SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: BS1146/20

Applicant:	**LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
	AND
First Respondent:	**PETER CHARLES DRAKE**
	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**

APPLICANT'S OUTLINE OF SUBMISSIONS

Application for judicial advice

Synopsis

1. This is an application for judicial advice whether to proceed with an appeal against the decision of Justice Jackson in *LM Investment Management Ltd (receiver apptd)(in liq) v Drake & Ors* [2019] QSC 281.

2. The application is brought by Mr David Whyte, the court-appointed receiver of the LM First Mortgage Income Fund ("**the FMIF**"), a registered managed investment scheme.[1]

3. Mr Whyte considers, having taken advice, that there are reasonable prospects on the appeal. He also considers that it is in the interests of members of the FMIF that the appeal be brought. It is further submitted that the points of law raised in the appeal concerning the duties of responsible entitles of managed investment schemes raise issues of public importance which should be considered by an appellate court.

4. A notice of appeal has been filed but the respondents to that appeal have been asked not to take a step until this application for judicial advice is determined. The Registrar of the Court of Appeal

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1 The Order of Dalton J appears at Exhibit DW-1 (pages 1 to 4) of the affidavit of Mr Whyte filed on 31 January 2020 (**CD 2**).

has agreed not to issue a timetable for, or make directions for, the appeal until this application is determined.

5. The Respondents to the proposed appeal have been served with this application. None has filed material in response. None has indicated they resist judicial advice being given.

6. Orders for substituted service on investors in the FMIF were made on 14 February 2020 and complied with.

7. Only one investor representative has raised concerns about the application for judicial advice, being the liquidator of LMIM, represented by Russells Law. The concerns are raised by the liquidator of LMIM as the Responsible Entity for two "Feeder Funds", namely the LM Institutional Currency Protected Australian Income Fund and the LM Currency Protected Australian Income Fund. That is, LMIM was responsible entity or trustee of multiple investment funds which dealt with one another.

8. The correspondence with the liquidator primarily concerns whether Mr Whyte's confidential legal advices should be shared with the liquidator. Mr Whyte submits that there is no proper or sufficient reason why those advices should be shared. There are also issues raised as to whether Mr Whyte ought to disclose facts or documents relevant to the proceeding at first instance.

9. Mr Whyte has not received any other objection to the appeal proceeding or judicial advice being sought, including the receivers who have been appointed to the two "Feeder Funds".

Mr Whyte's appointment

10. By the Order of Dalton J made on 21 August 2013, Mr Whyte was appointed to take responsibility for the winding up of the FMIF.

11. The Order provided for the following matters which are relevant to the present application:

    (a) the appointment was made pursuant to section 601NF(1) of the *Corporations Act 2001*;

    (b) Mr Whyte was appointed as a court-appointed receiver pursuant to section 601NF(2) of the *Corporations Act 2001*;

    (c) Mr Whyte was entitled to claim remuneration and be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the appointment;

    (d) Mr Whyte was specifically authorised to bring, defend or maintain proceedings on behalf of FMIF in the name of LMIM.

12. Judicial advice is now sought because, although the Order of Dalton J expressly permitted Mr Whyte to bring, defend and maintain proceedings referable to getting in the "scheme property" of the FMIF (which the proceeding at first instance related to), it is prudent to seek judicial advice

whether to proceed with an appeal of those first instance proceedings.[2] That is because bringing an appeal raises new and different considerations. Although Mr Whyte has reached the view that it is appropriate to appeal the decision, the starting point is that a judge has, at first instance, dismissed the claim. The appeal proceeding falls within the text of the order of Dalton J, but given the costs and risks associated with an appeal, it is prudent for Mr Whyte to seek judicial advice before proceeding with the appeal.[3]

Notice of Appeal

13. A copy of the notice of appeal appears at Exhibit SC-2 to the affidavit of Mr Couper filed on 31 January 2020.[4]

14. The applicant has obtained counsels' advice as to the merits of appealing. Privilege over that advice is not waived. Those advices have been provided to the court by way of a sealed, confidential affidavit, filed pursuant to the Court's order of 21 February 2020.[5]

Principles on an application for judicial advice

Jurisdiction of the court to provide advice or directions

15. The proposed appeal is brought in the name of LMIM. The application for judicial advice is brought in the same name, although Mr Whyte is, in a practical sense, the individual responsible for the application and whose decision is the subject of the judicial advice.

16. There are three sources of jurisdiction for this application.

17. These are emphasised because the liquidator of LMIM has questioned the basis upon which the application is brought.[6]

Section 96 of the Trusts Act 1973

18. Section 96(1) of the *Trusts Act 1973* (Qld) provides:

> "Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee."

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2 It is submitted that it would have been wasteful and unnecessary to bring a separate application for judicial advice in relation to the commencement of the first instance proceeding, where the order of Dalton J expressly authorised Mr Whyte to bring proceedings of that sort. The proceeding at first instance sought relief against the directors in relation to dealings with the "scheme property" of the FMIF.

3 Put another way, that Mr Whyte is seeking judicial advice in relation to the appeal does not mean that separate judicial advice was required prior to commencing any first instance proceedings as part of Mr Whyte's appointment pursuant to Dalton J's order.

4 **(CD 3)**.

5 The order is CD 13.

6 See letter from Russells Law dated 6 May 2020 at Exhibit "SC-23" (pages 108-109) to the affidavit of Scott Couper filed on 8 May 2020 (**CD 22**).

19. A responsible entity (LMIM) holds the "scheme property" on trust for members of the scheme (the FMIF), pursuant to section 601FC(2) of the *Corporations Act 2001*.

20. As Gillard J said in *Re Atkinson*, "Where an executor or trustee is in doubt as to the course of action it should adopt, it is always entitled to take the opinion of the court as to what it should do".[7] Such applications are often made where the decision is a particularly momentous one, and the trustee wishes to obtain the court's blessing to his proposed course.[8]

21. The liquidator disputes that Mr Whyte is able to seek directions under section 96 of the *Trusts Act 1973* in relation to the proposed appeal, which is to be brought in the name of LMIM as RE of the FMIF.[9]

22. There should not be any doubt that the named applicant (LMIM) as a trustee of scheme property may seek directions pursuant to section 96 and here, pursuant to the order of Justice Dalton, Mr Whyte is the person responsible for acting in the name of LMIM in relation to the winding up of the FMIF.

23. In that regard, it may be noted that the liquidator sought directions pursuant to section 96 of the *Trusts Act 1973* in proceeding BS3508/2015 in relation to his remuneration in his capacity as liquidator of LMIM as RE of the FMIF. That can be seen from the Further Amended Originating Application dated 16 December 2015 (CD 32 in that proceeding). By that document, LMIM as RE of the FMIF was defined by the liquidator as "the Trustee".

24. On 17 December 2015, Justice Jackson made orders for substituted service of the application for judicial advice under section 96 (CD 36 in that proceeding).

25. The liquidator filed a statement of facts pursuant to section 96 on 22 February 2016 (CD 45 in that proceeding).

26. By submissions (prepared by Mr McQuade QC and Mr Peden of counsel) dated 22 February 2016 and which were filed (CD 50 in that proceeding), the liquidator submitted at paragraph 46 that:

> "The problems facing the applicants and the various parties in relation to the LMIM matters have come before the Court on numerous occasions invoking the Court's jurisdiction under s. 96 of the *Trusts Act* 1974 (sic). Unless there are particular concerns in this matter as to why the exercise of jurisdiction may not be appropriate, no particular

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7 [1971] VR 612, 615; See also *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, 201D.

8 *Lewin on Trusts*, 19th ed, 1138 [27-077]; See paras 34-37 below. On the other hand, as Jackson J said in *Davidson v Cameron* [2016] 2 Qd R 340, [10], "Many decisions that must be made by a trustee or executor are not of such difficulty as to warrant and do not justify the expense to the estate of an application for judicial advice".

9 The issue is explained in the letter from Russells Law dated 6 May 2020 at Exhibit "SC-23" (pages 108-109) to the affidavit of Scott Couper filed on 8 May 2020 (**CD 22**).

further submissions are made now about those matters. Such submissions can be made if required."

27. The liquidator's letter of 6 May 2020 draws a distinction between Mr Whyte and LMIM seeking judicial advice, but there is no such distinction in reality. The liquidator saw no difficulty in he himself relying on section 96 in an analogous situation.

28. In the circumstances, there does not seem to be any serious controversy as between Mr Whyte as court-appointed receiver of the assets of the FMIF and Mr Park as liquidator of LMIM as RE of the FMIF that the jurisdiction to apply under section 96 of the *Trusts Act 1973* is enlivened.

Section 601NF(2) of the Corporations Act 2001

29. Section 601NF of the *Corporations Act 2001* provides:

> "(1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
>
> (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).
>
> (3) An order under subsection (1) or (2) may be made on the application of:
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> (a) the responsible entity;
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> (b) a director of the responsible entity; or
>
> (c) a member of the scheme; or
>
> (d) ASIC."

30. The liquidator has asserted in his solicitor's correspondence of 6 May 2020 that subsection (3) is not satisfied here. This is another aspect of the liquidator drawing a distinction between Mr Whyte and LMIM for the purposes of this application.

31. Section 601NF(2) was also relied upon by the liquidator in proceeding 3508/2015, in his Further Amended Originating Application dated 16 December 2015 (CD 32 in that proceeding) which sought directions as to how the FMIF was to be wound up taking into account, among other things, Mr Whyte's appointment pursuant to Justice Dalton's order of 21 August 2013.

32. Further, in *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233 at [80], Justice Jackson found that Mr Whyte has standing to apply for directions pursuant to section 601NF(2):

> "[80] Fourth, Mr Whyte identified that he is not specifically named as a relevant person or party who has standing to apply for an order under s 601NF(2) or s 601NF(3) of the CA. However, in my view, there is no difficulty of standing for him to make the interim distribution application. Mr Whyte was appointed as a person to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders under s 601NF(2). Clause 16.7(c) of the constitution of the FMIF provides for distributions of the net proceeds of realisations in the winding up. Given the breadth of the power of the court, by order, to give directions about how the registered scheme is to be wound up under s 601NF(2), it is implied that a person appointed under s 601NF(1) has the power

> to apply for directions about their appointment, particularly where the appointment is made as well to take possession of assets as a court appointed receiver. In any event, in this proceeding, prior directions were made by the order made on 17 December 2015 giving the parties liberty to apply, including Mr Whyte."

33. Given Mr Whyte's appointment under section 601NF(1), there should be no serious dispute that there is jurisdiction for Mr Whyte to apply for directions under section 601NF(2), if necessary to do so, in the event the Court finds it is not sufficient to give directions pursuant to section 96 of the *Trusts Act 1973*. He brings this proceeding in the name of and on behalf of the responsible entity, LMIM.

34. The power under section 601NF(2) is broad. It extends, for example, to a power to give directions as to how the expenses of a winding up of a scheme are to be paid: *Rubicon Asset Management Ltd (Administrators Appointed)* [2009] NSWSC 1068 at [54].

Inherent jurisdiction of the Court

35. Mr Whyte was appointed to his present position by the Court. The court has an inherent jurisdiction over the conduct of its officers.

36. That jurisdiction now has its source in section 58 of the *Constitution of Queensland 2001*, which provides that this court is "the supreme court of general jurisdiction" in and for Queensland and has "unlimited jurisdiction at law, in equity and otherwise".

37. It is appropriate for receivers to apply for judicial advice given their powers and discretions are generally more limited than those of liquidators and ordinary trustees.

Conclusion on jurisdiction

38. For the above reasons, it is submitted that the jurisdiction of this Court to give directions pursuant to section 96 of the *Trusts Act 1973*, or alternatively pursuant to section 601NF(2), or in reliance on the inherent jurisdiction of the Court, is well established. The issues raised in the liquidator's correspondence of 6 May 2020 are not genuine impediments to the relief sought.[10]

Nature of judicial advice

39. The application for judicial advice is concerned with the question of whether it would be proper for the proposed appeal to be brought. It is not concerned with deciding the issues which will be agitated in the substantive proceeding which is proposed to be brought.[11]

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10 See the letter from Russells Law dated 6 May 2020 at Exhibit "SC-23" (pages 108-109) to the affidavit of Scott Couper filed on 8 May 2020 (**CD 22**).

11 *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, [111].

40. In *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand,*[12] Gummow A-CJ, Kirby, Hayne and Heydon JJ said that an application for judicial advice and directions:[13]

> "... operates as 'an exception to the Court's ordinary function of deciding disputes between competing litigants'; it affords a facility for giving 'private advice'. It is *private advice* because its function is to give personal protection to the trustee." [emphasis added]

41. Kiefel J (as her Honour then was) said:[14]

> "The principal purpose of the section, and the opinion, advice or direction given under it, is the protection of the interests of the trust. Another purpose is the protection of a trustee who is acting in that regard and upon advice. Securing the latter purpose may ensure the attainment of the principal purpose, by removing the concern of a trustee about exposure beyond their usual indemnity."

42. Therefore, as Boddice J said in *Glassock v Trust Company (Australia) Pty Ltd*:[15]

> "The sole purpose in giving advice is to determine what should be done in the best interests of the trust estate... The function of the power is not merely to afford personal protection to the trustees. It is also to protect the interests of the trust."

43. In relation to the protection which judicial advice and directions afford to a trustee, section 97(1) of the *Trusts Act 1973* provides:

> "Any trustee acting under the direction of the court shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied."

44. Section 97(1) is subject to the proviso in section 97(2) that a trustee will not be protected if he has "been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction."

45. The joint judgment in *Macedonian* quoted[16] the following passage from the judgment of Lindley LJ in *In re Beddoe*:[17]

> "[A] trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his cestui que trust unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other

12 (2008) 237 CLR 66, 91 [64]; See also per Kiefel J (as her Honour then was).
13 Ibid [195].
14 *Macedonian Orthodox* (2008) 237 CLR 66, [196].
15 [2012] QSC 15, [15].
16 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, [47].
17 [1893] 1 Ch 547, 557.

> circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate."

46. The joint judgment in *Macedonian* then immediately added:[18]

> "The warning that trustees who become involved, or wish to become involved, in litigation should seek the court's sanction is the significant, and in later years influential, aspect of *In re Beddoe*."

47. It should be recalled that, in the present case, the Order of Dalton J specifically authorised the commencement of actions such as the proceeding at first instance. Mr Whyte's conduct of those first instance proceedings has also been subject to indirect oversight by the remuneration applications which have been made to the court from time to time. However, the risks identified in the passages in *Macedonian* set out above would be applicable here to the commencement of an appeal from that original proceeding.

48. The quotation from Lindley LJ also recognizes the important relationship between judicial advice and the trustee's right of indemnity. The joint judgment in *Macedonian* also made this point: [19]

> "[P]rovision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. **Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation.** No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs." (emphasis added)

49. Judicial advice is given on the basis of the facts stated in the trustee's statement of facts. As Atkinson J said in *Klatt v Coore*:[20]

> "The court is entitled to act on the facts stated by the trustee even if they are contested and controversial. The trustee loses the protection afforded by s 97(1) if the trustee "has been guilty of any fraud or wilful concealment or misrepresentation" to the court. It is therefore not necessary or appropriate to determine a challenge to those facts as if it were adversarial litigation...
>
> If the statement of facts on the basis of which judicial advice is given states or is premised on facts which are false, the administrator would lose the benefit of the protection afforded by the advice *ab initio*, at least if the relevant facts were known or should have been known to the administrator at the time the statement of facts is prepared and put to the court."

50. The matter should be sufficiently investigated to ensure that the proposed proceedings would not be fruitless, but it is not the function of the court to make a finding as to whether or not the proceeding will likely succeed.

51. In *Glassock v Trust Company (Australia) Pty Ltd* [2012] QSC 15 at [14], Boddice J observed:

> "Where an executor or trustee is in doubt as to the course of action to be adopted, the executor or trustee is entitled to seek the opinion of the Court as to what it should do (*Re Atkinson* (dec'd)[1971] VR 612at 615). In determining such an application, it is not the

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18 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, [48].

19 Ibid [71].

20 [2013] QSC 196, [11].

function of the Court to investigate the evidence and make a finding whether or not the trustees will be successful in the litigation (*Salmi v Sinivuori* [2008] QSC 321 at [16]). The Court has merely to determine whether or not the proceedings should be taken (*Fitzgerald v Smith*(1889) 15 VLR 467). However, the matter should be sufficiently investigated to determine whether or not the proceedings would be fruitless (Re Atkinson (dec'd)at 615; adopted by Atkinson J in *Loughnan v McConnel* [2006] QSC 359 at [7])."

52. Those observations were cited with approval by Applegarth J in *Re Public Trustee of Queensland* [2012] QSC 281 at [18] and Martin J in *Kordamentha Pty Ltd & Calibre Capital Ltd v LM Investment Management Ltd (in liq); Park & Muller v Kordamentha Pty Ltd & Calibre Capital Ltd* [2015] QSC 4 at [6].

53. The present application is not dissimilar from the type of application described by Robert Walker J (as his Lordship then was) in an unnamed and unreported judgment, quoted by Hart J in *Public Trustee v Cooper*,[21] as being one:

> "... **where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.** Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. **In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision.** In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are *prima facie* in a much better position than the court to know what is in the best interests of the beneficiaries." (emphasis added)

54. On such an application, the court's function is limited to seeing that:[22]

> "... the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; **but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, and that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view.** In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with the limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed.
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> The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed... If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval..." (emphasis added)

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21 [2001] WTLR 901.

22 *Lewin on Trusts*, pp 1139-1140 [27-079]-[27-080]; Citing, *inter alia, Public Trustee v Cooper* [2001] WTLR 901, 925G-H; See also *Underhill & Hayton on the Law of Trusts and Trustees*, 19th ed, p 1122 [85.6].

Receivers should be more inclined towards seeking judicial advice

55. One distinguishing feature of court-appointed receivers is the limited scope of their powers. In *Glazier Holdings Pty Ltd v Australian Men's Health Pty Ltd*,[23] Young J said:

> "... I think it should be appreciated that there is a difference between a liquidator, who is doing the work that last century the court did itself in the Master's Office, or even with a trustee, in that those people have unlimited functions, whereas a receiver has a very limited and usually relatively mechanical function. Instead of making a broad statement that receivers may always seek the opinion of the court, it would be better to put the proposition more narrowly, that if a receiver within his own limitations requires the guidance of the court, then normally he should have it."

56. In *Grain Technology Australia Ltd v Rosewood Research Pty Ltd (No 2)*,[24] Parker J noted that the principles governing the exercise of the power to give advice or directions to a court-appointed receiver "have been seen as having some analogy with the principles governing the court's power to give judicial advice concerning the administration of a trust to the trustee". His Honour noted that there is a "double analogy" between a receiver seeking directions from the court which appointed him or her, and a trustee seeking judicial advice:[25]

> "In the first place, there is a direct analogy between a receiver who acts for the benefit of all of the parties to the suit until their rights to the property are determined and a trustee who is required to administer trust property in the interest of the beneficiaries. There is a further analogy between the court's ultimate control over a receiver, who is "virtually" an officer of the court, and the control exercised by the court over the actions of the trustee of a trust by means of administration proceedings."

57. Parker J applied the principles applicable to trustees seeking judicial advice and made a direction that the receiver would be justified in entering into a particular settlement.

Capacity in which advice is sought

58. As noted above, by the order of Justice Dalton made on 21 August 2013, Mr Whyte was specifically authorised to bring, defend or maintain proceedings on behalf of FMIF in the name of LMIM.

59. That explains why the proceeding at first instance, the proposed appeal and this application were all brought in the name of LMIM as RE of the FMIF.

60. The liquidator's letter of 6 May 2020, at some length, seeks to parse a distinction between Mr Whyte and LMIM as RE for the FMIF for the purpose of this application.

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[23] Unreported, Young J, NSWSC, 30 April 1998.

[24] [2019] NSWSC 1744, [13].

[25] *Grain Technology Australia Ltd v Rosewood Research Pty Ltd (No 2)* [2019] NSWSC 1744, [22].

61. Mr Whyte stands, in effect, in the shoes of the trustee of the FMIF. He acts in the name of LMIM. It would be artificial to seek to separate Mr Whyte from LMIM as RE of the FMIF for the purposes of this application, the proposed appeal or indeed the proceeding at first instance.

62. There is nothing improper or incorrect in the form of the Originating Application in naming LMIM as the applicant and seeking advice as to steps which Mr Whyte should take while seeking protection for Mr Whyte personally. The form of the application properly identifies that the application is brought in Mr Whyte's capacity as receiver, pursuant to the order of Justice Dalton of 21 August 2013.

Purpose of seeking advice

63. Correspondence from the liquidator suggests that it may be improper for Mr Whyte to seek advice for purposes which include protection which would be afforded to him, including on the issue of any adverse costs order in the appeal, if judicial advice is granted. Having regard to the liquidator's letter of 6 May 2020, this may be related to the questions as to the capacity in which the advice is sought.

64. There is nothing improper in Mr Whyte seeking the "blessing" of the Court for the proposed course of conduct. As the proposed course of action is an appeal against an adverse judgment, it is all the more appropriate that Mr Whyte seeks directions before exposing the members of the FMIF to that action (beyond the costs necessarily incurred in commencing the appeal to preserve the limitation date and bringing this application).

65. It is no part of Mr Whyte's appointment pursuant to Justice Dalton's order that Mr Whyte should be personally exposed to adverse costs orders in the ordinary course of his work. Where there is a risk of a person taking a different view as the correctness of Mr Whyte's decision to bring the appeal, it is appropriate for Mr Whyte to seek judicial advice and thereby gain protection against personal adverse consequences of the decision.

66. There is nothing improper in Mr Whyte seeking to avail himself of the protections offered by section 97 of the *Trusts Act 1973*.

67. It is irrelevant whether Mr Whyte has professional indemnity insurance, as the liquidator's correspondence has enquired.[26] The existence or otherwise of professional indemnity insurance is not a reason to refuse judicial advice.

68. Finally, pursuant to the Order of Justice Dalton, Mr Whyte is already entitled to claim remuneration and be indemnified out of the assets of the FMIF in respect of any proper expenses

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[26] See the letter dated 21 April 2020 from Russells Law appearing at Exhibit "SC-21" to the affidavit of Scott Couper filed on 8 May 2020 (**CD 22**).

incurred in carrying out the appointment. The advice sought does not change that position or represent any unusual departure from the status quo.

Disclosure of legally privileged advice

69. The liquidator has sought production of legal advices obtained by Mr Whyte in relation to the first instance proceeding and the prospects of appeal. Those requests include, but are not limited to, the confidential affidavit which was filed (and sealed) pursuant to the order of Justice Callaghan made on 21 February 2020.[27]

Principles

70. Legal professional privilege is a substantive right.[28]

71. *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Dicesian Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112 establishes that parties given notice of an application for judicial advice are not entitled necessarily to all the material placed before the Court by the applicant and that legal professional privilege is not abrogated by statutory proceedings for judicial advice.

72. Beazley JA and Giles JA noted that an application for judicial advice is non-adversarial.[29] Their Honours also noted the inappropriateness of material which canvassed the strengths and weaknesses of a party's case being made available to the opposing parties in the substantive litigation.[30]

73. Their Honours noted that it would be "extraordinary" if legal professional privilege had been abrogated by the New South Wales equivalent of section 96.[31]

74. Their Honours also stated that, unless waived, privilege attached to the legal opinion in its entirety.[32] Their Honours found there was no implied waiver by placing the opinion before the court in support of the application on a confidential basis. Their Honours declared in conclusion that the judge could not compel disclosure of privileged material to other parties.[33]

75. Hodgson JA dissented on the issue of whether judicial advice proceedings determine the rights of persons other than the party seeking judicial advice.[34] His Honour considered that judicial

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[27] **(CD 13)**.

[28] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11].

[29] *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, the Dicesian Bishop of the Macedonian Orthodox Church of Australia and New Zealand* (2006) 66 NSWLR 112, [8].

[30] Ibid [20], [22].

[31] Ibid [34].

[32] Ibid [28], [29].

[33] Ibid [58].

[34] Ibid [64].

advice proceedings were, in substance, adversarial,[35] and it therefore follows that the conduct of a party in such proceedings may constitute an implied waiver of privilege.[36] His Honour considered that the trustee seeking advice should be given a choice as to whether to continue to ask the Court to have regard to the advice, and if the trustee does so, it would then be for the judge to conclude how much of the advice should be shared in order to ensure procedural fairness.[37] That, it may be noted, ran completely contrary to the findings of the majority.

76. The Court of Appeal's judgment in (2006) 66 NSWLR 112 was not the subject of appeal to the High Court. The High Court decision in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 referred to the "main proceeding" involving the Church, not the judicial advice proceeding, and was an appeal from a separate decision of the New South Wales Court of Appeal.

77. In the High Court, Gummow A-CJ, Kirby, Hayne and Heydon JJ relevantly stated that:

(a) an application for judicial advice is "private advice...because its function is to give personal protection to the trustee";[38]

(b) although persons may be given notice of the application, they are not strictly "parties" and it would be wrong to treat such persons as being "in a position of parity" with the applicant or as being "adversaries";[39]

(c) "the judicial advice proceedings are not to be treated as a trial of the issues that are to be agitated in the principal proceedings", but rather the judge must decide whether it would be proper for the trustee to engage in the proceeding, which is "radically different" from deciding the issues which are to be ultimately agitated;[40] and

(d) the primary judge did not make any error in refusing the other participants access to the opinions of counsel.[41]

78. *Weston v Publishing & Broadcasting Ltd* [2010] NSWSC 1288 gives cautionary treatment of the reasons of the majority in the Court of Appeal, but was a distinguishable situation because the material was deployed on an *ex parte* hearing where there was an expectation that material could later be tested.[42]

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35 Ibid [68].
36 Ibid [69].
37 Ibid [70].
38 *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, [64].
39 Ibid [65], [66].
40 Ibid [74].
41 Ibid [173].
42 *Weston v Publishing & Broadcasting Ltd* [2010] NSWSC 1288, [45].

79. In *Klatt v Coore* [2013] QSC 196, Atkinson J, in stating the guidance which may be received from the High Court's reasons in *Macedonian*, stated:[43]

> "Nothing warrants limiting the powers given to the court by reference to some proceedings as "adversarial" and some as not. Classification of the proceedings in which a trustee asks advice about the propriety of institute or defending, as "adversarial proceedings" is not useful in deciding whether advice should be given by the court that instituting or defending the proceedings is proper."

80. In *Corbiere v Dulley* [2016] QSC 134 at [29], Burns J noted:

> "Lastly, and as already mentioned, where advice is sought from the court as to whether a trustee is justified in prosecuting or defending proceedings, the court will often receive a written opinion of counsel on prospects.[31] Such an opinion is not provided to the other parties and submissions in relation to the advice usually take place in the absence of the other parties.[32] Again as already mentioned, an advice from counsel was provided to the court by the applicant trustees in this case, but not to the respondents. That advice has been considered by me and submissions were taken with respect to it in the absence of the respondents."

81. The footnotes were relevantly:

    (a) As to footnote 31:

    > "See, eg, *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* [2006] 66 NSWLR 112at 114–115 [3]; *Coore v Coore* [2013] QSC 196 at [21]"

    (that is, adopting the passage by the majority in *Macedonian* and the statement by Atkinson J in Coore, both of which were contrary to the dissenting views on privilege expressed by Hodgson JA);

    (b) As to footnote 32:

    > "See, eg, *Coore v Coore* [2013] QSC 196 at [21] per Atkinson J; *Stephens v Chee* [2015] QSC 138 at [16] per McMurdo J."

82. In those circumstances, it is respectfully submitted that Hodgson JA's dissent in *Macedonian* has not been, and should not be, followed. It should be regarded as settled law that the legal professional privilege attached to the legal opinions which have been provided to the Court on a confidential basis has not been waived, whether expressly or impliedly.

<u>Authorities raised in the liquidator's correspondence</u>

83. The liquidator referred to the statement of principle by Edelman J (as his Honour then was) in *Plan B Trustees Ltd v Parker [No 2]* [2013] WASC 216 at [42]. However, there was no statement by Edelman J that privileged opinions must be disclosed on an application for judicial advice. Rather, His Honour pointed out that the main significance of providing the advices to the court

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43 *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, [11](5).

is to show that the applicant (in this case Mr Whyte) sought to properly inform himself of the issues before seeking judicial advice (see [48]).

84. The liquidator also referred to statements of "doubt" expressed by Kenneth Martin J in *Wood (as co-executor and trustee of the Will of the deceased) v Wood [No 4]* [2014] WASC 393 at [98] – [135]. It is not apparent from the correspondence which particular passage from that section of the judgment the liquidator relies upon. At [123] and [124], Martin J supported the proposition advanced by Edelman J in *Plan B* that the court should not assess the prospects of success of an action by reference to an "expert opinion" by senior counsel. However, that goes no further than confirming the point that an opinion of counsel is not evidence as to whether there are prospects of success. Rather, the opinion goes to whether the applicant for judicial advice has properly informed themselves before moving the court for advice.[44]

85. However, it is respectfully submitted that *Wood* does not alter the position described above.

86. In light of the authorities cited above, the decisions raised by the liquidator do not establish a basis for the legal advices to be made available to the liquidator.

Prospect of collateral litigation in the liquidator's correspondence

87. Early correspondence from the liquidator suggested that:

(a) the liquidator wished to review any advice received by Mr Whyte in relation to the first instance proceeding or the prospective appeal "to assist … in considering whether it is necessary or appropriate for them to appear" on this application; and

(b) common interest privilege and a confidentiality arrangement would protect the advices once produced.

88. However, the affidavit of Mr Park filed on 17 April 2020 at [13] raised for the first time a new issue, namely whether the liquidator may wish to make a complaint about Mr Whyte's historical conduct. That is, in the Applicant's submission, quite different to the question as to whether judicial advice should be given in respect of a prospective appeal.

89. It is implicit in the liquidator's correspondence that the advices may be relied upon to support a claim against Mr Whyte or his advisors. It is unclear how common interest could apply in the case of such divergent interests.

44 The Court's attention is also drawn to paragraph [131] of *Wood*, which makes another brief reference to *Plan B* (Edelman J).

Submission

90. As developed above, it is submitted that the court should proceed on the basis that it is settled law that an applicant for judicial advice is not required to produce its confidential and privileged legal opinions to parties who appear on the application.

91. The statements of the majority in *Macedonian* explain why the privileged advices would not be made available to the named Respondents.

92. There are two reasons, which should then follow, why it would be similarly inappropriate for Mr Whyte to share his privileged advice with the liquidator:

    (a) if legal professional privilege is to be maintained, it must be maintained fully. The holder of that privilege ought not waive privilege in favour of some persons for some purposes but maintain the claim of privilege against others. To do so may be taken as an implied waiver of privilege; and

    (b) as Mr Park has by his affidavit and his solicitors' correspondence indicated that action may be commenced against Mr Whyte in respect of the conduct of the first instance proceeding, it would be entirely inappropriate for confidential and privileged advice which canvasses the strengths and weaknesses of the case to be made available to a prospective opponent who may wish to second-guess the decisions which Mr Whyte made in the litigation previously.

93. As noted above, the legal opinions of counsel are not evidence as to whether there are reasonable grounds of success on the appeal. The opinions are provided to the court to assist in understanding the issues and to demonstrate that Mr Whyte has properly informed himself as to those prospects before approaching the court for advice.

94. Mr Whyte has deposed openly to his view that, in light of the advice received, he thinks it is appropriate to bring the appeal. The advices do not need to be disclosed to know that Mr Whyte received advice and what conclusion he drew from it.

95. Mr Whyte's solicitors' letter of 12 March 2020 noted the further issue that,[45] should Mr Whyte provide privileged material the liquidator, who represents some but not all of the membership of the FMIF, other members may regard that as unfair. There would be the risk of the advices then being made available to all members, to remedy the unfairness. Once exposed to such a wide audience, there is a real risk the advices would enter the public domain and legal professional privilege would be lost.

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[45] The letter appears at Exhibit "SC-20" at page 102 of the Exhibits to the affidavit of Scott Couper, filed on 8 May 2020 (**CD 22**).

96. The view of the majority of the Court of Appeal in *Macedonian* was that the court has no power to order the disclosure of the privileged advices. That statement has not been countermanded by subsequent authority.

97. Finally, the liquidator does not need the privileged advices to form a view as to the issues raised in the proposed appeal, as he has the benefit of the following:

    (a) knowledge gained as to the issues in the Director Proceeding at first instance, as LMIM (represented by the liquidator and the liquidator's present solicitors) was the Seventh Defendant. The Applicant sought a right of indemnity against the assets of the MPF (the Eighth Defendant) and LMIM as responsible entity was a necessary party to that claim. The order of Justice Jackson made on 21 July 2015[46] directed, pursuant to section 59 of the *Trusts Act 1973*, that the Seventh Defendant had been properly joined to the proceeding. The Seventh Defendant prepared a defence in that proceeding and on 28 April 2016 was excused from further participation in the proceeding;[47]

    (b) access to all of the evidence and submissions made by the parties at first instance;

    (c) the Reason for Judgment of Jackson J; and

    (d) the Notice of Appeal.

98. Therefore, it is respectfully submitted that privilege over the advices exhibited to the confidential affidavit of Mr Couper has not been waived and those advices should not be disclosed to any other person, save to the judge hearing the application.

Enquiries in relation to the proceeding at first instance

99. To the extent the liquidator seeks information or documents going to the proceeding at first instance, that is irrelevant to the present application.

100. This application is concerned with the conduct of the appeal. That extends to the following matters:

    (a) considering the judgment at first instance;

    (b) taking advice as to the prospects of an appeal;

    (c) causing a notice of appeal to be filed to preserve the limitation date;

    (d) communications with the Court and the proposed Respondents to pause the appeal timetable pending this application for judicial advice;

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[46] The order appears at Exhibit "SC-15" at page 27 of the Exhibits to the affidavit of Scott Couper, filed on 8 May 2020 (**CD 22**).

[47] These steps are described in the affidavit of Scott Couper, filed on 8 May 2020 (**CD 22**) from paragraphs 36 to 43.

(e) this application for judicial advice; and

(f) the conduct of the appeal.

101. Therefore, the application has a limited retrospective effect in relation to steps associated with the appeal but has nothing whatsoever to do with the proceeding at first instance or any steps taken before that proceeding. Put another way, the application has nothing to do with any step prior to the date of judgment at first instance on 22 November 2019 or the subsequent (and related) costs orders made consequent to that judgment.

102. As noted above, the enquiries by the liquidator in relation to steps taken and advice received in relation to the first instance proceeding seem to relate to a potential collateral attack on Mr Whyte in relation to the first instance proceeding. That is not relevant to the application for judicial advice.

103. As part of those requests as to historical matters, the liquidator has suggested that judicial advice may be resisted on the basis that certain (unspecified) facts were not put before the Court. However, the advice sought is given based on the facts identified by the application. This is not an occasion to debate the facts. If Mr Whyte has sought advice on a misleading statement of the facts, Mr Whyte would risk losing the protection of the advice.

Reasonable prospects of appeal

104. The proposed grounds of appeal are listed in detail in the notice of appeal.

105. If the Court decides to exercise its discretion to give advice, it must then consider whether it is appropriate for the trustee to prosecute the appeal (or proposed appeal). That question "involves an assessment as to whether there is a reasonable basis or reasonable grounds for the appeal and as to whether [the trustee] would be acting reasonably in so doing having regard to [it's] responsibilities as [trustee]."[48]

106. The Court is not required to express any opinion on the merits of the appeal. Rather, the question is "whether there are reasonable and arguable grounds for the appeal that has been instituted such that it would be proper and appropriate for the [trustee] to prosecute that appeal."[49]

107. A summary of the proposed submissions on appeal appears as **Annexure A** to these submissions.

108. Those submissions are not intended to fully argue the proposed grounds of appeal, but rather to show that there is a reasonable basis for the appeal, having regard to the principles identified above.

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48 *Re Frost* [2011] NSWSC 591, [69].

49 *Re Frost* [2011] NSWSC 591, [72]; In *Re Alan Maxwell Frost and Diana Catherine Fallon* [2013] NSWSC 1619, [29] the Court concluded that the appeal was "properly arguable" and had "reasonable prospects of success"; See also *Re Appln by Frost* [2014] NSWSC 597, [29].

Judicial advice sought

109. The threshold requirement for judicial advice is that the applicant must point to a question respecting the management or administration of the trust property. Whether to appeal a judgment concerning the rights of the FMIF, when acting in the name of the responsible entity which holds the "scheme property" of the FMIF on trust, satisfies that requirement.

110. The advice should be directed to Mr Whyte, as the person made responsible by the order of Justice Dalton for the winding up of the FMIF and the individual who is making the relevant decisions in relation to this proceeding.

111. To merely give advice to "LMIM" (as the liquidator suggested in correspondence dated 14 May 2020) would not be appropriate, because the protection afforded by the ruling would arguably not extend to Mr Whyte personally.

112. The advice sought should follow the language of paragraph 5 of the Originating Application, namely advice that Mr Whyte is and was justified in making and pursuing the Notice of Appeal number 14258 of 2019.

Damien O'Brien QC

Matthew Jones

Counsel for the Applicant

25 May 2020

Annexure A

SUMMARY OF PROPOSED SUBMISSIONS AS TO THE GROUNDS OF APPEAL

Ground 1 – second limb / "the priority" of s601FD(1)(c)

1. Section 601FD(1)(c) of the *Corporations Act 2001* provides that:

> "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; 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;
>
> ..."

2. This ground is concerned with identifying "the interests of the responsible entity". At trial, the Applicant contended that phrase extended to LMIM (which was the responsible entity), in its capacity as trustee of a separate investment trust, the "Managed Performance Fund" or "MPF".

3. At paragraph [87] of the judgment, the learned primary judge found as to the second limb of section 601FD(1)(c):

> "In my view, on the proper construction of the provision, the interests of the responsible entity do not include the duty of the responsible entity as trustee of another trust to the beneficiaries of that trust."

4. That is, the learned primary judge found that the provision was limited the responsible entity company in its own capacity. That was based on four grounds identified at paragraphs [88] to [91] respectively.

5. The relevant effect of such a finding is that it could not be a breach of the "priority" duty to prefer the interests of a trust of which LMIM was also trustee over the interests of the FMIF.

6. That finding is open to challenge because:

   (a) the brief statement at paragraph [88] that the Applicant's case does not accord with the ordinary meaning of the words "interests of the responsible entity" did not address the purpose of the legislation, which had been identified in *ASIC v Lewski* (2018) 132 ACSR 403 at [52] as being protective in nature and did not deal with several authorities cited in the plaintiff's written submissions on the proper construction of the provision;

   (b) it sought to draw a distinction between a conflict of duty and duty and a conflict of duty and interest where no such distinction was warranted so far as this remedial protective provision was concerned. The extrinsic material to the provision makes it clear the provision incorporated the fiduciary duty of undivided loyalty. As the New South Wales

Court of Appeal unanimously observed in *Beach Petroleum NL v Kennedy* (1999) 48 NSLR 1 at 47:

> "**201** The conflict of duty and duty rule and the conflict of duty and interest rule may impact differently but both are manifestations of the over-riding duty of undivided loyalty. In the case of a duty and duty conflict, there is no aspect of "human nature" which tends to bias choice in a particular direction. Rather: "... the fiduciary ... may be unable to discharge adequately the one obligation without conflicting with the requirement for observance of the other obligation.": *Breen v Williams* (at 135), per Gummow J; see also *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 at 392-393.
> **202** Expressed in this way, there is no substantive difference between a duty and interest conflict and a duty and duty conflict: see *Moody v Cox* [1917] 2 Ch 71 at 81-82 and 84-85; *Haywood v Roadknight* [1927] VLR 512 at 516-517, 521."
> (emphasis added)

(c) the finding that section 601FC(1)(c) refers to "own interests", but section 601FD(1)(c) does not, supports the view that section 601FD(1)(d) must also refer to the responsible entity's "own interests". However, the reasons did not address the proposition that a trustee of a trust has an interest in the operation of a trust and the value of its right of indemnity. That is, it is difficult to say that LMIM's interests as trustee company are substantively different to its "own interests" as a company;

(d) the finding at paragraph [91] is to the effect that since the legislation permits one company to be the responsible entity of more than one registered scheme, that would create an absurd result of a responsible entity owing duties simultaneously to two different schemes. However, the Applicant submits that is not an absurd result and is well recognised in the area of conflicts of duty and duty. That is not a reason which justifies reading the provision down as to the nature of the duty; and

(e) the finding at paragraph [92] was that no case authority supported the Applicant's construction and that a passage in *Allco Funds Management Ltd v Trust Co (Re Services) Ltd* [2014] NSWSC 1251 was to the contrary. However, that passage in *Allco* related to a different situation and the learned primary judge, it is submitted, did not deal adequately with the Applicant's submissions at first instance as to the proper construction of the provision (similar to the response to paragraph [88] of the Reasons above).

7. As a consequence of those findings, the learned primary judge decided the section 601FC case only by reference to the first limb of the duty.

8. The Applicant submits that the construction preferred by the learned primary judge is an unlikely construction in respect of legislation which was intended to be remedial and protect the interests of investors in managed investment schemes. It tends to give additional protection to responsible entities who manage multiple schemes which deal with one another, as compared to the situation

faced by a responsible entity of only one scheme, or of multiple schemes but which do not deal with one another.

9. This ground raises an issue of public importance as to the operation of managed investment schemes which, given the controversy exposed by the Reasons, would benefit from appellate consideration.

Ground 2 – First limb / "the best interests element" of s601FD(1)(c)

10. The learned primary judge considered the "bests interests" limb of section 601FD(1)(c) from paragraphs [93] to [126] of the judgment. That passage traversed a wide body of law, but the critical passage is arguably from paragraphs [111] to [116].

11. A general law fiduciary, such as a trustee of a trust, owes proscriptive duties which have been colloquially described as the "no conflicts rule" and the "no profits rule".[50] The general law arguably does not recognise a specific "best interests" duty.[51] Rather, the term "best interests" is an umbrella term which provides a broad description of a number of more precise, and specifically recognised, fiduciary duties.[52]

12. In *ASIC v Lewski* (2018) 132 ACSR 403, the High Court supported Murphy J's statement of the relevant principles around s 601FC(1)(c) and s 601FD(1)(c) at first instance in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (No 3)* [2013] FCA 1342, including relevantly at [465] that the "heritage" of the best interests duty is equitable and that and at [471], that it encompasses the "fundamental duty of undivided loyalty" and the need for directors "to use their best efforts to pursue solely the members' interests."

13. At [111], the learned primary judge reached an interim conclusion as to what the provision does <u>not</u> mean.

14. At [112], the learned primary judge noted that the Constitution of the FMIF permitted the RE to deal with itself and act as trustee of other trusts or schemes, among other things.

15. At [113], the learned primary judge noted that it is possible for the scope of the fiduciary obligations of a trustee to be modified in certain circumstances. However, that leaves open whether the statutory duties in sections 601FC(1)(c) and 601FD(1)(c) can be modified by a schemes constitution. The Applicant submits it would defeat the purpose of the legislation, and

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50 *Bray v Ford* [1896] AC 44, 51–52; *Breen v Williams* (1996) 186 CLR 71, 108; *Re Colorado Products Pty Ltd (in prov liq)* (2014) 101 ACSR 233, [351]; *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1, [4503]–[4504]; *Vanguard Financial Planners Pty Ltd v Ale* (2018) 354 ALR 711, [123]–[129].

51 M Scott Donald, 'Regulating for fiduciary qualities of conduct' (2013) 7(2) *Journal of Equity* 142, 157-158; Citing Lord Nicholls, 'Trustees and their Broader Community: Where Duty, Ethics and Morality Converge' (1995) 9 *Trust Law International* 81.

52 GW Thomas 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2(3) *Journal of Equity* 177, 202.

be an unlikely statutory construction, if a constitution could contract out of a protective statutory provision.

16. At [114], the learned primary judge noted the conclusion in *ASIC v Drake (No 2)* (2016) 340 ALR 75 that a fiduciary duty can be modified by the trust instrument. However, that proceeding considered the constitution of the MPF, which was not subject to the statutory provisions of sections 601FC(1)(c) and 601FD(1)(c).

17. At [115], the learned primary judge noted that clause 29 "was part of the trust instrument constituting the MPF," but that must have been an error and an intended reference to FMIF. His Honour found that "subject to any statutory prohibition" the constitution authorised LMIM as RE to "deal with itself as trustee of another trust."

18. The critical conclusion was, it is submitted, at [116], where based on the reasoning in *ASIC v Drake (No 2)* which concerned the MPF, the learned primary judge concluded:

> "As such, the obligation of the defendants to act in the best interests of the FMIF has to take into account the fact that the constitution of the FMIF expressly authorised LMIM:
>
> (1) to act as a RE of another trust, or fund;
>
> (2) to deal with itself as trustee of another trust; and
>
> (3) to be interested in a contract or transaction with itself as trustee of another trust."

19. The reasoning applies to an unregistered managed investment scheme which is not subject to sections 601FC(1)(c) and 601FD(1)(c). The learned primary judge, in effect, concluded that the (remedial) statutory duties may be limited by the constitution of the scheme.

20. The Applicant submits that the fact that a RE may deal with other trusts does not mean that the RE no longer has to comply with the full tenor of a statutory duty to act in the best interests of the members of any registered managed investment scheme involved. As was submitted for the plaintiff at trial, one effect of the provision is to resolve an otherwise difficult conflict point by directing the RE which members are to be preferred.

21. His Honour then posed the question at [117] what, then, the scope of the duty meant. Some further learned articles and considerations were cited. At [127], the learned primary judge said that:

> "Before going further, it will be necessary to consider the facts of this case more closely."

However, the learned primary judge did not return to make a finding as to the true scope of the first limb of section 601FD(1)(c).

22. Therefore, the critical finding as to the scope of the duty appears to be paragraph [116] of the judgment, which arguably applies to an unregistered scheme but sits uneasily with the statutory provision applicable to a registered scheme.

23. This ground also raises an issue of public importance as to the operation of managed investment schemes which, given the controversy exposed by the Reasons, would benefit from appellate consideration.

Ground 3 – Failing to determine the content of the duty

24. As noted above, from paragraphs [117] to [126] of the Reasons, His Honour began the process of determining the scope of the "best interests" duty. The Reasons at [126] stated that none of the parties' competing propositions were made out.

25. Paragraph [127] stated that, before going further, it would be necessary to consider the facts of the case more closely.

26. Paragraph [128] commenced the consideration of the next duty case, namely subsection 601FD(1)(b) which addressed the duty of care and diligence to members.

27. The Applicant submits that the learned primary judge did not return to the issue of the proper meaning of the best interests duty. Paragraphs [128] to [135] considered the nature of the duty at section 601FD(1)(b). Paragraphs [136] to [177] dealt with causation, which was relevant to any of the breach cases. Paragraphs [178] to [282] considered the Applicant's case as to breach of section 601FD(1)(b).

28. Paragraph [283] then found that there was no breach of the due care and diligence duty established and paragraphs [285] and [286] found that it was therefore unnecessary to consider the section 1317S case.

29. Paragraph [284] referred to the Applicant's claim being necessarily dismissed because of "my earlier findings as to the operation of the duty to act in the members' best interests …", however the Applicant submits that no such findings were made, beyond that the contentions advanced by the parties were not made out.

30. The Applicant respectfully submits that a finding as to the scope of the "best interests" duty was necessary before breach and causation in respect of that duty were considered.

Ground 4 – Scheme Property

31. The learned primary judge found at [136]:

> "The plaintiff alleges that the damage that resulted from the defendants' contraventions of the duty to act in members' best interests or the duty of care and diligence to members was that the FMIF did not receive the amount that was received by LMIM as trustee for and credited to the MPF. That is to say, the damage was the amount of the settlement proceeds that PTAL as custodian for the FMIF did not receive. **The plaintiff did not contend at this point that that amount formed part of the plaintiff's scheme property before it was received by LMIM as trustee of the MPF.** The issue between the parties is whether that damage resulted from the alleged breaches of duty, so as to entitle the plaintiff to an order for compensation under s 1317H of the CA." (emphasis added)

32. The Applicant respectfully submits that the highlighted statement does not reflect its case or submissions at trial.

33. Paragraph 37 of the statement of claim pleaded:

> "The Settlement payment was scheme property which ought to have been held by LMIM as RE for the FMIF for the benefit of members of the FMIF." (emphasis added)

34. On day 4 of the trial, at transcript 4-89, ln 35-37, the plaintiff handed up a list of "Findings Sought by the Plaintiff". Those findings included:

> "2. The amount payable pursuant to clause 7 of the Deed of Release (Exhibit 85) to PTAL was scheme property of the FMIF.
>
> 3. The amount payable under the Gujarat Contract (Exhibit 87) to PTAL was scheme property of the FMIF." (emphasis added)

35. Paragraph 119 of the Applicant's written submissions submitted that the "Bellpac settlement proceeds were 'scheme property'" for a number of reasons.

36. Whether the settlement payment was "scheme property" was described as "Issue 1" in the sixth defendant's outline of submission and was put as a complete defence to the Applicant's claim. It was therefore plainly an issue in the proceeding.

37. In oral argument, there was a lengthy debate between Queens Counsel for the Applicant and the trial judge about whether the settlement proceeds were "scheme property" at T5-61 ln 38 to T5-66 ln 3.

38. It therefore was in fact the case that the Applicant contended that the whole of the settlement proceeds were scheme property.

39. The learned primary judge therefore erred failing to properly consider and deal with the submissions put to him.

40. The Applicant submits that the settlement proceeds were scheme property. The "proceeds split" was paid to MPF only because LMIM as RE for the FMIF directed the partial payment to the MPF. That meant the FMIF had the power to direct where the settlement sum was paid. Only the person entitled to money can give such a direction.

41. An analogy may be drawn with a cottage conveyance in which the vendor gives cheque directions for the settlement proceeds to be paid in a certain way. The vendor is still taken to have received all of the proceeds (and in fact receives the whole of the proceeds) even though cheques are drawn in favour of others.

42. Fundamentally, however, the deed of Release and the Gujarat Contract provided for the settlement sums to be paid to PTAL. That was expressly stated in the Applicant's written submissions at trial.

43. "Scheme property" was an important concept because LMIM as RE of the FMIF could only have acted in breach of its duties if it dealt with its "scheme property" in a way which was contrary to the interests of the FMIF. If the settlement proceeds were never "scheme property" within the control of LMIM, there would have been no way for LMIM as RE of the FMIF to deal with those proceeds, one way or the other.

44. The Applicant therefore submits that the learned primary judge erred in not properly considering the parties' (not only the Applicant's) submissions as to the meaning of "scheme property" and in also failing to find that the settlement payment in question was scheme property.

Ground 5 – The Existence of an "Understanding"

45. A substantial factual issue in the case was whether there was an "Understanding" among the directors to the effect that the MPF would be paid a portion of any settlement proceeds. That was put forward as an explanation or justification for the directors conduct in causing $15.5m of the settlement proceeds, which would otherwise have been paid to the FMIF, to be paid to the MPF.

46. The Applicant's case was that:

    (a) there was no such understanding, and indeed the date on which a split of proceeds was first contemplated could be pin-pointed through email correspondence, the terms of which were inconsistent with such an "Understanding";

    (b) even if there was a general expectation of a proceeds split, it was not certain or binding (there being, among other things, no term of the "Understanding" about the percentage or amount of the proceeds split); and

    (c) the better explanation for MPF having funded litigation for the benefit of both the FMIF and the MPF was that MPF was funding the litigation as second mortgagee, in the expectation that surplus proceeds might flow to it after the FMIF was paid out.

<u>Whether funding as second mortgagee</u>

47. From [178], the learned primary judge reached the conclusion that MPF had not funded the Bellpac Proceedings as second mortgagee.

48. At [185], the learned primary judge found, after considering a number of factual considerations:

> "It does not necessarily follow, therefore, that in funding almost the whole of the costs of the Gujurat proceedings, LMIM as trustee of the MPF was doing so as mortgagee or second charge."

49. However:

(a) Exhibits 37 and 39 were MPF loan statements which recorded payments in respect of the Bellpac Proceeding, including receivers' fees and property holding costs, with interest charged upon those sums pursuant to the Bellpac loan facility;

(b) there was evidence of the history of the settlement negotiations, which indicated that early in the proceedings, the anticipated recoveries were such that there would have been enough to pay out the FMIF in full and leave a surplus for the MPF; and

(c) Exhibit 14 was an email from Mr Monaghan, which rejected the suggestion from Mr Fischer in August 2010 to draw up a litigation funding agreement, because:

> "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."

50. The learned primary judge did not refer to that evidence or the submissions about them.

51. At [186], the learned primary judge found that:

> "There is no evidence that the defendants as the board of directors of LMIM considered whether it was proper for LMIM as trustee of the MPF and second mortgagee or chargee to fund the costs of Bellpac by its receivers and managers or of PTAL as custodian of the FMIF."

52. However, the learned primary judge made no findings that the board of LMIM had a practice of deciding and recording matters like that. The Applicant submits that it could equally be said that there was no evidence of the board of directors of LMIM considering whether the Bellpac Proceeding should have been funded on the basis of an "understanding" that the MPF would receive a proportion of the settlement proceeds.

53. The Applicant's written submissions at [165] offered an explanation that the defendant directors were conflating two concepts, namely the idea of a litigation funding analogy (which came later) with the expectation of the MPF receiving something as second mortgagee, since the anticipated recovery was enough to pay out the FMIF Bellpac loan and leave a surplus for the MPF as second mortgagee.

54. That was not considered by the learned primary judge.

No binding terms

55. The Applicant submits that the learned primary judge did not properly act upon the admission on the pleadings that there was no binding express arrangement that LMIM as trustee of the MPF would be paid any amount if the amount that LMIM as RE of the FMIF did not cover the whole of the amount owing to it: see [254].

56. The learned primary judge also found at [238] that the defendants were not entitled to make a gift of the FMIF's property to the MPF.

57. It therefore remains unclear, from the Reasons, how the "understanding" <u>required</u> the directors to suborn the interests of the FMIF and make the payment to the MPF.

<u>*Finding of an understanding but absent any terms*</u>

58. A related point is that there is no clear statement in the Reasons as to what the "understanding" was.

59. The understanding alleged by the defendants was identified at [256] as follows:

> "However, the defendants allege they had the understanding that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation."

60. There was no clear statement of what that understanding meant in terms of dollars or proportions of any recovered amount.

61. At [265], the rejection of the Applicant's arguments as to the absence of an understanding are similarly general:

> "The matters relied on by the plaintiff are not enough, in my view, to reject the defendants' evidence as to the existence of the understanding. I acknowledge that some of their evidence on the point was vague. Also, it is not to be ignored that the understanding is evidence of the states of mind of the defendants that it is in their interests to give and difficult to contradict. It is quite possible that the defendants believed that they had the understanding at the time when they gave evidence but that their beliefs are mistaken and the product of reconstruction. Further, the absence of two relevant witnesses should not go unnoticed. The first defendant did not give evidence. The plaintiff submits it should be inferred that his evidence would not have assisted his case. Second, Mr Monaghan, who was closely involved in the Gujurat proceedings as a lawyer advising LMIM was not called by any of the parties to give evidence. However, no inference is more readily drawn against the defendants because of that, because the plaintiff might have called Mr Monaghan."

62. At [264] the learned judge referred to "other forensic points [raised by the plaintiff] in support of its contention that there was no understanding", which were broadly summarised, with the conclusion "I have not overlooked these points."

63. Those points spanned paragraphs [158] to [266] of the Applicant's written submissions. That is, a very substantial body of evidence was put to the learned primary judge on this issue, but that evidence was dealt with only briefly. The learned trial judges identification of the Applicant's reliance on emails from paragraphs [261] to [263] did not include relevant material which was directly inconsistent with His Honour's findings, such as:

    (a) a reply from a manager, Mr Monaghan, dated 20 August 2020, which stated that MPF was funding the proceeding as second mortgagee (Exhibit 14 / FMIF.100.004.9878); and

    (b) another dated 31 August 2010 which, by reference to the alleged undertaking, said "There is no agreement in place" (Exhibit 17 / FMIF.100.003.2096).

64. The Applicant submits that all of the contemporaneous documentary evidence points against there being an "understanding" of the kind which the Respondent's alleged. That included documentary evidence as to other financial interactions between the FMIF and the MPF which shows that the MPF was already indebted to the FMIF at the time of the payment of part of the proceeds to the FMIF. That presented an alternative way for MPF's contribution towards the costs of the proceeding and the settlement to be recognised.

Litigation funding analogy not apt

65. The learned primary judge found that the litigation funding analogy was not an entirely accurate description of the "understanding" at [244].

66. However, that was the explanation proffered by the defendants, namely that there was an understanding that the MPF would take an (unspecified) share of the settlement proceeds in exchange for funding the Bellpac Proceeding.

67. At [254], the learned primary judge sought to draw a distinction between the litigation funding analogy and some other proceeds sharing arrangement:

> "However, Allens' advice as to the division of the proceeds was not based solely on the analogy between LMIM as the funder of the Gujurat proceedings and an arm's length commercial litigation funder. According to the Allens advice, it was also based, inter alia, upon the understanding of the directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation."

68. The Applicant submits that the basis for that distinction is not explained in the reasons.

Conclusion on understanding

69. For the above reasons, the Applicant submits that the learned primary judge's reasoning is captured by the principle in *Fox v Percy* (2003) 214 CLR 118 and the general oral evidence of the defendants which was relied upon at [265], was not a sufficient basis to find that the defendants had discharged their onus of establishing the existence of the relevant understanding.

Ground 6 – The lack of content of the "Understanding"

70. This ground is related to the matters raised in ground 5.

71. There are particular issues which are enumerated in ground 6 on the notice of appeal.

72. Each of those issues was raised in the Applicant's written submissions at trial, vis:

    (a) the admission that there was no legally binding arrangement or understanding was referred to at paragraphs 136 and 137;

    (b) that there was no understanding as to what the share of proceeds was to be (and that that was common ground) was referred to at paragraph 321; and

(c) the fact that the litigation funding analogy arose only in email communications between a subset of the directors from August to December 2010 (whereas MPF had been funding the Bellpac Proceeding for more than a year by that time) was referred to from paragraphs 176 to 211.

Ground 7 – Failure to find breach of s601FD(1)(c)

73. This ground follows from the conclusions which the Applicant submits should be reached on grounds 1 to 6 above.

74. If the "best interests" and "priority" cases operate in the way contended by the Applicant, the conduct in causing part of the FMIF's "scheme property" to be paid to the MPF could not be justified at all, and particularly not by the "Understanding" which the directors contended existed.

Ground 8 – Failure to find a breach of s601FC(1)(b)

75. The claim for breach of the duty of due care and skill was the Applicant's alternative case at trial.

76. The notice of appeal refers to a number of errors from paragraph [192] to [283] of the Reasons. Those erroneous findings should be considered in light of the circumstances identified from Ground 8(h) to (k). Those are the circumstances identified in respect of Ground 5 above.

77. This ground should not be seen as arguing a large number of specific findings individually. Rather, the case is that once the true factual framework is recognised, the directors' purported reliance on the WMS Report (which was accounting advice merely as to a litigation funding percentage) and the Allens Advice (qualified advice which was premised on assumptions which were incompatible with the true factual framework), the directors' conduct was so divorced from the true state of affairs that a reasonable director could not have proceeded on that false premise.

78. The Applicant's case accepts that the directors could not be expected to have remembered in April 2019 (at trial) the detail of their consideration of the Allens Advice in March and April 2011.

79. However, taking into account the content of the Allens Advice and the true factual framework identified above:

(a) if the directors read the Allens Advice, they must have appreciated that it did not justify the proceeds split without further enquiries being made, because it was based on assumptions which the directors must have known was wrong; and

(b) if the directors did not read the Allens Advice, but purported to rely on it in agreeing to transfer $15.5million from a registered managed investment scheme to a related unregistered investment scheme/trust, that manifestly fell below the standard of care required of a director of a responsible entity.

80. In turn, that leaves, in the Applicant's submission, no scope for a defence pursuant to section 1317S of the *Corporations Act 2001* in light of the gravity of the conduct.

Grounds 9 and 10 – Failure to find causal link to loss and failing to determine s1317S defences

81. The directors of LMIM were faced with three alternatives:

    (a) to pay the whole of the settlement proceeds to LMIM as RE of the FMIF;

    (b) to reimburse the MPF for the amounts it had advanced to fund the Bellpac Proceeding, but otherwise cause LMIM as RE of the FMIF to retain the settlement proceeds; or

    (c) make the proceeds split (as they in fact did).

82. Once it is concluded that option (c) was a breach of duty, it must follow that either option (a) or (b) would have been pursued. The choice to follow option (c) was the direct and clear cause of LMIM as RE of the FMIF failing to recover the whole of the settlement proceeds. The loss to the FMIF therefore plainly "resulted from" the conduct of the directors within the meaning of section 1317H of the *Corporations Act 2001*.

83. As to section 1317S, the Applicant maintains its submissions made at trial (which were not addressed by the learned primary judge) that the directors' section 1317S cases were based on false premises, including the existence of the alleged "understanding", and once it is determined that there was no such "understanding" justifying the course they took, there is no room for section 1317S to be invoked to excuse them from liability.