

SUPREME COURT OF QUEENSLAND

REGISTRY BRISBANE
NUMBER BS3383/13

Applicants: **RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE**

AND

First Respondent: **LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) ACN 077
208 461 IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE LM
FIRST MORTGAGE INCOME FUND**

AND

Second Respondent: **THE MEMBERS OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089
343 288**

AND

Third Respondent: **ROGER SHOTTON**

AND

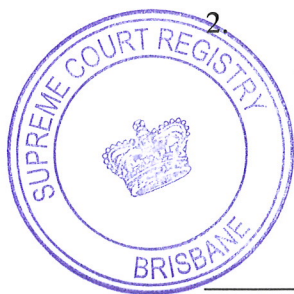
Intervener: **AUSTRALIAN SECURITIES AND
INVESTMENT COMMISSION**

OUTLINE OF SUBMISSIONS

on behalf of the Court-appointed Receiver

Background

1. Where these submissions refer to capitalised terms which are not defined in the submissions themselves, the definition of the term appears in the legend at paragraph 10 of Mr Whyte's affidavit filed 11 May 2020 and at paragraph 9 of the affidavit.
2. This is an application by Mr Whyte, as the person appointed pursuant to s 601NF(1) to ensure that the fund known as the LM First Mortgage Income Fund is wound up in accordance with its constitution and as a Court-appointed Receiver ("**the Receiver**") pursuant to s 601NF(2) *Corporations Act* 2001 ("**the Act**")¹, for an order



¹ Affidavit of David Whyte filed 11 May 2020, paragraph 3 (Court file number 460)

approving his remuneration for work done in the period of the receivership from 1 November 2019 to 30 April 2020.

3. ASIC has been served with the application and has not given any indication that it opposes the making of the orders sought.
4. The members have been served and, as at the time these submissions were prepared, apart from the first respondent's liquidator, no indication has been given by any member that they will appear to oppose the orders.
5. Other interested parties have been served and, likewise, they do not appear to oppose the making of the orders.
6. As explained below, the Receiver holds office under dual appointments ordered by the Court². The Receiver was appointed the person responsible for ensuring that a registered managed investment scheme operated by LM Investment Management Limited (Receivers & Managers Appointed) (in liquidation) ("LMIM") is wound up in accordance with its constitution. The Receiver was also appointed by the Court as the receiver of the property of the scheme, for the purpose of aiding the orderly winding up of the scheme.
7. Further, on 25 September 2014, and pursuant to the orders of Jackson J, Mr Whyte and Mr Fielding were appointed as agents of The Trust Company ("PTAL"), the Custodian of the Fund's Assets, in respect of six securities held for the fund.³
8. The scheme to which the Receiver is appointed ("**the Fund**") is the LM First Mortgage Income Fund ARSN 089 343 288 ("**the FMIF**").
9. The FMIF is a "first mortgage fund". In short, LMIM, as Responsible Entity for the FMIF, was required to invest the pooled capital subscribed by the members of the FMIF in "Mortgage Investments" to be held on trust for the benefit of the members of the FMIF. Each such investment was to be a loan to a third party to acquire real property on the security of a registered mortgage in favour of LMIM.⁴
10. In the post GFC and most definitely by March 2009, FMIF was experiencing serious difficulties. It closed for new investments in about March 2009 and redemption of units in FMIF was suspended in May 2009, other than redemptions allowed under

² Affidavit of David Whyte filed 11 May 2020, paragraph 3 (Court file number 460)

³ Affidavit of David Whyte filed 11 May 2020, paragraph 8 (Court file number 460)

⁴ Affidavit of David Whyte filed 7 November 2014, paragraph 18 (Court document number 225)

hardship provisions and certain payments to feeder funds.⁵ On 19 March 2013 John Park and Ginette Muller were appointed voluntary administrators of LMIM⁶ and on 9 April 2013, ASIC suspended LMIM's Australian Financial Services Licence.⁷

11. On 11 July 2013 Deutsche Bank AG, a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol as receivers and managers of the assets and undertakings of the FMIF.⁸ On 1 August 2013 Mr Park and Ms Muller were appointed Liquidators of LMIM.
12. On 8 August 2013, pursuant to s.601ND of the Act Dalton J directed LMIM to wind up the FMIF and Mr Whyte was appointed as the person responsible for ensuring that it is wound up in accordance with its constitution.⁹
13. Accordingly, by orders made on 8 August 2013, Mr David Whyte ("**the Receiver**") was appointed:
 - (a) pursuant to s.601NF(2) of the Act, as the receiver of the property of the FMIF; and
 - (b) pursuant to s.601NF(1) of the Act, to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution.
14. As to the FMIF, the Receiver was charged with taking responsibility to ensure that the winding up of the FIMF occurs by converting to money all of the assets of the FMIF, deducting all proper costs and then dealing with the remaining funds as ordered by the Court.¹⁰
15. As has been identified by the Court on prior remuneration applications, the winding up of the fund is a large and complex undertaking. For instance:
 - (a) there are over 4,600 members of the FMIF both in Australia and overseas and it has been necessary to communicate with each of the members during the course of the winding up as to the progress of the winding up to respond to members' queries and update the register of members;¹¹

⁵ Affidavit of David Whyte filed 7 November 2014, paragraph 21 (Court document number 225)

⁶ Affidavit of David Whyte filed 7 November 2014, paragraph 22 (Court document number 225)

⁷ Affidavit of David Whyte filed 7 November 2014, paragraph 23 (Court document number 225)

⁸ Affidavit of David Whyte filed 7 November 2014, paragraph 24 (Court document number 225)

⁹ Affidavit of David Whyte filed 7 November 2014, paragraphs 25 and 26 ex DW-1 p 31, DW-2 (Court document number 225)

¹⁰ See subclause 16.7(b) of the Replacement Constitution of the FMIF, at p.118 of ex. DW-5 to the Affidavit of David Whyte filed 7 November 2014 (Court document number 225)

¹¹ Affidavit of David Whyte filed 11 May 2020, paragraph 37(a) (Court file number 460)

- (b) the assets that were held as security for the various loans given by the FMIF consisted in large part of retirement villages situated in multiple States across Australia. Assets of that type, which are heavily regulated, require specialised knowledge regarding realisation strategy and day-to-day management;¹²
- (c) during the period for which the remuneration is claimed, complex litigation has progressed including claims made to recover funds for the benefit of members of the FMIF and claims made against the assets of the FMIF¹³;
- (d) the work involved in the winding up is made complex by the inter-relationship between LMIM, LMIM as RE of the FMIF and LM Administration (in liquidation)¹⁴ and by the complex inter-relationship between the FMIF and other funds of which LMIM is RE, including claims against the FMIF by KordaMentha¹⁵;
- (e) there has also been a need to liaise with other appointees, including the DB Receivers, the liquidators of LMIM, the liquidator of LMA, the Receivers of the LM Currency Protected Australian Income Fund and LM Institutional Currency Protected Australian Income Fund and the RE of the LM Wholesale First Mortgage Income Fund¹⁶;
- (f) during the period for which the remuneration is claimed there was extensive work involved in progressing the Auditors Claim and other litigation matters including the Claim against the MPF and the FTI Remuneration Proceeding¹⁷;
- (g) during the period for which remuneration is claimed there was extensive work relating to an interim distribution paid in October 2019 to over 4,600 investors and 5,200 investment accounts, which work included¹⁸:
 - (i) corresponding with investors regarding the distribution paid in October 2019;
 - (ii) updating investors' bank account details in the Fund's database to reprocess the distributions that returned;
 - (iii) reprocessing the distributions for any returned distributions from inactive bank account details;

¹² Affidavit of David Whyte sworn 7 November 2014, tables at paras 42 and 43 and affidavit of David Whyte filed 11 May 2020, paragraph 37(b) (Court file number 460)

¹³ Affidavit of David Whyte filed 11 May 2020, paragraph 37(c) (Court file number 460)

¹⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 37(f) (Court file number 460)

¹⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 37(g) (Court file number 460)

¹⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 37(h) (Court file number 460)

¹⁷ Affidavit of David Whyte filed 11 May 2020, paragraphs 38(a) and 22 (Court file number 460)

¹⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 38(b) (Court file number 460)

- (iv) providing instructions and information to PTAL to reprocess distributions;
 - (v) creating payment files to reprocess the distributions to the member's nominated bank account.
16. By the orders of the Court dated 21 August 2013, Mr Whyte is entitled to claim remuneration in respect of the time spent by him and by any employees of BDO (the firm of which the Receiver is a member) who perform work in the receivership, and in the winding up of the FMIF, at rates and amounts to be approved by the Court, and to be indemnified out of the assets of the FMIF in respect of such remuneration¹⁹. At the time of the appointment Mr Whyte's rates were in evidence before the Court²⁰. They have since risen marginally²¹.
17. On 4 September 2014, Mr Whyte applied for directions that it was appropriate for he and Mr Fielding to take up an appointment as agent of the Custodian of the assets of the Fund, Trust Company Pty Ltd (PTAL) which had been formerly held by the liquidators of LMIM. Jackson J ordered that it was appropriate for Mr Whyte and Mr Fielding to take up that appointment (“**the controllership appointment**”)²². Although the remuneration is governed by the terms of a Deed²³, Mr Whyte offered an undertaking to the Court at the time of directions to have their remuneration approved by the Court. In August 2018, PTAL issued notices revoking the appointments of Mr Whyte and Mr Fielding as controllers of all but one of the securities and in September 2018 PTAL issued notices revoking the appointments of Mr Whyte and Mr Fielding as controllers of the final security²⁴. In this application Mr Whyte does not seek remuneration in respect of the controllership appointment.

The present claim for remuneration

18. The Receiver now seeks orders approving his remuneration for work undertaken in the period 1 November 2019 to 30 April 2020, to be fixed in the sum of \$989,373.55 (including GST) in respect of his work as person responsible for ensuring the FMIF is wound up.

¹⁹ See the terms of the orders 3(b) and 3(c) at ex. DW-2 to the Affidavit of David Whyte filed 7 November 2014 (Court document number 225)

²⁰ Affidavit of David Whyte filed 7 November 2014, paragraph 3 ex DW-1, p 29 (Court document number 269)

²¹ Affidavit of David Whyte filed 11 May 2020, paragraph 43 and exhibit pages 1 to 3 (Court file number 460)

²² Court document number 223.

²³ Affidavit of David Whyte filed 7 November 2014, paragraph 3 ex DW-14, p 192 - 193 cl 2 and 3 (Court document number 225)

²⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 8 (Court file number 460)

19. The remuneration for this period compares with²⁵:
- (a) remuneration which was approved in respect of the period 8 August 2013 to 31 March 2014 in the amount of \$702,480.35 by McMurdo J on 28 August 2014;
 - (b) remuneration which was approved in respect of the period 1 April 2014 to 30 September 2014 in the amount of \$1,005,948.35 (receivership) and \$7,000.95 (controllership) by Mullins J on 27 November 2014;
 - (c) remuneration which was approved in respect of the period 1 October 2014 to 30 April 2015 in the amount of \$1,761,911.25 (receivership) and \$442,214.30 (controllership) by Jackson J on 23 June 2015;
 - (d) remuneration which was approved in respect of the period 1 May 2015 to 31 October 2015 in the amount of \$2,279,205.50 (receivership) and \$194,052.10 (controllership) by Martin J on 11 December 2015;
 - (e) remuneration which was approved in respect of the period 1 November 2015 to 30 April 2016 in the amount of \$1,405,155.40 (receivership) and \$36,510.65 (controllership) by Douglas J on 28 June 2016;
 - (f) remuneration which was approved in respect of the period 1 May 2016 to 31 October 2016 in the amount of \$1,119,991.40 (receivership) and \$13,385.35 (controllership) by Daubney J on 2 December 2016;
 - (g) remuneration which was approved in respect of the period of 1 November 2016 to 30 April 2017 in the amount of \$897,580.20 (receivership) and \$12,314.50 (controllership) by Justice Mullins on 30 June 2017;
 - (h) remuneration which was approved in respect of the period of 1 May 2017 to 31 October 2017 in the amount of \$1,280,897.20 (receivership) and \$26,155.25 (controllership) by Justice Applegarth on 30 November 2017;
 - (i) remuneration which was approved in respect of the period of 1 November 2017 to 30 April 2018 in the amount of \$1,041,907.90 (receivership) and \$22,306.90 (controllership) by Justice Boddice on 30 November 2017;

²⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 11 (Court file number 460)

- (j) remuneration which was approved in respect of the period of 1 May 2018 to 31 October 2018 in the amount of \$1,946,635.35 (receivership) and \$20,902.75 (controllership) by Justice Mullins on 29 November 2018;
- (k) remuneration which was approved in respect of the period of 1 November 2019 to 30 April 2019 in the amount of \$1,248,853.10 (receivership) by Justice Mullins on 2 July 2019;
- (l) remuneration which was approved in respect of the period of 1 May 2019 to 31 October 2019 in the amount of \$652,328.05 (receivership) by Justice Mullins on 17 December 2019.

The principles

- 20. The Receiver is entitled to be remunerated in accordance with the Court orders of 8 August 2013.
- 21. Unlike the case of a liquidator, there are no provisions (such as under the *Corporations Act* 2001 (Cth), s.473(10)) which provide guidelines as to how the Court should determine the appropriate remuneration. However, the principles applied in that context must by analogy provide some guidance to the Court's determination in the present case.
- 22. The overriding principle applied by the Court in the cases dealing with the *Corporations Act* provisions is that the liquidator (or receiver) is entitled to remuneration that is fair and reasonable²⁶. The Court must determine this question for itself irrespective of the absence of a contradictor²⁷.
- 23. The Receiver's application falls to be determined by a summary procedure in which the rules of evidence are not strictly observed²⁸. The Receiver carries the onus in establishing his entitlement.
- 24. To this end, there must be material before the Court which shows that the work undertaken was appropriate and necessary²⁹. The level of detail should be proportionate to the size of the estate and the volume of work done³⁰.

²⁶ *Conlan v Adams* (2008) 65 ACSR 521 at [28] per McLure JA (Buss JA and Newnes AJA agreeing)

²⁷ *ASIC v Groundhog Developments Pty Ltd & Ors* [2011] QSC 263 at [13] per Dalton J, citing *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379 at 1385 per Sir Robert Megarry VC

²⁸ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102 per Kennedy and Ipp JJ

²⁹ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 104 per Kennedy and Ipp JJ; *ASIC v Australian Foods Co Pty Ltd & Anor* [2005] WASC 110 at [8] per Sanderson M

³⁰ *Re Stockford Ltd; Korda and Anor* (2004) 52 ACSR 279 at 295 per Finkelstein J

25. Time-based costing has been recognised as being an appropriate basis for determining the remuneration³¹. In the present case the Court has ordered that Mr Whyte is able to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the appointment at rates and in sums from time approved by the Court. However, in determining whether the claimed amount is appropriate the courts are mindful of the disadvantages associated with time-costing. As such, it is recognised that in determining the appropriate remuneration, time spent represents a measure not of the value of the service rendered but of the cost of performing it, whereas remuneration ought be fixed so as to reward value rather than to indemnify against cost³².
26. The material assessable value is not the net financial gain to the members of the Fund. It is, rather, the value of the services rendered by or on behalf of the Receiver, which is considered by reference to whether the time was reasonably expended in the circumstances of the receivership³³.
27. The Receiver's expressed views as to what is reasonable are relevant but not decisive. The Court does not gainsay the considered oath of an officer of the Court, but nor does it uncritically accept unsubstantiated assertions³⁴.
28. Work will not be reasonably undertaken where it is unnecessary; where it is performed by persons of inappropriate seniority; and, where it is undertaken at inappropriate hourly rates³⁵. A cost-benefit analysis is desirable, and work done must be proportionate to the difficulty or importance of the task in the context in which it must be performed³⁶.
29. The process of determining whether claimed remuneration is fair and reasonable does not require the item by item analysis that would be necessary on a taxation of a solicitor's costs³⁷.

³¹ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at [105]- [106], followed in *Conlan v Adams* (2008) 63 ACSR 521 at [37]

³² *Mirror Group Newspapers plc v Maxwell & Ors (No 2)* [1998] 1 BCLC 638 at 652 per Ferris J

³³ *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532 per McLure JA (Buss JA and Newnes AJA agreeing); see also Dalton J in *ASIC v Groundhog Developments Pty Ltd* [14]

³⁴ *Owen, in the matter of Rivercity Motorway Pty Ltd (admins apptd) (recs and mgrs apptd) v Madden (No 2)* [2012] FCA 312 at [26] per Logan J

³⁵ *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532 per McLure JA (Buss JA and Newnes AJA agreeing)

³⁶ *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532-533 per McLure JA (Buss JA and Newnes AJA agreeing)

³⁷ *ASIC v Atlantic 3 Financial (Aust) Pty Ltd* [2004] QSC 133 at [16] per Mullins J; *Conlan (as liquidator of Oakleigh Acquisitions Pty Ltd)* [2001] WASC 230 at [24] – [27] per Owen J

30. There is otherwise no definitive approach to the exercise. Indeed, it has been observed that even where detailed evidence is before the Court, there is no touchstone or reliable independent measure of reasonableness other than judicial impression³⁸.
31. The above principles have been applied by this Court on prior applications. In particular, the Court accepted and considered the complexity of the task of Mr Whyte as the person responsible for winding up the Fund and that it is necessary to pay appropriate amounts to ensure that persons of Mr Whyte's abilities undertake these significant tasks³⁹.

The requirement of proportionality

32. In *Templeton v ASIC*⁴⁰ the Full Court of the Federal Court dealt with an application for approval of remuneration for persons who had been appointed to wind up an unregistered managed investment scheme. Under the order appointing them they were entitled to their reasonable remuneration and costs at the rates specified in the order. A registrar of the Federal Court discounted the amounts claimed by the liquidators and a review was made to the Federal Court followed by an appeal to the Full Court, Relevantly:
- (a) The Court considered that in fixing the remuneration for a receiver or liquidator or other controller, the requirement is founded upon the "reasonableness" of the amount⁴¹. That being so it is not necessarily apposite to determine the remuneration by reference to the reasonable time spent doing the work and then make an arithmetical calculation based on a scale of rates.
 - (b) That, in the application of orders of the kind in question, for the remuneration of liquidators etc, it is permissible to take into consideration notions of "proportionality"⁴². Indeed, that is an anterior consideration when ascertaining whether the time spent in undertaking the tasks was "reasonable".
 - (c) "The question of proportionality in terms of the work done as compared with the size of the property or activity the subject of the insolvency administration

³⁸ *Owen, in the matter of Rivercity Motorway Pty Ltd (admins apptd) (recs and mgrs apptd) v Madden (No 2)* [2012] FCA 312 at [20] per Logan J

³⁹ See the reasons for judgment of Mullins J dated 27 November 2014 and Jackson J dated 23 June 2015.

⁴⁰ (2015) 108 ACSR 545.

⁴¹ (2015) 108 ACSR 545 at [28].

⁴² (2015) 108 ACSR 545 at [30].

or the benefit or gain to be obtained from the work is an important consideration in determining overall reasonableness⁴³.

- (d) In considering proportionality, the value of the services rendered must be considered such that there is reasonableness in the cost of the work done when compared to the value of the services provided or their benefit⁴⁴.
- (e) That said, when undertaking proportionality considerations it is important to compare the cost of particular services to the benefits obtained. The comparison might be made on the basis of work done to the benefit realised at that point in time or total work for the total benefit obtained⁴⁵.
- (f) It must also be kept in mind that the benefit derived from work done is not always immediately apparent and that is particularly so where the work was done to preserve property as opposed to obtaining a benefit. Further, the work may be sufficiently complex that the maximising of returns warrant the expenditure of funds at a rate of \$0.60 to \$1.00 in relation to expected returns⁴⁶.

33. In *Re Wine National Pty Ltd*⁴⁷ Black J referred to *Templeton* although it could not be said that he embraced it entirely. His Honour identified various matters relating to the reasonableness of any approved amount of remuneration:

[section 425(8) of the Corporations Act] has the effect that, in determining the remuneration of a receiver appointed under an instrument, the Court must have regard to whether the remuneration is reasonable, taking into account all or any of specified matters. Those factors include the extent to which the work performed or likely to be performed by the receiver was reasonably necessary; the period during which the work was, or is likely to be, performed by the receiver; the quality and complexity of the work; whether the receiver was, or is likely to be, required to deal with extraordinary issues, or accept a higher level of risk or responsibility than is usually the case; the value and nature of any properly dealt with, or likely to be dealt with, by the receiver; whether the receiver was, or is likely to be, required to deal with other insolvency practitioners; the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors; and, if the remuneration is ascertained, in whole or in part, on a time basis, the time properly taken, or likely to be properly taken, by the receiver in performing the work; and whether the total remuneration payable to the receiver is capped.

⁴³ (2015) 108 ACSR 545 at [32].

⁴⁴ (2015) 108 ACSR 545 at [34].

⁴⁵ (2015) 108 ACSR 545 at [50]-[51].

⁴⁶ (2015) 108 ACSR 545 at [52].

⁴⁷ [2016] NSWSC 4 at [15]. See also the observations of Bockner J in *Eastwood Insulation Pty Ltd (in liq); Re Macks v Maka* (2015) 110 ACSR 279; [52]ff.

34. It is noted that in *Independent Contractor Services (Aust) Pty Ltd (in liq) (No.2)*⁴⁸ Brereton J identified that the time-based method of costing may not be appropriate in smaller liquidations “where questions of proportionality, value and risk loom large,” His Honour identified that in small liquidations, liquidators cannot expect to be rewarded for their time at the same hourly rate as may be justified where more properly is available. He also identified that an *ad valorem* approach might be adopted in such cases.
35. *Templeton* was applied in *Sanderson as Liquidator of Sakr Nominees Pty Ltd (in liq) v Sakr* (2017) 93 NSWLR 459 at where Bathurst CJ held at 470 to 471 that the Liquidator in that case was entitled to remuneration for work done in an unsuccessful attempt to recover assets if it was reasonable to do the work and the amount charged for the work was reasonable.

The evidence of the earning of remuneration in the present matter

36. By his affidavit filed 11 May 2020, the Receiver has deposed to the work done by him and his staff and the basis upon which remuneration is sought. The Receiver has provided a detailed schedule of the work done, who it was performed by and the amount charged for that work (paragraphs 50 and 51 and ex. pages 7 to 172, Affidavit of David Whyte filed 11 May 2020). He has deposed to the work having been done and that it was required for the purposes of the winding up of the Fund. He has also detailed in his affidavit a fulsome explanation as to the relevance of the tasks referred to in the schedule to fulfilling his role supervising the winding up of the FMIF and as receiver of the FMIF.
37. In addition to the Receiver’s evidence, which is addressed in more detail below, the affidavit of Mr Gerry Collins filed 18 June 2020 is read in support of the Receiver’s application. Mr Collins is a registered liquidator with experience of having been appointed to in excess of 500 receiverships or liquidations. He is a consultant of BDO. Mr Collins reviewed the Receiver’s affidavit, the narrations of work undertaken during the Relevant Period, a transcript of the hearing before Mullins J on 29 November 2018 and the letter from Russells dated 21 May 2020. On 29 November 2018 Mullins J raised the prospect of having a third party review the Receiver’s costs, even if that third party were “in-house”. Mr Collins also interviewed the Receiver’s staff where that was necessary. Mr Collins reviewed the month of March 2020, as that was the month in this Relevant Period in which the

⁴⁸ [2016] NSWSC 106 at [32]

remuneration was the highest. His evidence is that the claimed remuneration in March 2020 is fair and reasonable and in line with what insolvency practitioners of similar experience would charge for similar work (paragraph 53), though, of course, there were limitations on his review of the work which he identified (paragraphs 33 and 53). Mr Collins took a similar approach in an affidavit read in support of the Receiver's remuneration approval application heard by Mullins J on 2 July 2019 and her Honour accepted Mr Collins' opinion in that application that the work was appropriate and reasonable and that the amount of time spent on the work appeared to be reasonable.

38. A summary of the work done in the relevant period is set out below.

Winding up progress and benefits thereof

39. In the period for which the remuneration is claimed, the principal tasks which the Receiver has undertaken related to the litigious matters currently pursued were:

- (a) for advancing the Auditors Claim (a claim for an amount exceeding \$200 million), the Audit team of BDO assisted the Receiver in⁴⁹:
 - (i) providing instructions and assistance to his solicitors and counsel in respect of an application to strike out paragraphs of the defence filed in the proceeding claiming privilege against self-incrimination, where that application was heard by Dalton J on 14 February 2020;
 - (ii) providing detailed and extensive instructions and assistance to his solicitors and counsel in relation to the preparation of an answer to the counterclaim (a lengthy document of about 148 pages, responding to a counterclaim of about 155 pages)⁵⁰;
 - (iii) providing instructions and assistance to his solicitors and counsel in relation to a review of the proceeding before Jackson J on 21 November 2019;
 - (iv) reviewing and providing instructions in relation to further particulars of the defence served 24 December 2019;

⁴⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 22(a) (Court file number 460)

⁵⁰ Affidavit of Gerry Collins filed 18 June 2020, paragraph 26(g)(x).

- (v) reviewing and providing instructions in relation to the preparation of a seventh further amended statement of claim;
 - (vi) reviewing and providing instructions in relation to a Document Plan and Document Exchange Protocol required by the Court;
 - (vii) providing instructions in relation to without prejudice discussions with the defendants, as required by the Court, in relation to the questions to be posed to expert witnesses;
 - (viii) providing instructions to multiple experts engaged to provide expert opinion in the proceeding and conferring with his solicitors and counsel regarding briefing further experts in the proceeding;
 - (ix) attending a conference with the audit expert engaged in the proceeding;
 - (x) reviewing correspondence from his solicitors, the solicitors for the defendants and third parties in the proceeding.
- (b) for advancing the Feeder Fund claim (a claim for an amount exceeding \$55 million), the Receiver liaised with his solicitors in relation to the conclusion of the proceeding by the filing of a notice of discontinuance⁵¹;
- (c) for advancing the claim against the MPF (a claim for approximately \$15.5 million plus interest), the Receiver⁵²:
- (i) reviewed Jackson J's judgment dated 22 November 2019 and liaised with his solicitors in respect of advice concerning the judgment;
 - (ii) liaised with and provided instructions to his solicitors regarding the costs position following the judgment;
 - (iii) liaised with and provided instructions to his solicitors regarding the merits of an appeal, advice regarding the merits of an appeal and an application for judicial advice;

⁵¹ Affidavit of David Whyte filed 11 May 2020, paragraph 22(b) (Court file number 460)

⁵² Affidavit of David Whyte filed 11 May 2020, paragraph 22(c) (Court file number 460)

- (iv) provided instructions and assistance to his solicitors in relation to the filing of a notice of appeal which was filed on 20 December 2019;
 - (v) provided instructions and assistance to his solicitors regarding the preparation for an application for judicial advice which was filed on 31 January 2020 and the material relied on in support of the application, consisting of three affidavits;
 - (vi) provided instructions and assistance to his solicitors in relation to substituted service on the members of the application for judicial advice;
 - (vii) arranged for substituted service on the members of the application for judicial advice pursuant to the orders of Callaghan J dated 14 February 2020;
 - (viii) provided instructions and assistance to his solicitors in relation to the first hearing of the application for judicial advice on 14 February 2020 in relation to substituted service on members of the FMIF;
 - (ix) reviewed correspondence from the solicitors for the liquidator of LMIM and providing instructions in relation to that correspondence;
 - (x) provided instructions and assistance to his solicitors in relation to the preparation of a statement of facts and supporting affidavits filed 17 April 2020- in support of the application for judicial advice;
 - (xi) reviewed the liquidator for LMIM's affidavit filed in the application for judicial advice and liaising with his solicitors regarding the preparation of an affidavit in reply.
- (d) in the FTI Remuneration Proceeding, the Receiver⁵³:
- (i) provided instructions and assistance to his solicitors in relation to the EY Expenses Application, including reviewing the application and supporting affidavits, conferring with and providing instructions to his solicitors, swearing an affidavit in response to the application, providing instructions in relation to an offer to settle the application, reviewing a report from his solicitors regarding the hearing of the

⁵³ Affidavit of David Whyte filed 11 May 2020, paragraph 22(d) (Court file number 460)

application and reviewing the reasons for judgment for the application;

- (ii) provided instructions and assistance to his solicitors in relation to the Bellpac Expenses Application, including reviewing the application and supporting affidavits, conferring with and providing instructions to his solicitors, swearing an affidavit in response to the application, providing instructions in relation to an offer to settle the application and reviewing a report from his solicitors regarding the hearing of the application.

40. Other significant tasks which the Receiver undertook during the period for which remuneration is claimed were:

- (a) liaising with the Bellpac liquidator in relation to the Fund's entitlement to the bond proceeds⁵⁴;
- (b) liaising with the Bellpac liquidator in relation to the status of a Heads of Agreement with Wollongong Coal Ltd and the sunset date sought by Wollongong Coal Ltd for obtaining shareholder approval in the \$8M proceeding⁵⁵;
- (c) applying to extend the financial reporting and audit relief granted by ASIC⁵⁶;
- (d) complying with the conditions of ASIC's relief from financial reporting and audit requirements⁵⁷;
- (e) corresponding with investors and reprocessing returned interim capital distributions paid in October 2019 in the amount of 6.5 cents per unit to FMIF members⁵⁸;
- (f) preparing a unit price calculation as at 31 December 2019⁵⁹;
- (g) preparing management accounts for the half year ended 31 December 2019⁶⁰;

⁵⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 22(e) (Court file number 460)

⁵⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 22(f) (Court file number 460)

⁵⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 22(g) (Court file number 460)

⁵⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 22(h) (Court file number 460)

⁵⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 22(i) (Court file number 460)

⁵⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 22(j) (Court file number 460)

⁶⁰ Affidavit of David Whyte filed 11 May 2020, paragraph 22(k) (Court file number 460)

- (h) preparing reports to members issued in December 2019 and March 2020⁶¹;
- (i) work involved in undertaking the investor management function for the members of the FMIF including answering questions and processing changes in details and transfers of units⁶². Mr Collins deposes in his affidavit that in March 2020 alone (the month he reviewed) it is estimated that BDO received 185 investor queries, sent 118 emails and 109 letters in response to such queries⁶³.

BDO Work Practices

- 41. In paragraphs 37, 38, 39, 43 and 44 of his affidavit Mr Whyte sets out the reasons as to why it was necessary to draw on various teams in his firm to undertake the work done in the relevant period. The work involved in the winding up required the expertise of the Audit and Corporate Finance groups of BDO. The Receiver addresses the work undertaken by each of those teams and why the work was necessary in paragraphs 45 to 47 of his affidavit.
- 42. The Audit group provided assistance to the Receiver by⁶⁴:
 - (a) responding to queries from solicitors and counsel regarding the auditors' duties to comply with applicable legislation in financial and compliance plan audits to assist in the prosecution of the Auditors Claim;
 - (b) preparing for and attending conferences with experts retained to assist in the prosecution of the Auditors Claim in relation auditing issues and loss and damage;
 - (c) attending conferences with solicitors and counsel in relation to the engagement of experts in the Auditors Claim;
 - (d) assisting with the review and completion of management accounts for the year ended 30 June 2019.
- 43. The Corporate Finance group provided assistance to the Receiver by assisting with the quantification of loss in relation to the Auditors Claim⁶⁵.

⁶¹ Affidavit of David Whyte filed 11 May 2020, paragraph 22(l) (Court file number 460)

⁶² Affidavit of David Whyte filed 11 May 2020, paragraph 22(m) (Court file number 460)

⁶³ Affidavit of Gerry Collins filed 18 June 2020, paragraph 50(a)(ii)

⁶⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 45 (Court file number 460)

⁶⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 46 (Court file number 460)

The work performed and remuneration sought

Overview

44. During the Relevant Period, the Receiver has divided the work he and his staff undertook into the five Australian Restructuring Insolvency and Turnaround Association (ARITA) categories, namely⁶⁶:
- (a) assets;
 - (b) trade on;
 - (c) creditors; and
 - (d) dividend; and
 - (e) administration.
45. These categories were adopted by the Receiver in an attempt rationally to separate the various strands of the work required in the receivership. In a complex external administration such as this one it is impossible to draw clear lines of separation between categories of work, and in consequence there is unavoidable overlap between categories. However each task and the time for carrying it out has only been recorded once⁶⁷.
46. The Receiver has prepared a schedule providing from his records a description of each task undertaken under each of the above categories, the name and position of the person who undertook the task, the date the task was undertaken, the length of time it took and the amount charged⁶⁸. At the front of the Schedule is a table summarising the time spent on each category of work by each person.
47. This Schedule satisfies the test for adequacy outlined above, when it is read by reference to the detailed explanations the Receiver provides in his affidavit (and which are canvassed below) for why the work was appropriate and necessary.

⁶⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 48 (Court file number 460)

⁶⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 49 (Court file number 460)

⁶⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 51 and exhibit pages 6 to 172 (Court file number 460)

48. A scale of the hourly rates of the Receiver and his staff is exhibited to the Receiver's affidavit⁶⁹. The Receiver's evidence is that the charges in this scale are reasonable and appropriate⁷⁰.
49. The rates in the scale adopted by the Receiver at all times mirrored the prevailing commercial rates charged by BDO to its private clients, despite the fact that Mr Whyte's role is, for the reasons outlined above, especially complex and challenging – more so than the ordinary external administration⁷¹.
50. The Receiver has adopted cost-saving measures where practicable and appropriate. Where possible, and as explained below, the Receiver delegated to members of his staff the performance of the least complex of the required tasks, where appropriate⁷². At paragraphs 43 to 47 of his affidavit, Mr Whyte refers to each of the "audit" and "corporate finance" teams to which he delegated work, the specialised expertise they brought to the delegated tasks and why it was necessary to delegate work to those persons. The summary at exhibit page 4 of Mr Whyte's affidavit shows that over 2,000 of the just over 2,800 hours of work involved was undertaken by employees of BDO at a junior level (graduate and accountant level), which is approximately 70% of the hours. That work consists largely of administrative tasks. It also shows that approximately \$250,000 of the approximately \$300,000 in remuneration claimed in the Asset category, which relates to the litigation work, which will produce the greatest value, was undertaken by senior employees of BDO.
51. As mentioned, the work which the Receiver has been required to undertake has been attended by considerable complexity.
52. Further detail of the work performed is canvassed below by reference to each of the five categories of work adopted by the Receiver.

Assets

53. The work falling within this category relates in summary to⁷³:
- (a) advancing claims against guarantors; and

⁶⁹ Affidavit of David Whyte filed 11 May 2020, exhibit pages 1 to 3 (Court file number 460)

⁷⁰ Affidavit of David Whyte filed 11 May 2020, paragraphs 55 and 56 (Court file number 460)

⁷¹ Affidavit of David Whyte filed 11 May 2020, paragraph 54 (Court file number 460)

⁷² Affidavit of David Whyte filed 11 May 2020, paragraph 53 (Court file number 460)

⁷³ Affidavit of David Whyte filed 11 May 2020, paragraph 59 (Court file number 460)

- (b) progressing Court proceedings, including: pursuing claims against the MPF and the auditors of the FMIF; pursuing litigation associated with the realisation of bonds held in Wollongong Coal Limited by Bellpac; pursuing the claim against the Feeder Funds for breaches of duty.
54. The quantum of the claimed remuneration referable to this category is \$301,409.50 excluding GST⁷⁴.
55. The bulk of the work relates to the progression of the proceedings in Court which are addressed in turn below together with the Receiver's estimates as to when each proceeding will probably reach its conclusion.

The Auditors' Claim

56. The claim against the former auditors of the FMIF (Brisbane Supreme Court claim 3166 of 2015), is for a quantum of up to \$200 million and it is being managed on the Commercial List by Dalton J⁷⁵.
57. The proceeding was formerly managed by Jackson J when his Honour was a Commercial List Judge. On 21 November 2019 his Honour made directions for the progression of the proceeding⁷⁶. The third party claim against the fifth to fifteenth third parties was discontinued by order of Jackson J on 21 November 2019⁷⁷.
58. On 29 November 2019 the Receiver filed an application to strike out parts of the defence which claimed privilege against self incrimination and against penalties. The application was filed in accordance with the directions made by Jackson J on 21 November 2019. The application was heard by Dalton J on 14 February 2020 and reserved. Further submissions were made to her Honour at her Honour's request after the application had been heard, to address a decision of the Federal Court which was handed down this year⁷⁸.
59. A counterclaim was served by the defendants on 29 November 2019⁷⁹ and during December 2019, in accordance with Jackson J's directions, the parties conferred on

⁷⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 60 (Court file number 460)

⁷⁵ Affidavit of David Whyte filed 11 May 2020, paragraphs 65 and 66 (Court file number 460)

⁷⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 67 (Court file number 460)

⁷⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 68 (Court file number 460)

⁷⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 69 (Court file number 460)

⁷⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 70 (Court file number 460)

a without prejudice basis in relation to questions to be posed to expert witnesses and the Court was informed as to those discussions on 13 December 2019⁸⁰.

60. In compliance with Jackson J's directions, from December 2019 to April 2020 the parties conferred regarding the preparation of a Document Plan and Document Exchange Protocol and informed the Court as to the progress of agreeing a plan and protocol⁸¹.
61. The defendants served further particulars of the defence on 24 December 2019. A number of further requests for further particulars have been made by the plaintiff arising out of the particulars that were served⁸².
62. During the hearing before Dalton J on 14 February 2020 her Honour directed the plaintiff to amend the sixth amended statement of claim and the sixth amended statement of claim was amended pursuant to her Honour's leave⁸³. Her Honour also directed the parties to produce a schedule of the paragraphs of the sixth amended statement of claim in relation to which privilege claims were asserted together with the offences or penalties and limitation periods or other issues which are contended to be pertinent to those paragraphs. That work was completed⁸⁴.
63. The plaintiff filed an answer to the counterclaim on 23 April 2020⁸⁵
64. A summary of the work that was completed in respect of the Auditors' Claim, in addition to that which is referred to in paragraph 39(a) above is as follows⁸⁶:
 - (a) relevant information was prepared for the purpose of briefing audit experts, which work was complicated by the EY laptop malfunctioning. That necessitated the Receiver's staff undertaking extensive sorting, collating and categorisation of voluminous, uncategorised EY hard copy records into the nine relevant audit periods which are the subject of the proceeding;
 - (b) the Receiver provided instructions and assistance to his solicitors and liaised with retained experts;

⁸⁰ Affidavit of David Whyte filed 11 May 2020, paragraph 71 (Court file number 460)

⁸¹ Affidavit of David Whyte filed 11 May 2020, paragraph 72 (Court file number 460)

⁸² Affidavit of David Whyte filed 11 May 2020, paragraph 73 (Court file number 460)

⁸³ Affidavit of David Whyte filed 11 May 2020, paragraph 74 (Court file number 460)

⁸⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 75 (Court file number 460)

⁸⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 76 (Court file number 460)

⁸⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 79 (Court file number 460)

- (c) the Receiver reviewed the defence filed in the proceeding and provided instructions in relation to objections to be made to the defence regarding privilege claims;
 - (d) the Receiver reviewed submissions of the parties relied on in respect of the strike out application;
 - (e) the Receiver liaised with the defendants and with his solicitors regarding the repair and replacement of a laptop provided by the defendants containing GAMx audit files relating to the loans the subject of the proceeding.
65. The Receivers' solicitors anticipate that the Auditors Claim will probably take a further 18 months to two years to be determined or resolved⁸⁷.

The Claim against the MPF

66. The claim against the trustees of the LM Managed Performance Fund, and other parties including various former directors of LMIM (Brisbane Supreme Court proceeding 12317 of 2014) seeks the amount of \$15,546,147.85 plus interest calculated from 2011⁸⁸.
67. Jackson J delivered judgment in the proceeding on 22 November 2019. The Receiver filed a notice of appeal on 20 December 2019 and an application to the Supreme Court for judicial advice in relation to the appeal on 31 January 2020⁸⁹. The progress of the appeal is awaiting determination of the Receiver's application for judicial advice for directions whether he is justified in pursuing the appeal. The application for judicial advice for directions was heard on 2 June 2020⁹⁰.
68. The work involved during the Relevant Period is described in paragraph 39(c) above⁹¹. The total remuneration claimed for the Relevant Period relating to the appeal and the application for judicial advice is \$12,804.50⁹².

The \$2 million WCL Convertible Bonds proceeding

69. Federal Court of Australia proceeding 2014/332566 was successfully prosecuted and the FMIF is entitled as first ranking creditor to the funds recovered from the

⁸⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 78 (Court file number 460)

⁸⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 81 (Court file number 460)

⁸⁹ Affidavit of David Whyte filed 11 May 2020, paragraphs 86 and 87 (Court file number 460)

⁹⁰ Affidavit of David Whyte filed 11 May 2020, paragraphs 88 to 89 (Court file number 460)

⁹¹ Affidavit of David Whyte filed 11 May 2020, paragraph 90 (Court file number 460)

⁹² Affidavit of David Whyte filed 11 May 2020, paragraph 91 (Court file number 460)

\$2 million bonds, after costs. The MPF Trustee has made a claim to an amount of \$678,336 from these funds, which has been abandoned⁹³. The net proceeds of the \$2 million bonds are presently held by the Belpac liquidator and are being utilised to fund the recovery of the \$8 million of WCL convertible bonds (which are addressed under the next heading below)⁹⁴. A distribution of \$1 million was received by the FMIF from the Belpac liquidator in November 2019⁹⁵.

70. During the Relevant Period the Receiver liaised with the Belpac liquidator regarding distribution of the \$1 million to the FMIF and in relation to the liquidator's requests for payment of the liquidator's fees and legal fees from the bond proceeds⁹⁶.

The \$8 million WCL convertible bond proceeding

71. In Federal Court of Australia proceeding 2015/1488, in which summary judgment was entered in favour of the Liquidator of Belpac, the defendant's appeal and application for special leave to appeal to the High Court were unsuccessful⁹⁷.

Federal Court proceeding 2016/00120239

72. In this proceeding, the Liquidator entered a Heads of Agreement with WCL to settle and the sunset date for performance of the Heads of Agreement was extended on several occasions by agreement. There is a remaining condition precedent to be satisfied under the Heads of Agreement consisting of WCL obtaining shareholder approval of the settlement. The Receiver considers that the FMIF is a first ranking creditor entitled to funds received from the proceeding⁹⁸.
73. In relation to this proceeding, during the Relevant Period Mr Whyte and his staff liaised with the Liquidator regarding satisfaction of the condition precedent in the Heads of Agreement and requests to extend the Sunset Date⁹⁹.

The Feeder Fund Claim

74. In Supreme Court of Queensland proceeding 13534 of 2016 claims are made against LMIM and the Feeder Funds in respect of redemptions made to the Feeder Funds,

⁹³ Affidavit of David Whyte filed 11 May 2020, paragraph 93 (Court file number 460)

⁹⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 94 (Court file number 460)

⁹⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 95 (Court file number 460)

⁹⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 98 (Court file number 460)

⁹⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 91 (Court file number 460)

⁹⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 99 (Court file number 460)

⁹⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 101 (Court file number 460)

and declarations are sought to withhold payments or distributions otherwise payable to the Feeder Funds in the aggregate sum of \$55 million plus interest¹⁰⁰.

75. The proceeding was mediated by the Hon Richard Chesterman AO RFD QC on 5 and 6 November 2018 and the settlement is subject to various conditions precedent, including that the Receiver obtain judicial advice that the settlement is justified and obtain orders giving authority to make an interim distribution to FMIF members of at least \$30 million¹⁰¹.
76. Mr Whyte filed an application for authorisation to make the distribution and for an order that he was justified in entering the Deed of Settlement¹⁰². On 22 May 2019 Mullins J directed that the Receiver was justified in entering the Deed of Settlement and in making an interim distribution of approximately \$32 million if he was conferred with authority to do so on his application dated 1 February 2019 filed in Supreme Court proceeding 3508 of 2015¹⁰³. Mr Whyte was granted that leave, made the interim distribution on 23 October 2019 in accordance with judicial advice from Mullins J as to the amount that he would be justified distributing and the proceeding was discontinued in accordance with the Deed of Settlement¹⁰⁴.
77. During the Relevant Period, the Receiver undertook the work referred to in paragraph 39(b) above¹⁰⁵.

LMIM Supreme Court of Queensland claim 11560/16

78. For Supreme Court of Queensland proceeding 11560 of 2016, regarding breaches of trust and duty against LMIM by causing management fees to be paid from the assets of the FMIF¹⁰⁶, the quantum of the claim has not yet been finally determined but is presently up to \$13,720,167 plus interest in relation to loan management fees and \$12,931,836 plus interest in relation to claims pertaining to the payments to the Feeder Funds¹⁰⁷.
79. The claims in this proceeding may be relied on as a set-off against claims made by LMIM for indemnity out of the assets of the FMIF and hence a court application was made to stay the proceeding until further order, as those claims have not yet been

¹⁰⁰ Affidavit of David Whyte filed 11 May 2020, paragraph 103 (Court file number 460)

¹⁰¹ Affidavit of David Whyte filed 11 May 2020, paragraphs 109 and 110 (Court file number 460)

¹⁰² Affidavit of David Whyte filed 11 May 2020, paragraph 102 and 103 (Court file number 460)

¹⁰³ Affidavit of David Whyte filed 11 May 2020, paragraph 111 (Court file number 460)

¹⁰⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 112 (Court file number 460)

¹⁰⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 115 (Court file number 460)

¹⁰⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 117 (Court file number 460)

¹⁰⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 119 (Court file number 460)

identified and there was no party willing to fund a defence. Jackson J ordered the proceeding stayed¹⁰⁸.

80. During the Relevant Period in relation to this proceeding, Mr Whyte and his staff reviewed correspondence from his solicitors and provided instructions to his solicitors in relation to correspondence received from the solicitors for LMIM¹⁰⁹.
81. It is estimated that the proceeding would probably take approximately 18 months from when the stay is lifted to reach a conclusion¹¹⁰. During the Relevant Period the Receiver reviewed advices and updates from his solicitors, provided instructions with respect to proposed correspondence to the liquidator seeking further information to assist him to consider whether to take further steps to progress the proceeding¹¹¹.

The Trust Company (PTAL) Ltd v Ross Lamb

82. In New South Wales Supreme Court proceeding *The Trust Company (PTAL) Ltd v Ross Lamb*, PTAL obtained default judgment against Mr Lamb for approximately \$3 million plus interest and costs resulting in Mr Lamb's bankruptcy. The bankrupt was, together with others, party to a development agreement and the proceeds of sale of 11 properties owned by the bankrupt and his wife are presently held in a solicitors trust account (\$12 million). The trustee in bankruptcy has pursued a public examination in order to access the funds so that the judgment can be satisfied and the public examination occurred in November 2019¹¹². Following the public examinations the trustee issued letters of demand to various parties and has received requests from those parties to mediate the trustee's claims¹¹³.
83. During the Relevant Period the Receiver and his staff undertook work including¹¹⁴:
- (a) reviewing monthly reports from the trustee, the trustee's reports to creditors, the trustee's reports regarding the public examinations, transcripts of the examinations and the trustee's letters of demand;
 - (b) meeting with and discussing the matter with the trustee;

¹⁰⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 120 (Court file number 460)

¹⁰⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 120 (Court file number 460)

¹¹⁰ Affidavit of David Whyte filed 11 May 2020, paragraph 125 (Court file number 460)

¹¹¹ Affidavit of David Whyte filed 11 May 2020, paragraph 126 (Court file number 460)

¹¹² Affidavit of David Whyte filed 11 May 2020, paragraphs 127 to 131 (Court file number 460)

¹¹³ Affidavit of David Whyte filed 11 May 2020, paragraph 131 (Court file number 460)

¹¹⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 132 (Court file number 460)

- (c) reviewing and assessing monthly claims made by the trustee under the Deed of Indemnity and issuing instructions to PTAL with respect to those claims;
- (d) liaising with the trustees in relation to the proposed mediations and a variation to the Deed of Indemnity.

“Trade on”

84. The quantum of the claimed remuneration for this category is \$71,526.00 excluding GST¹¹⁵. The work within this category consists of work which was incidental to the winding up such as¹¹⁶:

- (a) preparation of unaudited management accounts;
- (b) reviewing and approving payment of expenses;
- (c) maintenance of the AX finance and loan management databases;
- (d) internal job management;
- (e) meeting with members of the BDO Audit practice group regarding the preparation of management accounts for the half-year ended 31 December 2019. Particular complexities that arise in relation to this work are identified in paragraph 42 of Mr Collins’ affidavit.

85. The Receiver’s work in completing preparation of the management accounts included¹¹⁷:

- (a) reviewing work papers to verify the accuracy of the management accounts;
- (b) ascertaining the amounts outstanding at 31 December 2019;
- (c) preparing a summary of loan reductions to calculate the movement in loans in default;
- (d) calculating the net assets attributable to unitholders, movement in default loans, receivables and related party transactions;
- (e) preparing a summary of payable invoices;

¹¹⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 136 (Court file number 460)

¹¹⁶ Affidavit of David Whyte filed 11 May 2020, paragraphs 133 and 135 (Court file number 460)

¹¹⁷ Affidavit of David Whyte filed 11 May 2020, paragraphs 137 (Court file number 460)

- (f) determining accrued expenses;
 - (g) calculating provisions for the remaining loan accounts or receivable balances and updating the loan spreadsheet;
 - (h) preparing a trial balance;
 - (i) preparing work papers to support the notes to the accounts;
 - (j) preparing management accounts for distribution to members.
86. The Receiver was directed to apply on behalf of the FMIF to ASIC for relief from compliance with financial reporting and audit obligations under Part 2M.3 and s.601HG *Corporations Act* 2001. He made that application in 2016. It has been necessary for the relief that was granted by ASIC to be extended. The Receiver instructed his solicitors to apply to ASIC for the relief to be extended and complied with the conditions of the relief¹¹⁸.
87. In relation to work associated with the Second FTI Remuneration Proceeding, which comes within the category “Trade on”, the Receiver¹¹⁹:
- (a) reviewed correspondence and advices from his solicitors in relation to a costs statement served by the liquidator for costs claimed by the liquidator pursuant to a costs order made on 17 October 2019;
 - (b) provided instructions to his solicitors regarding correspondence from the liquidator’s solicitors in respect of the quantum of the costs claimed;
 - (c) provided instructions in relation to a consent order fixing the quantum of costs;
 - (d) instructed PTAL to effect payment of the amount of costs ordered to be paid from the property of the FMIF to the liquidator.
88. In relation to the work associated with the FTI Indemnity Proceeding, which comes within the category “Trade on”, the Receiver¹²⁰:

¹¹⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 145 (Court file number 460)

¹¹⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 157 (Court file number 460)

¹²⁰ Affidavit of David Whyte filed 11 May 2020, paragraph 172 (Court file number 460)

- (a) reviewed and considered an application filed by the liquidator on 24 January 2020 seeking orders that the Court approve payment of the sum of \$98,647.27 to the liquidator from the property of the FMIF;
- (b) reviewed and considered an application filed by the liquidator on 24 January 2020 seeking orders that the Court approve payment of the sum of \$157,107.81 (although the application was subsequently amended to seek \$289,285.77) to the liquidator from the property of the FMIF;
- (c) provided instructions to his solicitors regarding the applications.

Creditors

89. The Receiver seeks approval of remuneration of \$452,868.50 excluding GST for work undertaken in this category¹²¹. This category of work was extensive, and resulted in the remuneration claimed in this category being larger than in previous applications for remuneration, because, as noted above, there was a large quantity of returned payments which the Receiver was required to address. The work that necessitated included updating investors' bank account details in the Fund's database to reprocess the distributions that returned, reprocessing the distributions for any returned distributions from inactive bank account details, providing instructions and information to PTAL to reprocess distributions and creating payment files to reprocess the distributions to the member's nominated bank account.
90. The work falling within this category also consists of the Receiver's work in¹²²:
- (a) reporting to members;
 - (b) attending to members' queries;
 - (c) maintaining and updating the AX investor management database;
 - (d) corresponding with members regarding the interim distribution, returned payments and reprocessing distributions after updating members' details;
 - (e) investigation of and ascertaining potential claims by the liquidators of LMIM against the FMIF.

¹²¹ Affidavit of David Whyte filed 11 May 2020, paragraph 190 (Court file number 460)

¹²² Affidavit of David Whyte filed 11 May 2020, paragraph 191 (Court file number 460)

91. During the period for which remuneration is sought, the Receiver produced two reports to members (being his 28th and 29th reports)¹²³ which updated members as to:
- (a) the status of the litigation matters;
 - (b) cash at bank and loan balances;
 - (c) the estimated return to members;
 - (d) the updated unit price;
 - (e) the actions taken in the previous six months and those proposed to be taken;
 - (f) his remuneration.
92. The work undertaken in this category also involves contact between the Receiver and members wherein the Receiver provided information as to¹²⁴:
- (a) the status of the winding up of the FMIF;
 - (b) unit prices and distributions;
 - (c) the transfer of units and documentation required to effect transfers;
 - (d) matters arising from his reports;
 - (e) the interim distribution and timing thereof.

Dividend

93. The Receiver seeks approval of remuneration of \$16,37.50 excluding GST for work undertaken in this category¹²⁵. The work falling within this category consists of the Receiver's work in resolving returned payments and reprocessing interim capital distribution to certain investors¹²⁶.

¹²³ Affidavit of David Whyte filed 11 May 2020, paragraph 192 (Court file number 460)

¹²⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 194 (Court file number 460)

¹²⁵ Affidavit of David Whyte filed 11 May 2020, paragraph 212 (Court file number 460)

¹²⁶ Affidavit of David Whyte filed 11 May 2020, paragraph 213 (Court file number 460)

Administration

94. The Receiver claims remuneration of \$57,288.50 excluding GST for work within this category¹²⁷. The work within this category includes¹²⁸:
- (a) work necessary for the proper and efficient administration of the winding up;
 - (b) ensuring proper accounts and records were maintained;
 - (c) preparing applications for approval of remuneration;
 - (d) residual administrative functions in respect of preparing reports to members, such as copying, mailing and uploading reports to the FMIF website.

Write off of the time

95. The Receiver has written off a portion of the amount charged (\$1,663.50 excluding GST)¹²⁹.

Further applications for approval of remuneration

96. The winding up of the fund is ongoing.
97. The Receiver proposes to make further regular applications for the approval of his remuneration as the receivership progresses¹³⁰.

David de Jersey QC

Counsel for the Receiver

26 June 2020

¹²⁷ Affidavit of David Whyte filed 11 May 2020, paragraph 212 (Court file number 460)

¹²⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 217 (Court file number 460)

¹²⁹ Affidavit of David Whyte filed 11 May 2020, paragraph 230 (Court file number 460)

¹³⁰ Affidavit of David Whyte filed 11 May 2020, paragraph 234 (Court file number 460)