MPF did require some payment for its efforts.

399. Once those circumstances are accepted, the plaintiff offers no reasonably practicable alternative course of conduct that would have enabled all the settlement proceeds to be paid to the FMIF.

400. As Edelman J noted with respect to the analogue duty under s 180(1):

> *"An essential question for the determination of whether s 180(1) ... has been contravened is what a reasonable person, with the position and responsibility of each respondent, in LMIM's circumstances would have done if he or she had acted with due care and diligence."*

401. ASIC failed in that case for not having proven any reasonably practicable alternative. Likewise

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453 *ASIC v Drake (No. 2)* [2016] FCA 1552 per Edelman J at [452] – [468].

454 Statement of Claim **[FMIF.PLE.013.001].**

here:

(a) the plaintiff has neither pleaded nor proven what the consequences would have been had LMIM obtained the advices they say should have been obtained;

(b) the plaintiff has failed to prove what reasonably practical alternative was open to the directors once it is accepted that the MPF's consent was required for any settlement occur.

402. The plaintiff has not satisfied this essential element of the cause of action under s 601FD(1)(b).

403. In ***summary***, and generally with respect to the plaintiff's claim, it is submitted that the plaintiff has not established any entitlement to compensation as, considering the transaction as a whole:

(a) the *'but for'* test has not been satisfied;

(b) the plaintiff has failed to establish the necessary causative link between the alleged contravening conduct and the loss and damage claimed.

404. In the premises, any breach of duty (which is denied) caused no loss to the FMIF or otherwise harmed the interests of its members.

PART G: DEFENCES UNDER PARTS 5.2C, 9.4B & 9.5 OF THE ACT

405. This section of our submissions proceeds on the premise that your Honour has concluded that the plaintiff's case should succeed. In such circumstances, it is submitted that relief from liability should be granted under either or both s 1317S(2) or s 1318(1) of the Act.

406. It is acknowledged that such relief is rarely granted. However, Mr van der Hoven and Ms Mulder are deserving of such relief, for the reasons which follow.

The law on s 1317S and s 1318(1)

The Statutory Provisions

407. Sections 1317S(2) and 1318(1) are subject to different threshold requirements, however, the substantive criteria to be considered are the same under both provisions.[455]

408. As to the threshold requirements, s 1317S(2) is available where, ***first***, where there are eligible proceedings and, ***second***, where it appears to the court that the person has, or may have, contravened a civil penalty provision.

409. The proceeding here is an eligible proceeding, being a proceeding for a contravention of a civil penalty provision. This submission proceeds otherwise on the premise that the Court considers that either or both Mr van der Hoven and Ms Mulder has, or may have, contravened either or both of s 601FD(1)(b) or s 601FD(1)(c).

410. Section 1318(1) applies to any civil proceeding against an officer of a company in that capacity, for negligence, default, breach of trust or breach of duty. *"Default"*, in this context, has been said to mean an *"omission or failure to do something, or to fall short in the performance of*

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455 *ASIC v Cassimatis (No 8)* [2016] FCA 1023 per Edelman J at [807]. See also *ASIC v Macdonald (No 12)* (2009) 27 ACLC 1,278; (2009) 4 BFRA 1 per Gzell J at [10]. It is accepted that reference to both provisions here is a 'belt and braces' approach, however, the sections involve the same material considerations.

something required by law".[456] These proceedings, involving allegations of breach of statutory duty to act with reasonable care and to act in the best interests of the FMIF members, comprehend such default. The section does appear to otherwise apply in respect of proceedings for breach of duty under the Act.[457] In this regard, in *DCT v Dick*,[458] Spigelman CJ observed that:

> *Although words such as "breach of duty" and "default" are capable of extending, respectively, to a breach of statutory duty and to a contravention of a statutory provision, there are textual and contextual reasons for concluding that that was not the intention behind the use of these particular words in s 1318.*
>
> *The words appear interspersed in a context which extends to "civil proceedings ... for negligence, default, breach of trust or breach of duty". Words such as "negligence" and "breach of trust" would not extend, in their natural and ordinary meanings to statutory obligations. Each clearly refers to obligations under the general law. In my opinion, the other words should be similarly so confined, save with respect to many, if not all, of the obligations imposed by the Corporations Act itself.*

411. It is submitted that the threshold requirements of both sections are met in the present case.

412. The sections provide, in substance, that:

(a) where it appears to the court that a person has breached a relevant provision, but that:

i. the person has acted honestly; and

ii. having regard to all of the circumstances, the person ought fairly to be excused,

(b) the court may excuse the person, either wholly or partly, from liability for the breach.

413. The court may then relieve the person, in whole or in part, from liability.

Legislative Intent

414. In *ASIC v Cassimatis (No 8)*,[459] Edelman J noted that a longstanding purpose of the excuse provisions was to mitigate the effect of the companies' legislation which had *"made many prudent and honest men decline to take the risk of accepting directorships, and rendered the promoter's task in organising his company more difficult".*[460]

415. To similar effect, the purpose of these provisions has been stated as being:

> *... to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision*

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456 *Gamble v Hoffman* (1997) 24 ACSR 369 per Carr J at p. 381.

457 *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388 per Spigelman CJ at [11]; *Pleash, in the matter of Suncoast Restoration Pty Ltd (in liq)* [2013] FCA 355 per Reeves J at [33].

458 *Deputy Commissioner of Taxation v Dick* (2007) 226 FLR 388 per Spigelman CJ at [11].

459 *ASIC v Cassimatis (No 8)* [2016] FCA 1023.

460 *Ibid* per Edelman J at [793].

making;....[461]

Acted Honestly

416. The first element for relief under these provisions is for the Court to be satisfied that the person has acted honestly.

417. Honesty is equated with an absence of *"moral turpitude"*.[462] That has both a subjective and objective aspect, and will not be satisfied where the court considers either that the conduct was subjectively dishonest (ie: dishonest intent) or that a reasonable person in the position of the person would regard the conduct as exhibiting moral turpitude. Thus, in *ASIC v Macdonald (No 12)*,[463] Gzell J said that:

> *[W]hether a person has acted honestly for the purposes of s 1317S(2) or s 1318(1) is not confined to a consideration of the subjective intention of the person in question. The lack of a subjective intention to deceive cannot avoid a conclusion that a person failed to act honestly if a reasonable person would have concluded that the conduct was dishonest.*[464]

418. His Honour then said:

> *In my view a person acts honestly for the purposes of s 1317S(2) and s 1318(1), in the ordinary meaning of that term, if that person's conduct is without moral turpitude in the sense that it is without deceit or conscious impropriety, without intent to gain improper benefit or advantage and without carelessness or imprudence at a level that negates the performance of the duty in question. That conclusion may be drawn from evidence of the person's subjective intent. But a lack of such subjective intent will not lead the Court to conclude that a person has acted honestly if a reasonable person in that position would regard the conduct as exhibiting moral turpitude.* [465]

419. A somewhat different analysis was made by Edelman J in *ASIC v Cassimatis*.[466] Tracing the history of the excuse provisions, his Honour noted in particular that reasonableness, as a criterion for assessment, had been omitted from the present provisions. His Honour accepted, however, that the reasonableness of conduct remains a relevant consideration in the exercise of the discretion concerning whether the relevant party ought fairly to be excused from liability. His Honour concluded that reasonableness was no longer a requirement for the excuse provision, but a consideration of all of the circumstances of the case includes an assessment of reasonableness.[467] His Honour observed:[468]

> *The more unreasonable the action (or, in the language of the older cases, the more "gross" the unreasonableness), the more unlikely that it will be that a person ought fairly to be excused.*

420. There is no requirement in the legislation for a person to give evidence of honesty before a finding of acting honestly can be made. However, the evidence must demonstrate honesty to the court

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461 *Anderson; Hooke v Daniels; Daniels v AWA Ltd* (1995) 13 ACLA 614 at p. 680.
462 *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 per Tadgell J at p. 198.
463 (2009) 27 ACLC 1,278; (2009) 4 BFRA 1.
464 *Ibid* at p. 7 [19].
465 *ASIC v Macdonald (No 12)* (2009) 27 ACLC 1,278; (2009) 4 BFRA 1 per Gzell J at p. 8 [22].
466 *ASIC v Cassimatis (No 8)* [2016] FCA 1023 per Edelman J at [789] – [811].
467 *Ibid* at [809] – [810].
468 *Ibid* at [810].

in order to persuade it to favourably exercise the discretion.[469]

Relevant Circumstances

421. The second element is for the court to determine whether the person ought fairly to be excused, based on a consideration of all of the circumstances of the case.

422. Without limitation, some relevant factors have been noted to include:

(a) the degree to which the person's conduct has fallen short of the statutory standard of reasonable care and diligence;[470]

(b) the presence or absence of contrition by the person after the event;

(c) the seriousness of the contravention, which involves three components:[471]

i. the importance of the provision contravened in terms of public policy;

ii. the degree of flagrancy of the contravention; and

iii. the consequences of the contravention in terms of harm to others;

(d) whether the defendant obtained and followed competent advice before committing the contravening act;[472]

(e) whether the conduct was in accordance with some established practice;[473] and

(f) whether the defendant was paid for undertaking the contravening conduct or obtained any person gain.[474]

423. General deterrence has also been identified as a relevant consideration.[475]

424. In *Morley v ASIC (No 2)*,[476] the Full Court of the Federal Court also said that:

> *Relevant considerations at both stages are the degree to which the person's conduct fell short of the statutory standard of care and diligence; the seriousness of the contravention and its potential or actual consequences; impropriety such as deceptiveness or personal gain (which may not survive acting honestly); and contrition. This is by no means exhaustive, and all the circumstances of the case are to be taken into account.*

425. Importantly, a finding of breach of a negligence-based duty does not preclude the exercise of discretion under ss 1317S(2) or 1318(1). A person may be excused from liability even though

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469 *ASIC v Adler (No 5)* (2002) 20 ACLC 1,146.

470 *ASIC v Vines* (2005) 65 NSWLR 281 per Austin J at p. 291 [39]; *ASIC v Macdonald (No 12)* (2009) 27 ACLC 1,278; (2009) 4 BFRA 1 per Gzell J at [70].

471 *ASIC v Vines* (2005) 65 NSWLR 281 per Austin J at p. 293 – 294, [51] – [52]; *ASIC v Macdonald (No 12)* (2009) 27 ACLC 1,278; (2009) 4 BFRA 1 per Gzell J at [71].

472 *ASIC v Vines* (2005) 65 NSWLR 281 per Austin J at p. 295 [57]; *ASIC v Macdonald (No 12)* (2009) 27 ACLC 1,278; (2009) 4 BFRA 1 per Gzell J at [72].

473 *Ibid.*

474 *Ibid.*

475 *Morley v Australian Securities and Investments Commission (No 2)* [2011] NSWCA 110 per the Full Court (Spigelman CJ, Beazley and Giles JJA) at [44].

476 *Ibid* at [50].

the contravening conduct has been found to have been unreasonable.[477] It will be a question of reviewing the whole of the circumstances in which the contravening conduct occurred.

Whether Mr van der Hoven acted honestly

426. It is submitted that the Court would accept that Mr van der Hoven acted honestly.

427. The plaintiff does not seek any finding of dishonesty, but it necessary to address the plaintiff's submission that there was no understanding as to the basis on which MPF was funding the Bellpac litigation.

428. Each of the directors' evidence was that there was an understanding amongst them to the effect that the MPF would fund the costs of the proceedings against Gujarat in return for a share of any proceeds realised from that litigation. The Deed Poll in evidence before the Court records the existence of such understanding.

429. Mr van der Hoven gave evidence generally that:

(a) he recalled generally the legal proceedings between LMIM and Gujarat between 2009 and 2011, but he was not the person within LMIM with control or responsibility for that litigation;[478]

(b) he would receive updates about the litigation, but it was not part of his day to day role to become involved in such matters;[479]

(c) Darcy and Tickner were the responsible directors with carriage of the Bellpac recovery and proceedings,[480] assisted by Monaghan[481]

(d) that was consistent with the division of responsibility within LMIM, as detailed in his affidavit;[482]

(e) his role from day to day was to monitor foreign exchange and cash flow in the funds. This was full-time work and his involvement with the Bellpac matter was limited really to approving draws on MPF's funds (including for Bellpac costs);[483]

(f) he observed from the numerous updates provided to him, that Tickner, Darcy and Monaghan had devoted great time and effort into the Bellpac recovery and he believe that they had done all that was necessary and prudent from a legal and compliance perspective in managing the matter.[484]

430. None of this was contested.

431. As to the funding of the proceedings, Mr van der Hoven's evidence was, in summary:

(a) he recalls being generally aware that the MPF was funding the ongoing costs of the Bellpac

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477 *ASIC v Vines* (2005) 65 NSWLR 281 per Austin J at p. 291 [41].
478 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 123.
479 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 124 and 128.
480 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 125.
481 *Ibid.*
482 *Ibid.*
483 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 126–128. This is made out generally in his affidavit which shows numerous payment requests and approvals.
484 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 343, 345 & 346.

proceedings;[485]

(b) he was not part of the decision for the MPF to fund the Bellpac proceedings, which to his knowledge was something decided by Tickner, Darcy and Monaghan,[486] though he did not know exactly which of them were involve in that;[487]

(c) he knew that Darcy and Tickner had an understanding, in which he shared,[488] that the MPF would receive a share of the proceeds of moneys resulting from the litigation, but he is unable to recall how or when he first had that understanding;[489]

(d) there was nothing remarkable about that understanding as, from what he knew, he considered that the FMIF Bellpac loan was never go to be fully repaid;[490] and

(e) his understanding was that the proceeds split was a fulfilment of an earlier decision for the MPF to fund the cost of the proceedings in return for a share of the proceeds.[491]

432. Mr van der Hoven otherwise refers to the Deed Poll as an accurate summation of the directors' conclusions and considerations. The cross-examination of Mr van der Hoven did not challenge this.

433. Under cross-examination, Mr van der Hoven's evidence as to the understanding remained forthright and consistent. When it was put to him that *"you did not have any understanding that MPF was getting a share of the Bellpac proceedings"*, he responded:

> *My understanding was that it was the case that MPF was a contributor to the proceedings and that there was an understanding that the MPF will get a benefit from the being the – the funder of those proceedings.*[492]

434. When a similar proposition was put, he expressly disagreed, responding that:

> *It was my understanding that the contribution that was made by the managed performance fund was made on the basis that there will be a receipt of some sort of portion of whatever may be the end result to the managed performance fund. Otherwise the managed performance fund would not have contributed those funds.*[493]

435. It was put to Mr van der Hoven that he could not recall any discussion he had had about the understanding (a matter which he already stated in his affidavit[494]), which he accepted.[495] He also accepted that he could not point to any document showing the directors' consideration of their understanding.[496]

436. None of these matters is remarkable given the peripheral Mr van der Hoven played in the Bellpac recovery and litigation. Of course he would not be aware of documentation of such matters in an organisation as large as LMIM, where there were teams of people to carry out such tasks under

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485 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 154.
486 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 152.
487 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 341(b).
488 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 268 & 347.
489 *Ibid.*
490 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 348(b).
491 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 347.
492 T3-32, ln 33 – 35.
493 T3-31, ln 21 – 27.
494 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, para 268 & 347.
495 T3-30.40 to 42.
496 T3-30.43 to 45.

the supervision of other directors and senior staff. It is unsurprising that Mr van der Hoven cannot recall conversations about the matter given the passage of time and nature of the issue. Mr van der Hoven accepted the understanding was important, but he was not managing the matter and it was not his role to document the understanding. It was reasonable for him to rely on the others in the company to manage such matters.

437. For the reasons submitted earlier,[497] the document entitled *"ASIC Benchmark Disclosure & Update for Investors"*,[498] dated 2 September 2010, and the cross-examination in respect of that, should be afforded no weight.

438. By distinction, the Court should place weight upon:

(a) the fact that each of the WMS Report[499] and the Allens Advice,[500] and the instructions provided to those firms,[501] all recorded the existence of the directors' understanding about the basis on which the MPF had been funding the litigation costs; and

(b) the Deed Poll,[502] which similarly recorded the directors' understanding.[503]

439. These documents are the best and most contemporaneous records of the directors' understanding. The instructions given to the advisers innocently, and honestly, recorded the fact of the directors' understanding, which was, in any event, the understanding of Mr van der Hoven. It was not put to any of the witnesses, and there is no evidence to suggest, that any of these documents were prepared with this, or any other, litigation in mind or were otherwise contrived. Mr van der Hoven had no reason, when he executed the Deed Poll, or otherwise, to invent the understanding.

440. It was not otherwise suggested that Mr van der Hoven acted dishonestly in approving the proceeds split between the FMIF and the MPF. He gave a candid account of his considerations about that, in so far as his recollection allowed, and with reference to the Deed Poll.[504] It is evident from his account that he:

(a) gave the matter independent consideration;

(b) genuinely believed that entering the settlement subject to the proceeds split was the proper thing to do in the interests of each of the funds; and

(c) considered, with fair basis for doing so, that appropriate steps had been taken to get independent legal and accounting advice which was favourable to the proceeds split in the circumstances.

441. It is submitted accordingly that:

(a) Mr van der Hoven conduct evinces no moral turpitude, on either subjective assessment, or on the objective assessment referred to by Gzell J in *ASIC v Macdonald*; and

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497 See Part D above.

498 FMIF ASIC Benchmark Disclosure & Update for Investors dated 2 September 2010 (Exhibit 18) **[FMIF.500.009.8033]**.

499 WMS Report (Exhibit 32) **[FMIF.100.003.6807]**.

500 Allens Advice (Exhibit 35) **[FMIF.100.003.6995]**.

501 Instructions to Allens (Exhibit 33) **[FMIF.200.012.6633]**; Instructions to WMS (Exhibit 31) **[FMIF.300.004.2881]**.

502 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]** which records that *"it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation"*.

503 As confirmed by Mr van der Hoven under cross examination. See T3-40.10.

504 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 336–349.

(b) the Court should accept that Mr van der Hoven's actions were – and appeared to be – honest.

Whether Ms Mulder acted honestly

442. The Court should equally accept that Ms Mulder acted honestly in approving the proceeds split. Much of the above analysis made in respect of Mr van der Hoven applies equally to Ms Mulder.

443. Ms Mulder also gave candid evidence of her consideration and process in approving the proceeds split. She too was prepared to expose her thoughts and reasoning to the scrutiny of the Court and the plaintiff in as much detail memory permits.

444. Save again with respect to her understanding about the MPF funding the proceedings, her evidence was not challenged and the plaintiff does not seek any finding of dishonesty.

445. Ms Mulder gave evidence generally that:

(a) she too had only remote involvement in the legal proceedings between LMIM and Gujarat,[505] but she had a broad awareness of them;[506]

(b) she never saw or understood the proceedings, decisions about which were made by one or more of Tickner, Darcy and Monaghan;[507]

(c) she would also receive[508] and note[509] the updates about the litigation, vias emails, at meetings or in discussions, but she did not manage the litigation or settlement negotiations;[510]

(d) she was occupied throughout July 2009 to June 2011 managing investor relations in the global financial crisis environment.[511] It was not possible for her to discharge her role and be completely across every other thing that was happening,[512] including the Bellpac proceedings. She had to rely on her colleagues, Darcy, Tickner and Monaghan, to manage that matter;[513]

(e) that was (again) consistent with the organisational structure of LMIM as detailed in Ms Mulder's affidavit.

446. There was no challenge to this evidence.

447. As to her understanding about MPF's funding of the proceedings, Ms Mulder evidence was, in summary:

(a) her understanding was that the

> *MPF was funding the proceedings on the basis that it would get a capital return, that is, by sharing in any funds resulting from those proceedings. I had a discussion*

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505 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 96.
506 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 95.
507 *Ibid.*
508 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 97.
509 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 114.
510 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 98.
511 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 100.
512 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 101.
513 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 102.

about that, but I cannot now remember the details or specific content of that discussion, or when it occurred.[514]

(b) she too thought that there was little prospect of the MPF getting anything as second mortgagee, so it made sense to her for the MPF to fund the proceedings as set out above;[515]

(c) while she cannot recall specifically when she first formed this understanding, but states that "it was well-before" the settlement with Gujarat or execution of the Deed Poll;[516]

(d) she did not have any other understanding about the basis on which the MPF was funding the proceedings and was uncertain if or how any arrangement about that was documented. That was for the persons in the appropriate team to attend to;[517]

(e) she accepts that the Deed Poll recorded the matters she was aware of and had considered at the time she signed it.[518]

448. Ms Mulder was exposed to the same cross-examination as Mr van der Hoven. She too answered in a direct manner, consistently with what she had already plainly stated in her affidavit, *viz*:

(a) she could not recall the date or detail of the conversation that led to her having the understanding about how MPF was funding the litigation;[519]

(b) she rejected directly the suggestion that the conversation was well-after funding was initially provided in July 2009.[520]

449. Ms Mulder's also accepted that she did not take steps to document the understanding, but fairly noted that she was not the director with carriage of the matter.[521]

450. Mr O'Brien did not squarely put to Ms Mulder that she did not have the understanding. Rather, the question put was as follows:

Could I suggest to you that you did not have the understanding that you suggest that you had because, for MPF to get a share of the – of any settlement out of the Bellpac proceedings, that would defeat the priority that LMIM as FMIF had as first registered mortgagee? --- No.[522]

451. The plaintiff's attempts to undermine Ms Mulder's evidence by reference to the *"ASIC Benchmark Disclosure & Update for Investors"*, dated 2 September 2010,[523] were equally ineffective.[524] The same analysis applies to Ms Mulder's evidence as is made above in relation to Mr van der Hoven, save to note that Ms Mulder also did not recall reading the document.[525]

452. It is submitted that there is no basis to doubt that Ms Mulder's understanding as to the basis on

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514 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 121.
515 *Ibid.*
516 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 122.
517 *Ibid.*
518 Affidavit of Mulder (Exhibit 267) **[FMM.LAY.001.0001]**, para 209 and 210.
519 T3-45.42 to 47.
520 T3-46.3 to 4.
521 T3-46.39 to 43.
522 T3-48.33 to 36.
523 FMIF ASIC Benchmark Disclosure & Update for Investors dated 2 September 2010 (Exhibit 18) **[FMIF.500.009.8033]**.
524 See T3-47.4 to 37.
525 T3-47, ln 21 – 23.

which the MPF was funding the proceedings was as she said it was. Again the fact that details of the discussions around this have been lost is unsurprising in view of the time that has since passed. Equally, nothing flows from the fact that Ms Mulder did not take any steps to record the understanding. It was not her job to do so.

453. Again, the existence of the understanding is borne out by the content of the Deed Poll, the WMS Report, the Allens Advice and the instructions given to those firms. In any event, Ms Mulder's understanding was as she said it was and there is no reason to doubt that she was informed as to the basis of MPF funding, just as the expert advisers were.

454. It is submitted that the Court would accept that Ms Mulder acted honestly. She too had no reason, when she executed the Deed Poll,[526] or otherwise, to invent the understanding.

455. It was not otherwise suggested that Ms Mulder acted dishonestly in approving the proceeds split between the FMIF and the MPF. As with Mr van der Hoven, Ms Mulder gave a candid account of his considerations about that, in as much detail as possible, and with reference to the Deed Poll.[527] Her evidence also shows that she:

(a) gave the matter independent consideration;

(b) genuinely believed that entering the settlement subject to the proceeds split was the proper thing to do in the best interests of each of the funds; and

(c) considered, with fair basis for doing so, that appropriate steps had been taken to get independent legal and accounting advice which was favourable to the proceeds split in the circumstances.

456. It is submitted accordingly that:

(a) Ms Mulder's conduct evinces no moral turpitude, on either subjective assessment, or on the objective assessment referred to by Gzell J in *ASIC v Macdonald*; and

(b) the Court should accept that Ms Mulder's actions were – and appeared to be – honest.

Other relevant circumstances – Mr van der Hoven & Ms Mulder

Reliance on independent advices & conduct of others

457. This is not a case where LMIM failed to obtain independent advice concerning the impugned transaction. On the contrary, the directors relied not only on detailed advices from independent and legal and accounting firms, they also had the services of Monaghan Lawyers acting as another check on their conduct in entering into the proceeds split.

458. The directors, Mr van der Hoven and Ms Mulder included, can be seen to have acted in accordance with the advices they received. What else truly should they have done? Obtained further advices to police the scope and content of those initial advices?

459. This is a case where any liability on part of the directors arises not for failure to take appropriate steps to obtain independent advices, but in spite of them. If the directors breached their duty, it was not from a failure by them to take appropriate steps and, in particular, to seek to obtain

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526 Deed Poll (Exhibit 36) **[FMIF.008.001.0126]**, which records that *"it was the understanding of LM's Directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation"*.

527 Affidavit of van der Hoven (Exhibit 266) **[EVH.LAY.001.0001]**, paras 336–349.

reliable advices to guide their decision-making.

460. It is submitted that this factor deserves substantial weight, particularly in respect of Mr van der Hoven and Ms Mulder, who as directors without the daily material involvement in the matter, could not reasonably have been expected to have identified any flaws in the advice or thinking around the proceeds split (none of which is conceded).

461. It is submitted that Mr van der Hoven's and Ms Mulder's liability arises really due to their positions as directors who necessarily placed their trust and confidence in the persons managing the matter, and the external advisers. In so far as Mr van der Hoven and Ms Mulder are liable in this position, it is not because of a gross failure on their part.

The degree to which conduct has fallen short of statutory standard

462. For similar reasons, it is submitted that the degree of any substandard conduct is not great.

463. It is, at most, an innocent and well-intended error of judgment made consistent with advices which gave no warning that the split of the proceeds would, or could, constitute a contravention.

The seriousness of the contravention

464. It is accepted that a contravention of either duty under ss 601FD(1)(b) or (c) is serious. Plainly, the duties to act with reasonable care and in the best interests of scheme members is important to the protection of those members' interests.

465. However, the contravention cannot be described as flagrant. This is not a contravention that has arisen due to any flagrant disregard for the interests of the FMIF's members. Rather, and as set out above, the evidence shows that the directors, Mr van der Hoven and Ms Mulder in particular, did give careful consideration to the best interests of the members. At most, a contravention has occurred because the directors erred in determining what was in the best interests of the FMIF members. That error occurred in circumstances where none of the advices they obtained, nor LMIM's own internal lawyers, gave any warning that the proceeds split could not proceed without contravention of s 601FD (which is denied)

466. Were the Court to find that the contravention reduced the funds flowing to the FMIF, then neither Mr van der Hoven nor Ms Mulder can contest the effect of that. A few contextual matters may be noted, however:

(a) insofar as the split is said to have deprived the plaintiff of $15 million, that should really be subject to some accounting for the sums expended on behalf of the FMIF/PTAL on the costs of litigation, without which none of the funds would have obtained a settlement;

(b) while the sum of $15 million in isolation appears significant, it is a number that should be taken in context of a fund that, at its highest, had a loan book of almost $1 billion;[528] and

(c) the plaintiff adduced no evidence of any complaint from any investor concerning the split of the settlement proceeds.

467. The curious position arising from this case is that there is no evidence or contention that the members of the FMIF would have done any better had an independent trustee been acting for the MPF. In this sense, it is only the fact that the directors continued acting (in circumstances where none of the advisers told them they could not) which produces the liability. The conflict results in a windfall to the FMIF.

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528 Affidavit of Tickner (Exhibit 325) **[SJT.LAY.001.0001]**, para 40.

No personal gain

468. There is no evidence or suggestion that Mr van der Hoven or Ms Mulder personally gained as a result of their approval of the proceeds split.

Contrition after event

469. It is submitted that given the inadvertent nature of the breach, and the lengths the directors went to to ascertain the best way to handle the situation, contrition is not a factor upon which any weight should be placed.

Deterrence

470. Similarly, deterrence should not carry any weight in the circumstances of this case. Deterrence is a relevant factor in context where there is some real impropriety or misconduct. That is not the case here.

Whether Mr van der Hoven and Ms Mulder ought fairly to be excused

471. If ever there was a case deserving of relief and fitting with the rationale for the exculpatory provisions, this is it. Directors and fund managers should not be at peril of liability where they have taken the steps taken in this case.

472. This is an exceptional case where the directors had not one, but two sets of experienced lawyers advising them, in addition to WMS. They registered the potential conflict. They took appropriate action to obtain advice about it. They acted in accordance with that advice in circumstances where there was no apparent reason for them, and particularly Mr van der Hoven and Ms Mulder, not to rely upon it.

473. Mr van der Hoven and Ms Mulder can both be seen to have acted conscientiously in considering the issues and to have applied an independent mind to those issues in light of the information presented to them.

474. It is submitted that, while Mr van der Hoven and Ms Mulder might have failed in the result, it is not for a failure on their part to follow proper process by obtaining independent advices and carefully considering the issues with an independent mind.

475. The position of Mr van der Hoven and Ms Mulder is particularly deserving of relief from liability. They were not the directors with carriage of the Bellpac recovery or litigation against Gujarat. The plaintiff itself identifies Darcy and Tickner as the two main directors who dealt with Bellpac litigation.[529]

476. Ms Mulder and Mr van der Hoven were in the position where they had to, mindful of the size of LMIM and their own pressing responsibilities, rely on the diligence of their colleagues and the external advisers engaged. If they have failed, in the result, to meet the standard required by s 601FD(1), it is not for want of due process on their part. They did not abdicate their responsibility as directors to monitor the company's business at an appropriate level. They gave independent consideration to the information presented to them and determined to approve the proceeds split upon a due consideration of the information available to them in respect of a complex situation where professional advice was obtained. It is submitted that, in their position, there was no reasonable hope that they could identify now any of the asserted legal deficiencies in this case.

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529 T1-26.15 to 17.

477. If Mr van der Hoven and Ms Mulder are liable in this case, it is due to their having trusted and acted upon the competence of their colleagues and the external advisers, not to any specific failure or actual misconduct on their part. Similarly, any prejudice or damage to the members of the FMIF is not due to the actions of Mr van der Hoven or Ms Mulder.

478. By reason of the above, it is submitted that each of Mr van der Hoven and Ms Mulder ought fairly to be excused, in whole, having regard to all the circumstances of the case.

PART H: CLOSING SUBMISSION

479. By reason of the foregoing, it is submitted that the claim should be dismissed.

480. Alternatively, each of Mr van der Hoven and Ms Mulder should be excused from liability.