

SUPREME COURT OF QUEENSLAND

**REGISTRY: Brisbane
NUMBER: 3383 of 2013**

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 & INVESTMENTS
COMMISSION**

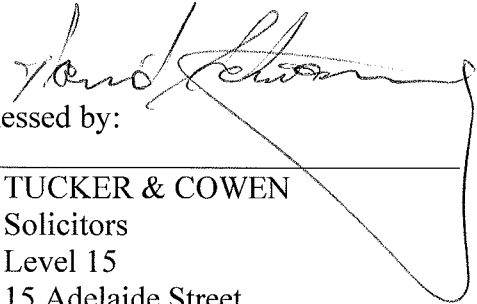
AFFIDAVIT OF DAVID WHYTE

I, **DAVID WHYTE** of Level 10, 12 Creek Street, Brisbane in the State of Queensland,
Registered Liquidator, state on oath:-

1. I am a Registered Liquidator and a Partner of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand and a

Page 1

Signed: 

Witnessed by: 

AFFIDAVIT:
Form 46, R.431

TUCKER & COWEN
Solicitors
Level 15
15 Adelaide Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
Fax: (07) 300 300 33

Filed on behalf of the Applicant

professional member of the Australian Restructuring, Insolvency and Turnaround Association (“ARITA”).

2. Now produced and shown to me and marked “DW-122 is an indexed paginated bundle of the documents referred to in this Affidavit (“the Bundle”).
3. I swear this Affidavit in support of my application for approval of remuneration filed on 11 May 2020 (“the Application”).
4. Unless stated otherwise, terms defined in my Affidavit filed on 11 May 2020 (“May 2020 Affidavit”) have the same meaning in this Affidavit.

Correspondence with Russells relating to Application

5. I am informed by my solicitors, Tucker & Cowen, and believe, that on 21 May 2020 they received a letter (“21 May 2020 Letter”) from Russells, the solicitors for Mr John Park (“Mr Park”), the Liquidator of LMIM, and LMIM, raising various issues relating to the Application. At pages 1 to 4 of the Bundle is a copy of that letter.
6. I am informed by Tucker & Cowen and believe, that on 3 June 2020, they sent a letter to Russells seeking clarification in relation to certain matters referred to in the 21 May 2020 Letter. At pages 5 to 6 of the Bundle is a copy of that letter.
7. I am informed by Tucker & Cowen and believe, that on 11 June 2020 they received a response from Russells (“11 June 2020 Letter”). At pages 7 to 8 of the Bundle is a copy of that that response.

Authority to Commence Litigation

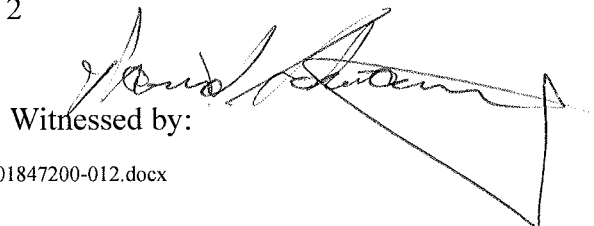
8. During the course of the winding up of the FMIF, I caused LMIM as RE of the FMIF, to commence a number of proceedings, pursuant to the orders made by Justice Dalton on 21 August 2013 (“Dalton J Orders”).
9. The proceedings in question include:
 - (a) the Auditors Claim; and

Page 2

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- (b) the claim made against the directors of LMIM and others in Supreme Court of Queensland Proceeding 12317/14 (in this Affidavit, I shall refer to this proceeding as “**The Drake Proceeding**”).

Constitution of FMIF

10. A copy of the Constitution of the FMIF (including various amendments to the Constitution) is exhibit DW-4 to my Affidavit sworn and filed in this proceeding on 2 May 2014.
11. At pages 9 to 22 of the Bundle is a copy of the following clauses from the Constitution:
- (a) Clause 1.1 – definition of “scheme property”; and
- (b) Clause 16 – Winding up the Scheme.

Judgment on Application to set aside Summonses for Public Examination

12. On 15 May 2015, Justice Burns delivered reasons for judgment, on an application to set aside summonses that had been issued, on my application, for a public examination: *Whyte v McLuskie & Ors* [2015] 296 FLR 35; [2015] QSC 132. At pages 23 to 35 of the Bundle is a copy of His Honour’s reasons for judgment.
13. Justice Burns, at paragraphs [21] to [30]:
- (a) considered and rejected an argument made by the examinees that the Court had no power to issue the summonses, on my application;
- (b) held that the Dalton J Orders authorised me to bring, defend or maintain any proceedings in the name of LMIM as are necessary for the winding up of the FMIF, that no limitation on the exercise of those powers was expressed or may sensibly be inferred, and

Page 3

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that when making those orders that Justice Dalton must be taken to have had in mind that there may be choses in action which would constitute property which the responsible entity winding up the scheme would have power to pursue.


Judgment in Proceeding 3508/15

14. On 8 April 2015, in Supreme Court of Queensland Proceeding 3508/15, Mr Park and LMIM applied to Court for directions to ascertain the respective powers and responsibilities of Mr Park and I in the winding up of the FMIF.
15. On 15 October 2015, Justice Jackson delivered reasons for judgment with respect to that application: *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte (Receiver of the LM First Mortgage Income Fund [2015] QSC 283*. At pages 36 to 64 of the Bundle is a copy of His Honour's reasons for judgment.
16. At paragraph [82], Justice Jackson says that:

Although the respondent [Mr Whyte] is appointed receiver of the property of the FMIF under par 5 of the existing orders [the Dalton J Orders] and authorised to bring proceedings on behalf of the FMIF in the name of the applicant by par 7(b) of the existing orders, neither of those orders authorises the respondent to bring proceedings pursuant to rights that are expressly conferred upon the liquidators by the CA [the Corporations Act 2001].

The Drake Proceeding

17. On 19 December 2014, I caused this proceeding to be commenced in the name of LMIM as RE of the FMIF.
18. I caused the plaintiff to apply to Court for leave to proceed against LMIM, pursuant to s 500(2) of the *Corporations Act* 2001 ("CA").


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19. At pages 65 to 70 of the bundle is a copy of the submissions of the applicant/plaintiff dated 12 February 2015, in support of the leave to proceed application, which drew to the Court's attention that, at paragraphs [6] and [7]:

Pursuant to the order of Dalton J, Mr Whyte is authorised to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM as are necessary for the winding up of the FMIF.

In exercise of those powers, this proceeding was commenced by claim filed on 19 December 2014.


20. On 12 February 2015, Justice Mullins, made orders, by consent, granting leave to proceed against LMIM, on certain terms. At pages 71 to 72 of the Bundle is a copy of these Orders.
21. The plaintiff also obtained leave to proceed against Mr Drake, a defendant to the claim who was bankrupt:

(a) At page 73 of the Bundle is a copy of Orders of Judge Jarrett of the Federal Circuit Court dated 16 March 2015 granting leave, by consent, to proceed against Mr Drake pursuant to 58(3) *Bankruptcy Act* 1966;

(b) At pages 74 to 75 of the Bundle is a copy of Orders Justice Jackson made on 8 April 2015, granting leave to proceed against Mr Drake pursuant to rule 72 of the *Uniform Civil Procedure Rules* 1999 (Qld).

22. At pages 76 to 93 of the Bundle is a copy of the Further Amended Claim and Statement of Claim filed on 17 June 2015.

23. On 1 July 2015, LMIM filed a Defence admitting at paragraphs 3(b) and (c) that I have power to bring the proceeding, save for in relation to claims for


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compensation under s 1317H of the CA for alleged contraventions of s 182 of the CA. At pages 94 to 115 of the Bundle is a copy of the Defence.

24. I caused the plaintiff to file an application for directions pursuant to s 59 of the *Trusts Act 1973* (Qld) (“TA”) as to how the differing interests of LMIM were to be represented. This application was made because LMIM was both a plaintiff in its capacity as RE of the FMIF, and a defendant in its own capacity and in its capacity as former trustee of the LM Managed Performance Fund (“MPF”).
25. At pages 116 to 127 of the Bundle is a copy of the plaintiff’s submissions dated 21.7.2015 in support of this application, which expressly drew to the Court’s attention, at paragraph [8], the issue raised by LMIM as to whether the claim for compensation under s 1317H of the CA for breach of s 182 of the CA falls under scope of the Dalton J Orders.
26. On 21 July 2015, Justice Jackson directed, pursuant to s 59 of the TA that:
- (a) I represent the interests of LMIM as RE of FMIF, pursuant to the Dalton J Orders;
 - (b) that claim for compensation under s 1317H of the CA for contravention of s 182 of the CA was properly included;
 - (c) That Mr Park represent the interests of LMIM in its own capacity and in its capacity as former trustee of the MPF.

At pages 128 to 129 of the Bundle is a copy of those orders.

27. LMIM, as former trustee of the MPF, applied to Court for an indemnity for its legal costs from the MPF.
28. On 29 October 2015, Justice Jackson delivered judgment dismissing that application: *Park & Muller v Whyte* [2015] QSC 287. At paragraph [8], His

Page 6


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Honour noted that an order had been made under s 59 of the TA authorising me to continue the proceeding in the name of LMIM as RE of FMIF.

29. At pages 130 to 151 of the Bundle is a copy of His Honour's reasons for judgment.

Dual Appointment Application

30. On 10 October 2018, Mr Park applied to Court for directions in Supreme Court of Queensland proceeding 3508/15 in relation to the dual appointments of Mr Park and myself in relation to the winding up of the FMIF, including directions limiting my role to undertaking certain specified legal proceedings ("**Dual Appointment Application**").

31. At pages 152 to 159 of the Bundle is a copy of that application.

32. On 2 October 2019, Justice Jackson delivered reasons for judgment dismissing that application: *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233 ("**Dual Appointment Judgment**").

33. At pages 160 to 188 of the Bundle is a copy of His Honour's reasons for judgment, in which His Honour noted that Mr Park accepted that I should remain in control of the litigation being undertaken on behalf of the FMIF, and referred to the fact that my powers under my appointment extended to continuing and completing the remaining court proceedings: see footnote 14, paragraphs [68], and [69].

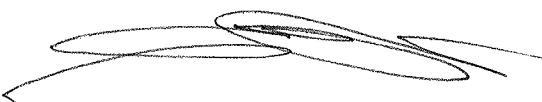
Investigations and advice prior to commencement of Proceedings

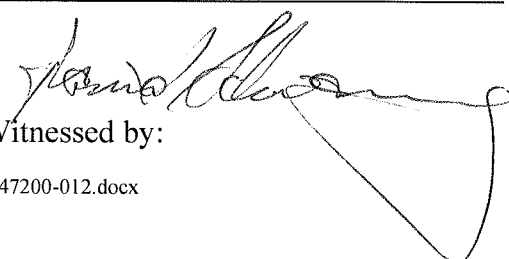
Public examination

34. On 27 November 2014, I applied to Court to issue summonses for a public examination to investigate various issues relating to the audits undertaken of the FMIF and summonses were issued on 30 January 2015.

35. A significant quantity of documentation was produced by EY pursuant to the Summonses.

Page 7

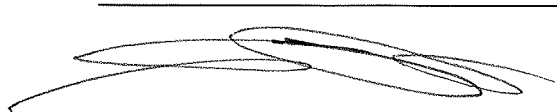

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36. The examination of witnesses for the public examination, including directors of LMIM and the former auditors, took place in the Magistrates Court from 15 to 26 June 2015 and from 19 to 29 October 2015.
37. The information and documents obtained as a result of undertaking this examination assisted me and my legal representatives to make an informed decision regarding whether to continue to prosecute the proceedings against EY.

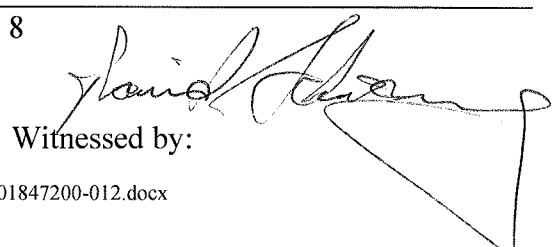
Advices from legal representatives prior to Commencement of Proceedings

38. The only pieces of litigation specified in the 21 May 2020 Letter, as being proceedings which may have been commenced (it is said) without authority, are the Auditor's Claim and Drake Proceeding.
39. In the 11 June 2020 Letter, reference is also made to the following proceedings:
- (a) The \$2M proceeding;
 - (b) The \$8M proceeding;
 - (c) The public examination undertaken by David Clout, as trustee of the Bankrupt estate of Ross Lamb, in the Ross Lamb bankruptcy; and
 - (d) The Feeder Fund Claim.
40. The proceedings referred to in paragraphs 39(a) to 39(c) were not commenced by me.
41. My May 2020 Affidavit deposes to:
- (a) The amounts recovered from the \$2m proceeding (see paragraph 95);



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Page 8



Witnessed by:


(b) A settlement that has been reached with respect to the \$8m proceeding, subject to satisfaction of a condition precedent (see paragraph 100).

42. As noted in paragraph 80 of this Affidavit, the Feeder Fund Proceeding has settled, and judicial advice given by Justice Mullins that I was justified entering into and performing the terms of that settlement.
43. Prior to commencement of the Drake Proceeding and the Auditor's Claim, I obtained advices from experienced solicitors and/or Counsel acting for me as to the claims available to me, based on the available information. I do not waive legal professional privilege in respect of such advices.
44. I did not obtain judicial advice before the commencement of the Drake Proceeding or the Auditor's Claim but (having had the benefit of legal advice as mentioned above, the privilege in respect of which is not waived) I formed the view that I was authorised to commence the proceedings pursuant to the powers conferred on my by the Dalton J Orders and that it was unnecessary to obtain judicial advice.

Judicial Supervision of Winding up

45. There has been a significant amount of judicial supervision and guidance in this winding up. To date, I have brought a total of 13 applications for approval of remuneration to date (including this Application), generally at six month intervals.
46. Many of my past remuneration applications have sought approval for remuneration relating to the conduct of each of the relevant proceedings, including the Drake Proceeding and the EY Proceeding.
47. Mr Park and LMIM have been served with each remuneration application and have not appeared on any of my previous remuneration applications, save for the first application and the current Application.


Page 9


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48. All of my past remuneration applications have been approved in full by various Justices of this Honourable Court, as detailed in paragraph 11 of my May 2020 Affidavit.
49. During the course of this winding up, where appropriate, I have brought applications for judicial advice or directions, including:
- (a) An application filed in this proceeding on 4 September 2014 for directions as to whether I would be justified appointing Mr Andrew Fielding and myself as controller of certain retirement village assets over which the FMIF held security;
 - (b) An application filed on 15 March 2017 in proceeding 3508/15 for directions as to whether I would be justified raising the clear accounts rule in response to certain claims for indemnity made by LMIM; and
 - (c) An application filed on 1 February 2019 in this proceeding for directions as to whether I was justified entering into and performing a Deed of Settlement entered into with respect to the Feeder Fund Proceeding; and
 - (d) An application filed on 1 February 2019 in proceeding 3508/15 for directions as to the entitlements of investors who invested in a foreign currency.
50. In light of the complexity of this winding up, and to further enhance the level of judicial supervision and guidance of this winding up, on 23 November 2018, I caused my solicitors to send correspondence to the Associate of the Senior Judge Administrator requesting that a single Judge be allocated to hear all of my remuneration or judicial advice applications relating to the FMIF (other than applications relating to the proceedings managed by Justice Jackson on the commercial list).


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51. At pages 189 to 204 of the Bundle is a copy of this correspondence.
52. In response to that request, on 26 November 2018, the Senior Judge Administrator determined that Justice Mullins would hear my remuneration and judicial advice applications. At pages 205 to 207 of the Bundle is a copy of the response from the Associate to the Senior Judge Administrator.
53. Following Justice Mullins' elevation to the Court of Appeal, the Senior Judge Administrator determined that Justice Callaghan would hear such applications.

Analysis of Advantages and Disadvantages of Appeal and EY Proceeding

54. I have during the course of the winding up of the FMIF, undertaken, in conjunction with experienced Solicitors and Counsel acting for me, an assessment of the advantages and disadvantages of the various proceedings including the Appeal and the Auditor's Claim; however, the details of such analysis are commercially sensitive and/or subject to legal professional privilege (which is not waived).
55. These matters are considered and reviewed by me on an ongoing basis, in conjunction with my legal representatives.
56. During the course of the winding up, I have provided regular reports to FMIF members (including LMIM in its capacity as RE of the Feeder Funds) every three months, which, *inter alia*, detail the steps taken in and status of, and any significant developments relating to the various proceedings relating to the FMIF. My reports to investors are sent to all members of the FMIF by their preferred method of communication and published on the FMIF website.
57. In my next report to members, I intend to include a high level overview of the best and worst case scenarios in relation to the Auditors Claim. My next report to members is due to be issued by the end of June 2020.
58. The quantum of the claim made in the EY proceeding at its highest is in excess of \$200 million.

Page 11



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59. In my opinion, having consulted with my solicitors retained in the Auditors Claim (Gadens), and based on my experience undertaking litigation, I estimate that the contingent liabilities (which may or may not ultimately be actually expended or incurred) associated with the Auditors Claim (which is the most substantial piece of litigation which remains), excluding remuneration claimed or legal costs paid to date, are as follows:

Description	Amount (excluding GST)
Legal costs of application for judicial advice	\$200,000
Legal expenses and remuneration for prosecuting claim	\$5,000,000
Adverse costs orders (including with respect to third party claims)	\$7,000,000
Total	\$12,200,000.00

60. These are my estimates of what these liabilities might be in a realistic, worst case scenario.

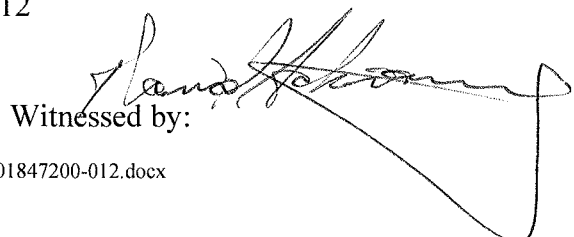
61. In my experience, it is difficult to accurately estimate the costs of complex litigation. These are estimates only and could vary depending upon a range of factors usual for litigation matters.

62. These estimates are made on the following assumptions:

- (a) That detailed expert evidence is obtained from a number of experts, including financial statement auditors, compliance plan auditors, accountants and others;
- (b) That both liability and quantum is contested by EY;
- (c) That a further mediation is likely to be held prior to trial;



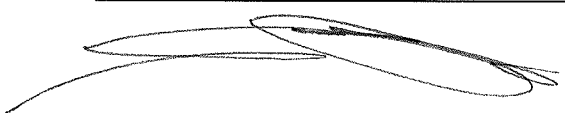
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- (d) That the claim and the counterclaim proceeds to trial and the length of the trial is approximately 4 weeks.
63. These liabilities are controlled, in the sense that I do not have to continue to incur the costs.
64. The current status of the proceeding is that a Defence has been filed by EY on 25 September 2019, refusing to plead to a significant number of allegations made in the Statement of Claim on the basis of claims to privilege against self-incrimination and against self-exposure to penalty. EY has also filed a counter-claim.
65. I applied to Court to strike out or challenge these privilege claims. The application was heard by Justice Dalton on 14 February 2020, and judgment is reserved.
66. My solicitors have commenced the process of identifying and briefing independent expert witnesses and conferring with the defendant's solicitors in relation to preparation of a document plan for disclosure.
67. In relation to the Drake Proceeding, the material in support of my application for judicial advice as to whether I would be justified pursuing the Appeal (which was served on FMIF members), included estimates of the remuneration and costs of prosecuting the appeal and the quantum of adverse costs orders in the event that the Appeal is not successful.
68. Justice Jackson was, until recently, the Judge on the Commercial List managing the Auditors Claim and the Drake Proceeding and was the trial judge for the Drake proceeding.
69. Justice Jackson approved my remuneration on my third application for approval of remuneration (on 23 June 2015), which included remuneration relating to the Drake Proceeding and other court proceedings.
70. Justice Jackson also heard the Dual Appointment Application.

Page 13



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71. In the Dual Appointment Application, Mr Park submitted that 50% of my remuneration and expenses should be deferred until conclusion of winding up so that an assessment of proportionality could be undertaken.
72. At pages 208 to 216 of the Bundle is a copy of the Liquidator's submissions in support of the Dual Appointment Application, making this submission at paragraph 33(a).
73. Justice Jackson rejected this argument and held that 50% of my remuneration and expenses should not be deferred until the conclusion of the winding up: at paragraphs [43] to [54].

Current Outlook for finalisation of Receivership

74. There is an estimated return to members at paragraph [15] of my May 2020 Affidavit; it does not take into account the effect of recoveries from legal proceedings, any allowance for future claims against the FMIF or costs to finalise the winding up. All of my reports to members provide an estimated return.
75. In accordance with the conditions of the financial reporting and audit relief granted by ASIC, every second report I issue to members provides, *inter alia*, a timeframe to complete the winding up (dependent on progress of outstanding legal proceedings), and a list of the actions required to complete the winding up.
76. On 1 February 2019 I applied to Court for authority to make an interim distribution ("**Authority Application**").
77. On 2 October 2019, Justice Jackson authorised distribution of up to \$40 million from property of the FMIF. His Honour's reasons for judgment with respect to that application, were included in the reasons for judgment for the Dual Appointment Application referred to in paragraph 33 above.
78. The Authority Application only concerned power to make the interim distribution, because confidential material bearing upon the amount that ought to be distributed, that it was not appropriate to put before Justice Jackson as a


Page 14

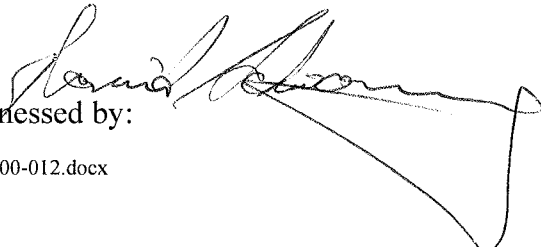
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potential trial Judge of the proceedings on the commercial list, was put before Justice Mullins on an application to her for judicial advice.

79. On 1 February 2019, I applied to Justice Mullins for judicial advice with respect to the settlement of the Feeder Fund Proceeding (“**Judicial Advice Application**”). It was a condition precedent of the settlement of the Feeder Fund Proceeding that an interim distribution, of at least a certain amount, be made within a specified timeframe.
80. On 22 May 2019, Justice Mullins directed that I would be justified in settling the Feeder Fund proceeding and distributing 6.5 cents per unit to FMIF members (approximately \$32 million before amounts to be withheld from distribution to the Feeder Funds, under the terms of the settlement of the Feeder Fund Proceeding): *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126 . The interim distribution was made in accordance with Her Honour’s judicial advice.
81. At pages 217 to 227 of the Bundle is a copy of Her Honour’s reasons for judgment and at pages 228 to 229 of the Bundle is a copy of the orders made by Her Honour.
82. Detailed estimates of the contingent liabilities of FMIF were detailed in affidavit material filed in support of the Authority Application and the Judicial Advice application.
83. Justice Jackson’s Judgment on the Authority Application referred to in paragraph 33 above, summarises my estimates of the amounts of these contingent liabilities, on a realistic worst case scenario basis, as at March 2019 at paragraph [89]. His Honour accepted my estimates of these liabilities were reasonable at paragraph [104].
84. The contingent liabilities were not limited to my remuneration and legal costs or adverse costs liabilities relating to prosecuting the legal proceedings I commenced and also included:


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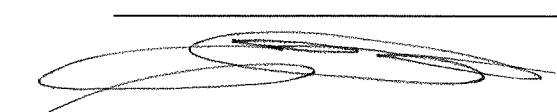

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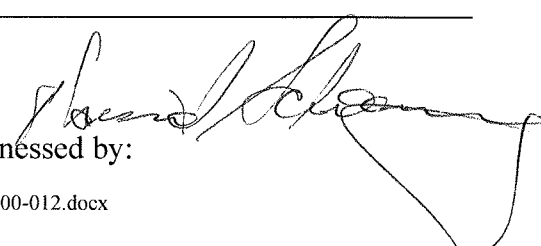
- (a) Creditor Indemnity Claims (claims by LMIM for indemnity from the FMIF with respect to debts or claims of creditors admitted in the liquidation of LMIM) - \$949,497.72;
- (b) Exit entitlements relating to former retirement village assets - \$5 million;
- (c) Claims for remuneration and expenses by Mr Park - \$2,043,889.89.

85. At the time of the application before Justice Jackson, I estimated that the contingent liabilities for the Auditor's Claim including remuneration, legal expenses and adverse costs orders, were \$2,450,000 up to the mediation and an application to Court for judicial advice.

Breakdown of Amount of Remuneration relating to court proceedings

- 86. Generally, during the winding up, BDO has not separately kept track of the amounts of remuneration attributable to each proceeding, as that would have involved additional costs being incurred.
- 87. My remuneration is broken up into the categories "Assets", "Trade On", "Creditors", "Dividend" and "Administration" as set out in [48] of my May 2020 Affidavit.
- 88. These are the categories recommended by ARITA and are similar to the categories used by Mr Park for his remuneration applications.
- 89. I have caused the narrations of work performed by me and staff of BDO to be reviewed, for this Relevant Period, to determine the approximate amount of remuneration relating to each legal proceeding that is on foot.
- 90. A summary of each of the relevant legal proceedings, and the approximate amount of Remuneration attributable to that proceeding, is as follows:


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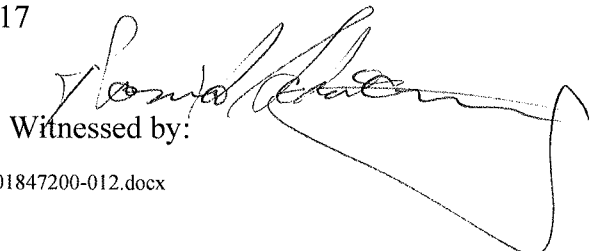
	Assets (\$ exc GST	Administration (\$) exc GST	Trade On (\$) exc GST	Creditors (\$) exc GST	Total (\$) exc GST
Auditors Claim	268,985.50	315.00	246.00	16,397.50	285,944.00
Bellpac Bonds	4,059.00	-	-	-	4,059.00
Ross Lamb	10,615.00	-	-	-	10,615.00
Appeal	12,005.00	184.50	615.00	-	12,804.50
Other	5,745.00	-	-	-	5,745.00
Total	301,409.50	499.50	861.00	16,397.50	319,167.50

91. The balance of my remuneration relates to administrative and non-litigious aspects of the winding up.
92. At the following pages of the Bundle is a copy of a schedule which sets out the descriptions of work performed by me and BDO staff and the amount of remuneration sought relating to each of the following proceedings, in this Relevant Period:
- (a) At pages 230 to 276 - the Auditor's Claim - \$285,944.00 (ex GST);
 - (b) At page 277 - The Bellpac Proceedings (the \$2m proceeding and/or the \$8m proceeding) - \$4,059.00 (ex GST);
 - (c) At pages 278 to 279 - the Ross Lamb bankruptcy - \$10,615.00 (ex GST);
 - (d) At pages 280 to 282 - the Appeal/the Drake Proceeding - \$12,804.50 (ex GST);
 - (e) At pages 283 to 284 - other proceedings, including proceeding 3508/15 - \$5,745 (ex GST).

Page 17




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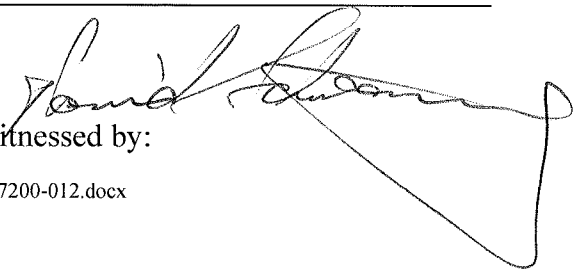


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Reporting to and Consultation with Beneficiaries

93. There are approximately 4,600 members of the FMIF.
94. It would not have been practicable to consult with all members of the FMIF regarding the proposed Court proceedings.
95. In my view, there is a need to treat all members fairly and equally. It would not be appropriate to disclose legal advices to some members, but not others and if the advices were disclosed to all FMIF members, there would be a substantial risk the privileged advices would enter the public domain and legal professional privilege would be lost.
96. As noted above, members are provided with regular, detailed reports, which contain information in relation to the various proceedings on foot in which the FMIF has an interest, the steps taken in those proceedings and any significant developments in respect of the various proceedings.
97. LMIM was a defendant to many of the proceedings which were commenced, including:
- (a) To the Drake Proceeding, in its own capacity and in its capacity as former trustee of the MPF;
 - (b) To the third party claims made by the Defendants in the Auditor's Claim (which have since been struck out by Justice Jackson);
 - (c) To the Feeder Fund Proceeding, in its own capacity and in its capacity as RE of the Feeder Funds; although Justice Jackson directed that Mr Jahani, a receiver appointed by a secured creditor, represented the interests of the Feeder Funds in this proceeding.
98. In addition to this, Mr Park deposes, in an Affidavit sworn by him 17 April 2020 in response to the application by me for judicial advice as to whether I am justified pursuing the Appeal, at paragraph [13] that he is concerned that a claim might be made against me in respect of the institution and conduct of


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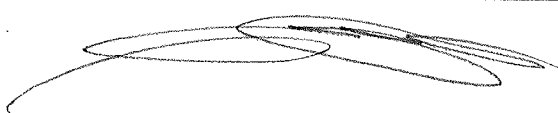
the Drake Proceeding. At pages 285 to 302 of the Bundle is a copy of Mr Park's Affidavit.

99. Given the considerations referred to in paragraphs 93 to 98 , I am not prepared to share legal advices relating to the Drake Proceeding with Mr Park.

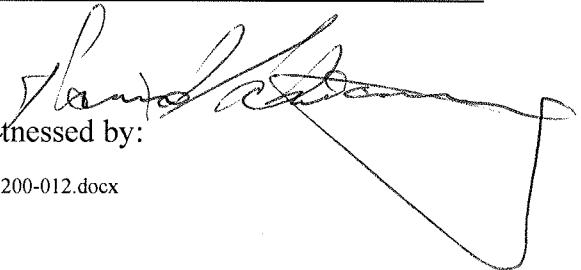
Expenses

100. I do not seek approval of expenses by this application.
101. The most significant expenses being incurred in the winding up are legal expenses.
102. I regularly review invoices from my legal representatives (who are all senior and experienced practitioners) and keep track of costs that are being incurred on the various litigious matters.
103. A secured creditor of the FMIF, DB, appointed the DB Receivers.
104. Until the retirement of the DB Receivers (in December 2018), they controlled the bank accounts of FMIF, and approved and issued instructions to PTAL in relation to all payments of costs and expenses from the FMIF's bank accounts.
105. There is a custodian of the Fund, PTAL, a professional trustee, that holds bank accounts of the FMIF and acts on instructions pursuant to a Custody Agreement. Following the retirement of the DB Receivers, I have provided PTAL with instructions pursuant to the Custody Agreement.
106. Details of the legal costs incurred by the FMIF (including my costs and the Liquidator's costs) are provided in yearly and half-yearly financial statements, which BDO prepare and publish on the website www.lmfimf.com ("FMIF Website"), which I maintain and use to communicate with FMIF members.
107. Statements of receipts and payments of the FMIF prepared by the DB Receivers (up until their retirement) and thereafter, by myself, are regularly lodged with ASIC. The DB Receivers statements of receipts and payments are available on the FMIF website and I have provided details of my receipts and

Page 19



Signed:



Witnessed by:

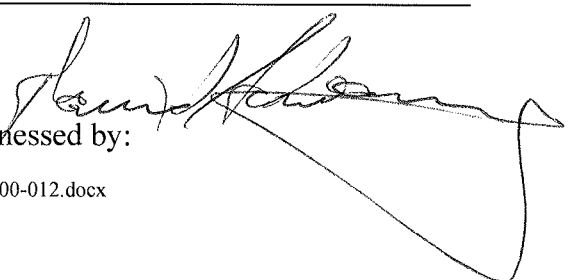
payments, since the retirement of the DB Receivers, in my reports to members and affidavits filed in support of my remuneration applications.

108. ASIC has, on my application, granted a deferral of the FMIF's financial reporting and audit obligations under the CA. A copy of the current instrument of relief appears at pages 176 to 177 of the exhibit to my May 2020 Affidavit.
109. The current deferral expires on 16 March 2022. Unless that deferral is further extended, all of the deferred obligations will fall due on this date and a final audit of the FMIF, at completion of the winding up, is required by clause 16.10 of the Constitution of the FMIF.
110. Despite all this information being available to members, whilst members have, understandably, expressed generalised complaints about costs or the time being taken to wind up the FMIF, no specific objections or issues to any of the expenses have ever been received (save for, perhaps, the issues raised by Mr Park in the 21 May 2020 Letter).
111. Justice Jackson, at paragraph [48] of His Honour's judgment with respect to the Dual Appointment Application, rejected a submission by the Liquidator that I ought to be ordered to provide budgets and estimates of expenses, because it was not possible to accurately estimate or budget the costs of litigation in advance.
112. In the statement of receipts and payments which appears at paragraph 238 of my May 2020 Affidavit, I depose to a total of approximately \$1.756 million in legal fees and disbursements being incurred in the Relevant Period.
113. A breakdown of the legal expenses paid by the FMIF during the Relevant Period, is as follows:

Firm	Amount (\$) Inc GST
Clayton Utz	1,672.55
Gadens	1,144,022.11
Russells	377,799.42



Signed:



Witnessed by:

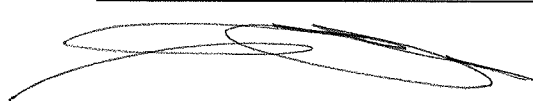
Tucker & Cowen Solicitors	233,141.78
Total	1,756,635.86

Litigation Funding

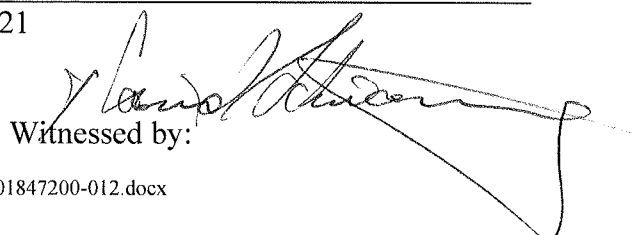
- 114. Prior to commencing the Auditors Claim and subsequently, I considered the possibility of obtaining litigation funding or adverse costs insurance, for that proceeding.
- 115. I decided not to obtain litigation funding or adverse costs insurance to date because, given that the FMIF had sufficient cash at bank to fund the litigation, I formed the view that it was not in the best interests of members of the FMIF to become liable to pay substantial fees to the litigation funder from the proceeds of the litigation or substantial premiums for the adverse costs insurance.
- 116. I intend to review the position on an ongoing basis and give further consideration to obtaining litigation funding for the Auditor's claim if appropriate.

Audit Partners are employees of BDO

- 117. The 21 May 2020 Letter raises an issue concerning remuneration for work performed by the Audit Partners of BDO who have performed work in the winding up of the FMIF in this Relevant Period, namely Craig Jenkins and Clark Jarrold.
- 118. As was disclosed in my consent to act filed at the time of my appointment (which is exhibit DW- 9 to my Affidavit sworn and filed in this proceeding on 2 May 2014), the business of BDO is conducted through a corporate structure rather than a partnership.
- 119. All of the 'Partners', including the audit Partners, Mr Jenkins and Mr Jarrold, are in fact employees of the firm.
- 120. I have explained in previous Affidavits sworn in support of my remuneration the benefits of involving the BDO audit partners. In short, they bring



Signed:



Witnessed by:

considerable specialist expertise to the tasks which they have performed, costs savings have been achieved by reason of this expertise enabling them to perform tasks requiring such expertise more cost effectively and efficiently, and there may also be benefits associated with a Partner from a different section of BDO contributing or having input into, or bringing a different perspective to, certain complicated aspects of this winding up, such as the Auditor's Claim.

121. The role of the Audit Partners in relation to the Auditors Claim has been detailed in previous Affidavits sworn by me in support of my previous remuneration applications; to briefly summarise, their role has been to assist with quantification of the claim, give advice as to audit standards to assist my solicitors and Counsel to draft pleadings and particulars, and provide input into the instructions given to independent experts. They have also assisted with the review and preparation of management accounts that are completed in accordance with the relevant accounting standards for each financial year or half-year.
122. The role performed by the Audit Partners is not in the nature of expert evidence, and they have not been engaged as independent experts in the Auditor's Proceeding.

Review of remuneration by Gerry Collins

123. At the hearing of an application by me for approval of remuneration on 29 November 2018, Justice Mullins suggested that an independent review of my remuneration be obtained for a limited period of time even if undertaken in-house. At pages 303 to 320 of the Bundle is a copy of the transcript of that hearing (see page 17 lines 4 to 10).
124. A review of my remuneration for a limited period of time was obtained, for my next remuneration application, in accordance with Her Honour's suggestion.
125. At pages 321 to 325 of the Bundle is a copy of the Reasons for Judgment of Justice Mullins on my next remuneration application, delivered ex temp on 2 July 2019, in which Her Honour described Mr Collins' review of my remuneration as "helpful" (see page 4 line 5).

Page 22

Signed:

Witnessed by:

126. In response to the concerns raised in the 21 May 2020 Letter, that certain time entries of Mr Ryan Whyte, Mr Arthur Taylor and Ms Julie Pagcu are repetitive, I instructed Mr Collins to undertake a review of the remuneration claimed, and suggested that he review the month of March 2020 as, in this Relevant Period, that was the month in which the amount of remuneration sought is highest.

Liquidator's proposal to appoint referee

127. I am informed by Tucker & Cowen and believe, that on 25 May 2020, they received correspondence from Russells attaching draft orders proposing, *inter alia*, that Mr Paul Vincent be appointed as referee to determine the amount of my remuneration. At pages 326 to 333 of the Bundle is a copy of that correspondence and the attached draft orders.

128. I am aware that Mr Vincent is an accountant, not a registered Liquidator. He is not listed on a list of registered Liquidators published on ASIC's website as at 31 May 2020, a copy of which appears at pages 334 to 353 of the Bundle.

129. Under the CA, only registered Liquidators are eligible to accept appointments as Liquidators, Receivers, or administrators.

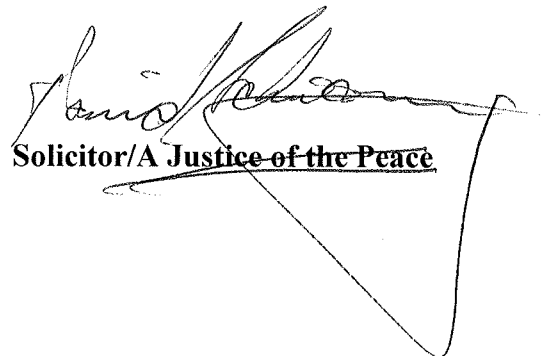
130. So far as I am aware, Mr Vincent has never wound up a managed investment scheme, or managed an external administration of this complexity.

131. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit.

Sworn by **DAVID WHYTE** on the 11th day of June 2020 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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 & INVESTMENTS
COMMISSION**

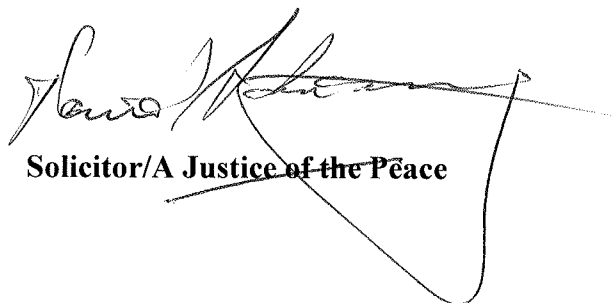
CERTIFICATE OF EXHIBIT

Volume 1 of 2

Exhibit "**DW-122**" (pages 1 to 188) to the Affidavit of **DAVID WHYTE** sworn this
11th day of June 2020



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:

Form 47, R.435

Filed on behalf of the Applicant

TUCKER & COWEN

Solicitors

Level 15, 15 Adelaide Street

Brisbane, Qld, 4000

Tel: (07) 300 300 00

Fax: (07) 300 300 33

SUPREME COURT OF QUEENSLAND

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AND

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AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

INDEX OF EXHIBITS

Volume 1 of 2

No.	DW-122	Date	Page No.
1.	Letter from Russells to Tucker & Cowen	21 May 2020	1 – 4
2.	Letter from Tucker & Cowen to Russells	3 June 2020	5 – 6
3.	Letter from Russells to Tucker & Cowen	11 June 2020	7 – 8
4.	Extract of Clauses 1 and 16 of the Constitution of the FMIF	Various	9 – 22

CERTIFICATE OF EXHIBIT:

Form 47, R.435

Filed on behalf of the Applicant

TUCKER & COWEN

Solicitors

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Brisbane, Qld, 4000

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No.	DW-122	Date	Page No.
5.	<i>Whyte v McLuskie & Ors</i> [2015] 296 FLR 35; [2015] QSC 132	15 May 2015	23 – 35
6.	<i>Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte (Receiver of the LM First Mortgage Income Fund</i> [2015] QSC 283	15 October 2015	36 – 64
7.	Submissions of the applicant/plaintiff in support of leave to proceed application	12 February 2015	65 – 70
8.	Orders of Justice Mullins, granting leave to proceed against LMIM	12 February 2015	71 – 72
9.	Orders of Judge Jarrett of the Federal Circuit Court granting leave to proceed against Mr Drake	16 March 2015	73
10.	Orders Justice Jackson granting leave to proceed against Mr Drake	8 April 2015	74 – 75
11.	Further Amended Statement of Claim	17 June 2015	76 – 93
12.	LMIM's Defence	1 July 2015	94 – 115
13.	Plaintiff's submissions in support of application under s 59 of TA	21 July 2015	116 – 127
14.	Orders of Justice Jackson on application under s 59 of TA	21 July 2015	128 – 129
15.	<i>Park & Muller v Whyte</i> [2015] QSC 287	29 October 2015	130 – 151
16.	Application by Mr Park for directions in relation to winding up of FMIF	10 October 2018	152 – 159
17.	<i>LM Investment Management Limited & Anor v Whyte</i> [2019] QSC 233	2 October 2019	160 – 188

RUSSELLS

21 May 2020

Our Ref: SCR:MKR:20141556

Tucker & Cowen
Solicitors
GPO Box 345
BRISBANE 4001

By Email: anase@tuckercowen.com.au
dschwarz@tuckercowen.com.au

Dear Colleagues

**Bruce & Anor the LM Investment Management Limited (in liquidation) – BS3383 of 2013
Application by Mr Whyte for Approval of Remuneration**

We write on behalf of the liquidator of LMIM to raise a number of substantive issues which have arisen from your client's application for approval of his remuneration in respect of the period of six months commencing 1 November 2019. LMIM is interested in the matter as RE of the FMIF and as the RE of two of the Feeder Funds (the CPAIF and the ICPAIF), which are substantial beneficiaries of the FMIF.

By our letter to you dated 28 November 2018, we raised some issues, as they then presented themselves. The liquidator does not wish to devote substantial time or resources, much less incur substantial legal costs, in relation to Mr Whyte's application for approval and payment of his remuneration. On the contrary, our instructors continue to regret that it is necessary to raise these issues – some not for the first time.

At the outset, therefore, we are instructed to invite you and your clients to confer privately with us and our clients about the issues raised below. For one thing, the issues concern the institution and conduct of two substantial (and several other smaller) pieces of litigation, namely the appeal in the Director Proceedings matter (re Bellpac) (the **Appeal**) and the proceedings against Ernst & Young (the **EY Proceedings**). For another, there is the need to maintain professional comity and to resolve these concerns by private agreement, if possible.

Assuming you and your clients are willing to discuss these matters privately, we suggest that the appropriate course is to adjourn Mr Whyte's application from next Wednesday, pending resolution of these concerns.

Firstly, an issue arises as to whether the litigation that the Receiver has conducted and is conducting was or is authorised by the order of Justice Dalton. There seems to be a substantial doubt, since the authority to bring proceedings is limited to proceedings "necessary for the winding up of the FMIF in accordance with clause 16 of its constitution". Clause 16 of the constitution does not authorise the

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RussellsLaw.com.au

institution of any litigation in particular during the winding-up; but of course it requires the “assets of the Scheme Property” to be realised.

A claim for compensation under s 1317H of the *Corporations Act* (which was the subject of the Director Proceedings and is the subject of the Appeal) and a claim for damages of the kind brought in the EY Proceedings do not appear to us to form part of the Scheme Property of the FMIF, mentioned in cl 16 and defined in the Constitution. The litigation authorised by para 7(b) of the Order seems, unsurprisingly in the context of Chapter 5C of the *Corporations Act*, to be limited by the definition of Scheme Property in the Constitution, to *property acquired* with money that was Scheme Property, which would include debts owed to the RE by its borrowers; and the associated mortgage securities.

It would not seem to include claims for unliquidated damages or statutory compensation the subject of the Director Proceedings, the Appeal or the EY Proceedings.

Similarly, Mr Whyte is either conducting or funding other (smaller) litigation which also seems unauthorised.

We will refer to all of this litigation (the Director Proceedings, the Appeal, the EY Proceedings and the other, smaller litigation) compendiously as the **Unauthorised Litigation**.

Secondly, even if the order of Dalton J did empower Mr Whyte to conduct the Unauthorised Litigation, neither the Receiver nor LMIM obtained any judicial advice prior to instituting any of the proceedings – the belated application for the Appeal being the only exception of which we are aware. If we are wrong about this, please let us know.

As you know, where a trustee, without judicial advice, embarks on litigation which fails, he is, as a general rule, not entitled to resort to the trust fund for remuneration for, or for paying the legal costs and other expenses of the litigation – or for paying adverse costs orders.

On the limited materials available to our client, neither the limitation in subparagraph 7(b) of the order of Justice Dalton, nor the fact that no judicial advice had been obtained, has in the past been disclosed to any judge of the Court who has approved the remuneration claimed. Again, if we are wrong about this, please let us know.

Thirdly the material does not disclose the Receiver’s overall analysis of the advantages and disadvantages, to the FMIF, in the respective events of success or failure of the Appeal or the EY Litigation, which are the two substantial pieces of litigation work to the fore in the present application. As you know, proportionality is a necessary element of claims for remuneration by external administrators.

Fourthly, and a related point, the current outlook for the finalisation of the receivership does not appear from the material. The outcome of the receivership is of course is heavily dependent on the success or failure of the Appeal and the EY Proceedings. However, as we apprehend the Receiver’s position, although he received judicial advice that he would be justified in distributing up to \$40 million in late 2019, he decided in fact to distribute only \$32 million. That left him with about \$39 million on hand; now down to \$34.8 million, a cash burn rate of \$700,000 per month, excluding receivers’ remuneration (claimed at \$165,000 per month).

It accordingly seems that in October 2019, the Receiver adopted the view that if all outstanding litigation fails, he may, in a worst-case scenario, need the whole of the \$39 million to pay the legal costs of prosecuting the Appeal and the EY Proceedings and to meet the resultant adverse costs orders.

This seems to be a reasonable conclusion since the October 2019 distribution was the first and only distribution the Receiver has made since his appointment in August 2013 and, after all that time (more than six years) we presume he would have been anxious to let the members of the FMIF have as much as he reasonably could – that is, the Receiver would have retained only what he thought he may need to conclude the receivership.

Please advise if this was the reasoning behind the Receiver fixing the \$32 million as the amount to distribute in October 2019.

If that is the case, then the spectre facing the members of the FMIF is that, in the worst-case scenario, out of total collections of \$175 million, Deutsche Bank AG has collected its debt of about \$25 million; the Receiver has paid the members of the FMIF about \$32 million; and the whole of the balance – about \$118 million – will have been spent predominantly on accountants' and lawyers' fees and adverse costs orders.

Fifthly, it is not possible to identify, from the present material, how much remuneration is sought in respect of the Unauthorised Litigation (either individually or altogether) or on other tasks in *the Appointment* (as defined in paragraph 2 of the order of Dalton J). It is important that this be done and that the costs of the remuneration for these separate tasks is differentiated in future applications.

The liquidator does not apprehend that there is any issue with respect to the quantum of the remuneration claimed in respect of work done in the Appointment, apart from the Unauthorised Litigation. If that remuneration can be separately identified, we expect to receive instructions from the liquidator not to oppose an order fixing the quantum and authorising the Receiver to withdraw that sum from the Scheme Property of the FMIF.

Sixthly, the Unauthorised Litigation has been both instituted and prosecuted by the Receiver without any attempt at consultation with any of the beneficiaries. As you will appreciate, the liquidator – especially on behalf of the Feeder Funds - contends that this is contrary to authority. Whether that view is right or not, the fact remains that neither has the Receiver obtained judicial advice to the effect that he was justified in commencing any of the Unauthorised Litigation.

We have on several occasions endeavoured to open a dialogue with the Receiver; those attempts have to date not succeeded.

If any of the Unauthorised Litigation has both reasonable prospects of success and is otherwise commercially justifiable, then the liquidator and the Feeder Funds would be very grateful to know that. At present, they have practically no insight into these important matters. This, however, would require the Receiver to abandon his current attitude that he will not share even with actively interested beneficiaries – the liquidator and the Feeder Funds – the legal advice the Receiver has and the other considerations he has undertaken, respectively, to justify his expenditure of (and his claim to continue to expend) money comprising the Scheme Property of the FMIF.

Seventhly, to date, the Receiver has not been subject to any external oversight in respect of his expenditure on legal costs and other costs associated with the prosecution of the Unauthorised Litigation. Of course, the cost of remuneration (if allowable) is only part of the cost of this litigation. Given the disastrous worst-case scenario mentioned above (i.e. if the members receive only \$32 million), the liquidator enquires whether the Receiver is willing to submit his estimates of legal costs, going forward, to scrutiny. Our client has no interest in penny-pinching in respect of serious and complex commercial litigation of the kind that has been commenced – but the overall control of the legal budget is a matter of serious concern to the liquidator; and of vital and direct interest of the Feeder Funds and all other beneficiaries.

Eighthly, the overall cost particularly of the Director Proceedings and, even more so the EY Proceedings, leads the liquidator to enquire whether the Receiver considered and sought to obtain litigation funding for those two proceedings. Whilst litigation funding is expensive, there are nonetheless the complete saving of legal costs and the guarantee of indemnity against adverse costs orders. Also, the presence of litigation funders can often encourage a settlement. In summary, if the whole or even a good proportion of the \$39 million is potentially at risk, the liquidator enquires whether litigation funding was considered and he on behalf of both LMIM and the Feeder Funds wishes to discuss this with the Receiver.

It may not be too late for litigation funding for the EY Proceedings.

Ninthly, in the EY Proceedings, a question arises as to the basis on which Mr Whyte has, in the past sought, and now seeks remuneration for persons other than “him and ... employees of BDO who perform work in carrying out the Appointment” (*vide* para 3(c) of the order of Dalton J). The Receiver is recited, in paragraph 2 of the order, to be a Partner of BDO. The order did not anticipate or authorise in advance that any other Partner would carry out any work under the Appointment or that any other such Partner would spend time which was to be remunerated. This is no mere pedantic point – the appointment was a personal one and was for a receivership. The work that the liquidator understands has been carried out by the audit division of BDO is of an entirely different character.

A related difficulty is that of course none of the audit partners of BDO will be giving expert evidence – they lack the requisite independence. We note that the current material includes consideration, in early February 2020, by the Receiver – and many others in BDO - of which expert auditor or auditors is or are to be retained for the purpose of providing expert evidence in the EY proceedings. We note that we enquired about the issues of independence, utility and doubling up of costs in paragraph 1 of our letter of 28 November 2018 and that you did not deal with it in your response. It seems that only now is the Receiver confronting this issue.

Again, the limitation in subparagraph 3(b) of the order does not seem to have been previously drawn to the attention of the court in the context of the claims for remuneration by “Partners” of “BDO”, apart from Mr Whyte. Again, if it has, would you please direct us to the relevant evidence or submission?

Lastly, but by no means least, there are difficulties with some uninformative and repetitive time entries made by various staff members, including Mr Ryan Whyte, Mr Arthur Taylor and Ms Julie Pagcu. Again, without wishing to penny-pinch and acknowledging the court’s role is to take a broad view of the work done, this has been a problem previously (witness the Affidavit of Mr Collins for example) and the problem regrettably seems to persist in many places. This makes it impossible to assess whether the time spent by and the remuneration claimed for these staff members is reasonable.

In conclusion, the liquidator wishes to avoid any public disputation about these matters – some are obviously highly sensitive issues. For that and associated reasons, we are instructed to invite the Receiver to agree to an adjournment of his application and for him and you – and other solicitors for that matter (for example Gadens) - to confer with the liquidator, the relevant senior staff of FTI and us, on a confidential basis, to see if these matters can be resolved.

We will telephone for that purpose.

Yours faithfully



Stephen Russell
Managing Partner

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20141556/2737977

Our reference: Mr Schwarz / Mr Nase / Ms Sargent 3 June 2020
Your reference: Mr Russell

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Dear Colleagues

Principals.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

Special Counsel.
Alex Nase.
Ben Shaw.

Senior Associates.
Emily Anderson.

Associates.
Scott Hornsey.
Paul Armit.

**Bruce & Anor. –v- LM Investment Management Limited & Ors.; Queensland Supreme Court Proceeding No. BS3383/2013
Application by David Whyte for Remuneration – LM First Mortgage Income Fund (Receiver Appointed) (“FMIF”)**

We refer to our client’s Application filed 11 May 2020 and to your letter of 21 May 2020 (“**your letter**”). We note that our client’s Application has been adjourned until 2 July 2020 for hearing, and directions have been made requiring an exchange of affidavit material and submissions. Mr Whyte’s further affidavit material is required to be filed and served by Friday, 12 June 2020.

In order to ensure, as far as possible, that our client’s further material addresses any issues raised in your letter that need to be addressed, we are instructed to request clarification of the following matters raised by your letter:-

1. It appears from your letter that you act for LMIM and its liquidator in various capacities; it appears that the matters raised by your letter are raised on behalf of the liquidator of LMIM acting in the following capacities (at the least):-
 - (a) As RE of the FMIF;
 - (b) As RE of the CPAIF;
 - (c) As RE of the ICPAIF; and
 - (d) (we assume) in its personal capacity; that is, the liquidator raises the issues in connection with LMIM in its personal, corporate capacity, as well as in his capacity as responsible entity of the funds mentioned above.

We would be grateful for your clarification and confirmation as to that.

2. In the third paragraph of your letter on the first page, and again on the second page of your letter (in respect of the “first” issue mentioned in your letter), you refer to certain “*Unauthorised Litigation*” which is said to comprise “(the Director Proceedings, the Appeal, the EY Proceedings, and the other, smaller litigation)”.

The “*other, smaller litigation*” is not identified in your letter. We ask that you let us know to which litigation your letter is intended to refer.

3. In respect of the “last” point (made in the third last paragraph of your letter), it is said that there are difficulties with some “*uninformative and repetitive time entries made by various staff members...*” In order that our client may consider the point, we ask that you identify which particular time entries are the subject of the complaint made in your letter.

We would be grateful for your response by Monday, 8 June 2020.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au
Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

RUSSELLS

11 June 2020

Our Ref: SCR:MKR:20141556

Tucker & Cowen
GPO Box 345
BRISBANE 4001

By Email: dschwarz@tuckercowen.com.au
By Email: anase@tuckercowen.com.au

Dear Colleagues

Bruce & Anor v LM Investment Management Limited & Ors – Supreme Court Proceeding No. 3383 of 2013
Application by Mr Whyte for Remuneration

We are instructed to respond to your letter dated 3 June 2020 as follows, adopting your numbering.

1. We are unsure of the reasons behind your client's constant reference to and enquiry about the "capacity" in which LMIM appears on the present application.

As you and your client know, we are instructed by Mr Park, the liquidator of LMIM. The company is entitled to be heard on the present application, because:

- (a) It is the RE for the FMIF, from the Scheme Property of which Mr Whyte seeks substantial remuneration. It is a natural – indeed, the primary – contradictor in that respect;
- (b) LMIM has been ordered to wind up the FMIF. While there is no doubt that Mr Whyte has primary responsibility for ensuring that it is wound-up in accordance with its Constitution, the liquidator has a proper role in the present application for that reason as well;
- (c) It is the RE for the CPAIF, in which capacity it is a member of the FMIF
- (d) It is the RE for the ICPAIF, in which capacity it is a member of the FMIF.

There is, after almost seven years, no need for "clarification and confirmation" of these matters.

2. The "other, smaller litigation" referred to in our letter dated 21 May 2020 is a reference to the litigation other than the EY Proceedings and the Bellpac Director Proceedings (and the Appeal) which comprise, by reference to Mr Whyte's affidavit:-

Liability limited by a scheme approved under professional standards legislation

Brisbane
Postal – GPO Box 1402, Brisbane QLD 4001 / Street – Level 18, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899
RussellsLaw.com.au

- (a) Supreme Court of New South Wales Proceeding No. 2014/332566 in respect of a claim about \$2 million of bonds issued by Wollongong Coal Ltd to Bellpac;
 - (b) Federal Court of Australia at New South Wales Proceeding 2016/00120239 in respect of a claim against Wollongong Coal Ltd by Bellpac's liquidator for non-conversion of \$8 million of bonds to shares;
 - (c) The funding of the bankruptcy trustee Mr Clout in respect of his administration of the bankrupt estate of Mr Lamb;
 - (d) The Trust Company (PTAL) Ltd v Ross Lamb - Federal Circuit Court SYG2097/2016 and Federal Court Proceeding NSD643/2019; and
 - (e) The "Feeder Fund Claim" - Supreme Court of Queensland Proceeding No. 13534 of 2016.
3. We must say that we are puzzled by your enquiry about the "uninformative and repetitive time entries made by various staff members" referred to in our letter dated 21 May 2020. These are self-evident. The practice has been the subject of comment in the past, not only by judges of the Court but also by witnesses on whose evidence your client has had to rely.

The issue is one that arises again on the present application.

As we perceive it, the principle is that a line-by-line analysis of the kind that sometimes occurs in the assessment of legal costs is not required. The application has been made after careful review. It is unnecessary for us to descend into the detail, since that has already been done and the principle is as we have stated it.

Yours faithfully



Millie Russell
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20141556/2745366

LM INVESTMENT MANAGEMENT LIMITED

ABN 68 077 208 461

Australian Financial Services Licensee 220281

AND

THE MEMBERS AS THEY ARE CONSTITUTED

FROM TIME TO TIME OF THE

LM FIRST MORTGAGE INCOME FUND

ARSN 089 343 288

**REPLACEMENT
CONSTITUTION**

DEED made this 10 day of April 2008

BETWEEN: LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 9 Beach Road, Surfers Paradise in the State of Queensland (the Responsible Entity hereinafter referred to as the "RE")

AND: All those persons who from time to time apply for Units and are accepted as Unitholders of the Scheme ("the Members")

WHEREAS:

- A. The RE holds a responsible entity's licence from the ASIC.
- B. The RE established a pooled mortgage unit trust called the LM Mortgage Income Fund on 28 September 1999. From 31 May 2007 the LM Mortgage Income Fund will be known as the LM First Mortgage Income Fund.
- C. By applying to invest in this Scheme through a PDS a person will become a Member and be bound by this Constitution.
- D. Clause 26.1(b) and section 601GC(1)(b) of the Law allow the RE to modify or repeal and replace the Constitution where the RE reasonably considers the change will not adversely affect Members' rights. The RE is satisfied the amendments contemplated by this replacement Constitution will not adversely affect Members' rights.
- E. Accordingly with effect from the date of this deed poll, the existing constitution of the Scheme is repealed and replaced with this Constitution.
- F. This Constitution is made with the intent that the benefits and obligations hereof will enure not only to the RE but also to the extent provided herein to every person who is or becomes a Member.

IT IS AGREED:

1. DICTIONARY AND INTERPRETATION

1.1 Dictionary of Terms

In this Constitution:

"Accounting Standards" means the accounting standards and practices determined under clause 1.3;

"Adviser" means the financial adviser who has offered Unit/s in this Scheme to a Member;

"Applicant" anyone who submits an application for Unit/s in the Scheme in accordance with the PDS;

"Application" means a request from a Member to the RE to issue Units in a managed investment scheme pursuant to an Arrangement;

"Application Form" an application in writing for Unit/s in the Scheme attached to the PDS.

"Application Money" the amount received from an Applicant when lodging the

Application in respect of the Unit/s applied for in accordance with the PDS;
"Arrangement" means a written arrangement between the RE and a Member that sets out the circumstances in which Applications for Units in registered schemes operated by the RE, may be accepted;

"ASIC" the Australian Securities and Investments Commission;

"ASIC Instrument" means:

- (a) an exemption or modification granted by ASIC in accordance with Part 5C.11 of the Law; or
- (b) any other instrument issued by ASIC under a power conferred on ASIC which relates to the RE or the Scheme.

"Auditor" means the auditor of the Scheme appointed by the RE under clause 27.1 and shall be qualified to act as a registered scheme auditor pursuant to the Law;

"Authorised Investments" means

- (a) monies deposited (whether secured or unsecured) with a Bank, or any corporation related to a Bank or other corporation or monies deposited with any trustee company, fund, bills of exchange, certificates of deposit and negotiable certificates of deposit issued by a Bank or similar instrument accepted and endorsed by a Bank;
- (b) any investments the time being authorised by the laws of the Commonwealth of Australia or any State or Territory thereof for the investment of trust funds;
- (c) monies deposited with an authorised short term money market dealer as such expression is used in section 65 of the Law;
- (d) any investment in or acquisition of cash, stocks, bonds, notes or other securities or derivatives issued by the Government of Australia, any other country, any company, corporation, body corporate, association, firm, mutual fund or unit trust;
- (e) any investment in or acquisition of options, entitlements or rights to any of the securities or derivatives referred to in clause (d) of this provision;
- (f) real property or interests in real property whether by acquisition of units in unit trusts or otherwise;
- (g) interests in any registered managed investment scheme (as defined in the Law) including but not limited to any scheme of which the RE acts as RE;

- (h) making loans to any person or company with or without interest, whether secured or unsecured, and for any period whatsoever; and
- (i) the acquisition of foreign currencies, hedging contracts, commodity contracts of any kind which are quoted on a financial market (as defined in the Law).

"Bank" has the meaning given to an ADI in section 5 of the Banking Act 1959 (Cth) and also includes an ADI constituted by or under a law of the State or Territory and a foreign ADI as that term is defined in section 5 of the Banking Act 1959 (Cth).

"Borrower" any person who applies to the Scheme to borrow Scheme Property and who is approved by the RE;

"Business Day" any day on which trading Banks are generally open for business on the Gold Coast, Queensland;

"Class" means a class of Units, being Units which have the same rights.

"Commencement Date" means the date of registration of the Scheme;

"Compliance Committee" the Compliance Committee of the RE.

"Compliance Plan" means the Compliance Plan for the Scheme lodged at the ASIC on Scheme registration;

"Constitution" this document including any Schedule, Annexure or Amendments to it and which also means the Unit Trust Deed;

"Custodian" Permanent Trustee Australia Limited ACN 008 412 913;

"Custody Agreement" an agreement dated the 4th day of February, 1999 and any further amendments entered into between the Custodian and the RE;

"Development Loan" a loan to fund the construction of a building on mortgaged property which is to be drawn down before completion of the building;

"Differential Fee Arrangement" means an arrangement pursuant to Class Order [CO 03/217] which provides an exemption from S601FC(1)(d) of the Law in relation to differential fee arrangements offered to investors investing in the Fund as a Wholesale Investor, within the meaning of Wholesale Client in Section 761G of the Corporations Act;

"Distributable Income" has the meaning given in clause 11.3;

"Distribution Period" is the relevant period referred to in clause 12.1;

"Dollars", "A\$" and "\$" mean the lawful currency of the Commonwealth of Australia;

"Extraordinary Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by

at least 50% of the total votes that may be cast by Members entitled to vote on the resolution (including Members who are not present in person or by proxy);

"**Financial Year**" means the period of 12 months ending on the 30th day of June in each year during the continuance of this Constitution and includes the period commencing on the date the trust was established and expiring on the next succeeding 30th day of June and any period between the 30th day of June last occurring before the termination of the trust and the termination of the trust;

"**FICS**" means the Financial Industry Complaints Service Limited;

"**GST**" means a tax, impost or duty on goods, services or other things imposed by any fiscal, national, state, territory or local authority or entity and whether presently imposed or novel, together with interest or penalties either before or after the date of this Constitution;

"**Income**" means all amounts which are, or would be recognised as, income by the application of the Accounting Standards;

"**Issue Price**" means the price at which a Unit is issued calculated in accordance with clause 6.

"**Investment Term**" means the initial fixed investment term selected by the Member when they invest in the Scheme for a fixed term, and any subsequent fixed term for the investment where the investment is rolled over for that subsequent term, but does not include any fixed term under a Savings Plan Investment (and the initial fixed investment term and each subsequent fixed term will each be a separate Investment Term, and not a longer combined Investment Term);

"**Law**" means the Corporations Act 2001 and the Corporations Regulations.

"**Lender**" means the RE on behalf of the Members lending Scheme Property through the Scheme;

"**Lending Rules**" means the rules detailed in clauses 13.2 and 13.3;

"**Liabilities**" means at any time the aggregate of the following at that time as calculated by the RE in accordance with the Accounting Standards:

- (a) Each liability, excluding Unit Holder Liability, of the RE in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (b) Each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (c) Other appropriate provisions in accordance with the applicable Accounting Standards.

"**Liquid Scheme**" means a registered scheme that has liquid assets which

account for at least 80% of the value of scheme property.

"LMM" means Law Mortgage Management Pty Ltd ACN 055 691 426;

"LVR" means loan to valuation ratio and is the ratio of the amount of a loan to the valuation of the property offered as security for a loan in the Scheme;

"Member" in relation to a Unit, means the person registered as the holder of that Unit (including joint holders).

"Minimum Investment" means the minimum investment disclosed in the PDS from time to time unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment;

"Minimum Subscription" means any minimum amount of Application Money of a particular currency required by the RE to be received in respect of one or more Applicants, before the Application(s) will be accepted by the RE;

"Mortgagee" in all mortgages held by the Scheme the Mortgagee will be the Custodian as agent for the RE;

"Mortgage Lending Valuation Policy" means the RE's mortgage lending valuation policy as detailed in the Compliance Plan;

"Net Fund Value" at any time, means the value of the Scheme Property less the Liabilities at that time.

"Power" means any right, power, authority, discretion or remedy conferred on the RE by this Constitution or any applicable law;

"Promoter" for the purpose of the Law the promoter of this Scheme is the RE;

"PDS" means a Product Disclosure Statement or any Supplementary Product Disclosure Statement for the Scheme;

"Register" means the register of Members maintained by the RE under clause 22;

"Responsible Entity" or "RE" means the company named in the ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE and who is also the Trustee of the Scheme;

"Savings Plan investment" means an Australian dollar investment described as the "LM Savings Plan" in the PDS, with terms and conditions as disclosed in the PDS;

"Scheme" means a managed investment scheme to be known as the "LM First Mortgage Income Fund" that is to be registered under s601EB of the Law and also means the Trust;

"Scheme Property" means assets of the Scheme including but not limited to:

- (a) contributions of money or money's worth to the Scheme; and
- (b) money that forms part of the Scheme assets under the provisions of the Law; and

- (c) money borrowed or raised by the RE for the purposes of the Scheme;
and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d);

"Scheme Valuation Policy" means the scheme valuation policy as detailed in the Compliance Plan;

"Security Property" means any property offered by a Borrower as security for a Mortgage in the Scheme;

"Special Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution;

"Subscription Account" an account opened and maintained by the RE into which is deposited all Application Moneys;

"Tax" includes, but is not limited to:

- (a) stamp duty, excise and penalties relating to these amounts which are imposed on the RE in respect of any assets in the Scheme;
- (b) taxes and duties and penalties relating to these items imposed as a result of any payment made to or by the RE under this Constitution;
- (c) taxes imposed or assessed upon:
 - (i) any Application Money;
 - (ii) distributions of Income to Members, capital gains, profits or any other amounts in respect of the Scheme; or
 - (iii) the RE in respect of its capacity as responsible entity of the Scheme;
- (d) imposts, financial institutions duties, debits tax, withholding tax, land tax or other property taxes charged by any proper authority in any jurisdiction in Australia in respect of any matter in relation to the Scheme, and every kind of tax, duty, rate, levy, deduction and charge including any GST;

"Tax Act" means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);

"Trustee" means the RE;

"Uncontrolled Event" means an act of God, strike, lock out or other interference with work, war (declared or undeclared), blockage, disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction,

embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the party relying on the Uncontrolled Event;

"Unit" means an undivided interest in the Scheme Property created and issued under this Constitution;

"Unit Holder Liability" means the liability of the Scheme to the Members for their undivided interest in the Scheme Property;

"Unit Holding" means the number of Units in the Scheme held by a Member as evidenced in the Register of Unit holders;

"Unit Holding Statement" means a statement issued by the RE to a Member pursuant to clause 5.9;

"Valuation Date" means the date which is the last day of each month or any date during each month at the RE's discretion or the date on which the RE determines there has been a material change in the value of the Scheme Property;

"Withdrawal Notice" means:

- (a) for a Savings Plan Investment, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE, provided that only 4 such notices may be given within any 12 month period, and any notices in excess of this number will not be valid unless otherwise determined by the RE in its discretion;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE;
- (c) for all investments for an Investment Term, a notice in writing given by a Member and received by the RE before the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE,

and provided that if a notice in writing as referred to above is not received before 12 noon on a Business Day, the notice will be deemed to be received on

the next Business Day;

"Withdrawal Notice Period" means:

- (a) for a Savings Plan Investment by a Member, the period commencing 1 Business Day after the first 12 month period of the Savings Plan Investment has expired, and continuing throughout the term of the Savings Plan investment;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, any period when the Member owns Units; or
- (c) for all investments for an Investment Term, the period commencing 5 Business Days before the expiry of the relevant Investment Term (and where an investment Term is created by the rollover of an existing investment, means the period commencing 5 Business Days before the expiry of that subsequent Investment Term); or
- (d) any other time period as determined by the RE.

"Withdrawal Price" means the price at which a Unit is redeemed calculated in accordance with Clause B.

1.2 Interpretation

In this Constitution, unless the context otherwise requires:

- (a) headings and underlining are for convenience only and do not affect the interpretation of this Constitution;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing a gender include any gender;
- (d) other parts of speech and grammatical forms of a word or phrase defined in this Constitution have a corresponding meaning;
- (e) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;
- (f) a reference to any thing includes a part of that thing;
- (g) a reference to a part, clause, party, annexure, exhibit or schedule is a reference to a part and clause of, and a party, annexure exhibit and schedule to, this Constitution;
- (h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (i) a reference to a document includes all amendments or supplements to,

- or replacements or novations of, that document;
- (j) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day except that any amount payable on demand where the demand is made on a day which is not a Business Day must be paid on the next succeeding Business Day;
 - (k) a reference to an agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
 - (l) a reference to a document includes any agreement in writing, or any statement, notice, deed, instrument or other document of any kind;
 - (m) a reference to a body (including, without limitation, an institute, association or authority), whether statutory or not:
 - (i) which ceases to exist; or
 - (ii) whose powers or functions are transferred to another body;
is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
 - (n) a reference to any date means any time up to 5.00 pm (Queensland time) on that date; and
 - (o) a reference to dealing with a Unit includes any subscription, withdrawal, sale, assignment, encumbrance, or other disposition whether by act or omission and whether affecting the legal or equitable interest in the Unit.

1.3 Accounting Standards

In respect of any accounting practice relevant to this Constitution, the following accounting standards apply as if the Scheme were a company in accordance with:

- (a) the accounting standards required under the Law; and
- (b) if no accounting standard applies under clause 1.3(a), the accounting practice determined by the RE.

2. ESTABLISHMENT OF TRUST

2.1 Trustee

The RE continues to act as trustee of the Scheme.

s601FC(2) 2.2 Role of Trustee

The RE recognises that it continues to hold the Scheme Property on trust for the Members.

s601FB(2) 2.3 Appointment of Custodian

- (a) The RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE.

the Complaints Register including:-

- (a) the person responsible for resolving the complaint;
- (b) the name of the Member making the complaint;
- (c) the nature of the complaint;
- (d) the product service or department in respect of which the complaint was made;
- (e) the actual time required to resolve the complaint;
- (f) the actual resolution of the complaint;
- (g) recommendations, if any, for changes to products disclosures systems or processes to ensure similar complaints do not arise in the future.

14.5 The Complaints Register should be reviewed by the Complaints Manager of the RE as part of an ongoing review process to determine whether recommendations for change arising from resolved complaints have been effectively incorporated in the compliance program.

14.6 Where the RE believes it has either resolved the complaint, or it has not resolved the complaint but believes it can do nothing more to satisfy the complainant, and the Member feels their complaint has still not been satisfactorily resolved, the complainant must be referred to the FICS for mediation. The FICS adopts a three stage approach in resolving complaints as follows:-

- (a) stage 1: initial opportunity for Member to resolve complaints;
- (b) stage 2: complaints review, investigation and conciliation;
- (c) stage 3: independent determination of complaints by adjudicator.

The full terms of reference for the FICS are held by the RE.

14.7 If a complaint cannot be resolved to the satisfaction of the Member by the RE or the FICS then the complainant Member may:-

- (a) refer the matter to arbitration or the courts; or
- (b) take whatever other action is open to the complainant Member under the general law.

14.8 The RE must disclose the details of its complaints procedure to all investors.

15. TERM OF TRUST

The Scheme begins on the Commencement Date and is to be wound up on the earlier to occur of:

- (a) the date which is eighty years from the Commencement Date; and
- (b) any earlier date which the RE, in its absolute discretion may appoint as the Vesting Date.

16. WINDING UP THE SCHEME

s601GA(1)(d) 16.1 The Scheme shall only be wound up in accordance with the Law and this

Constitution.

- 16.2 The RE must wind up the Scheme in the following circumstances:-
- s601NE(1)(a) (a) if the term of the Scheme as detailed in this Constitution has expired;
 - s601NE(1)(b) (b) the Members pass an extraordinary resolution directing the RE to wind up the Scheme;
 - s601NE(1)(c) (c) the Court makes an order directing the RE to wind up the Scheme pursuant to the Law and in particular pursuant to section 601FQ(5) and section 601ND;
 - s601NE(1)(d) (d) the Members pass an extraordinary resolution to remove the RE but do not at the same time pass an extraordinary resolution choosing a company to be the new RE that consents to becoming the Scheme's RE;
- s601NC(1) 16.3 (a) If the RE considers that the purpose of the Scheme:
- (i) has been accomplished; or
 - (ii) cannot be accomplished,
- it may take steps to wind up the Scheme.
- (b) If the RE wishes to wind up the Scheme pursuant to clause 16.3(a), the RE must give to the Members of the Scheme and to the ASIC a notice in writing;
- (i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished; and
 - (ii) informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on a special resolution Members propose about the winding up of the Scheme; and
 - (iii) informing the Members that the RE is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the RE giving the notice to the Members;
- (c) if no meeting is called within that 28 days to consider the proposed winding up, the RE may wind up the Scheme.
- s601NE(2) 16.4 (a) The RE may wind up the Scheme in accordance with this Constitution and any orders under S601NF(2) of the Law if the RE is permitted by S601NC(3) of the Law to wind up the Scheme.
- s601NF(3) (b) An order to wind up the Scheme pursuant to s601ND (1) or s601NF (1) or (2) of the Law may be made on the application of:

- (i) the RE; or
- (ii) a director of the RE; or
- (iii) a Member of the Scheme; or
- (iv) the ASIC.

- s601NE(3) 16.5 The RE shall not accept any further Applications for Units in the Scheme or make any further loans from the Scheme Property at a time after the RE has become obliged to ensure the Scheme is wound up or after the Scheme has started to be wound up.
- 16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.
- 16.7 Subject to the provisions of this clause 16 upon winding up of the Scheme the RE must:
- (a) realise the assets of the Scheme Property;
 - (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
 - (c) subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;
 - (d) The Members must pay the costs and expenses of a distribution of assets under clause 16.7(c) in the same proportion specified in clause 12.4.
 - (e) The RE may postpone the realisation of the Scheme Property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement.
 - (f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.
 - (g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.
- s601NG 16.8 If on completion of the winding up of a registered Scheme, the RE or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the RE or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the

- ASIC to be dealt with pursuant to Part 9.7 of the Law.
- s601EE 16.9 If at any time the Scheme is operated while it is unregistered the following may apply to the Court to have the Scheme wound up:
- (a) The ASIC
 - (b) The RE
 - (c) A Member of the Scheme
- 16.10 The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up.
17. **VALUE OF THE SCHEME FUND**
- 17.1 **Valuation of the Scheme Property**
The RE may cause the Scheme Property to be valued at any time in accordance with the Scheme Valuation Policy of the RE.
- 17.2 **Valuation if required**
The RE must cause the Scheme Property or any asset of the Scheme Property to be valued if required by ASIC or under the Law and the valuation must be undertaken in accordance with those requirements.
- 17.3 **Determination of Net Fund Value**
The RE may determine the Net Fund Value at any time in its discretion, including more than once on each day.
18. **FEEES, TAXES, COSTS AND EXPENSES**
- s601GA(2) 18.1 **Taxes:**
The RE may use the Scheme Property to pay any Tax or other obligation, liability or expense required by any applicable law in relation to:
- (a) this Constitution;
 - (b) any amount incurred or payable by the RE;
 - (c) a gift or settlement effected by this Constitution;
 - (d) the exercise by the RE of any Power; or
 - (e) money or investments held by or on behalf of the RE under this Constitution.
- s601GA(2) 18.2 **Payment of Debts:**
The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.
- s601GA(2) 18.3 **Fees:**
The RE is entitled to receive out of the Scheme Property, a management fee of up to 5.5 % per annum (inclusive of GST) of the Net Fund Value in relation to the performance of its duties as detailed in this Constitution, the Compliance Plan and the Law. This fee is to be calculated monthly and paid at such times as the RE determines.

SUPREME COURT OF QUEENSLAND

Whyte v McLuskie and Others

[2015] QSC 132

Burns J

13 March, 15 May 2015

Corporations — Managed Investment Schemes — Winding Up — Where person appointed to wind up managed investment scheme and to act as receiver of property of fund — Where examination summonses issued — Whether summonses issued beyond power or otherwise an abuse of process — Whether examination may be ordered on application by receiver appointed to wind up scheme — Corporations Act 2001 (Cth), ss 601NF, 596B.

Under s 601NF(1) of the *Corporations Act 2001* (Cth) (Corporations Act), the Court could appoint a person to take responsibility for ensuring a registered scheme was wound up in accordance with its constitution, and under s 601NF(2) the Court could give directions about how the scheme was to be wound up. Section 596B empowered the Court to summons a person for examination about a corporation's examinable affairs if certain conditions were satisfied.

The LM First Mortgage Income Fund (the Fund) was established as a managed investment scheme and provided secured loans to property developers. The Fund went into voluntary administration and the administrators resolved to wind up the scheme. The applicant was appointed under s 601NF(1) of the Corporations Act to ensure that the Fund was wound up in accordance with its constitution, and was also appointed under s 601NF(2) to act as a receiver of the property of the Fund. The applicant successfully applied for examination summonses to be issued to the examinees under s 596B of the Corporations Act.

The examinees applied for the summonses to be discharged on the basis that they were issued beyond power or were otherwise an abuse of process. At issue before the Court was whether on an application by a receiver appointed pursuant to s 601NF of the Corporations Act an examination could be ordered under s 596B of the Act.

Held, dismissing the application: It is not an improper purpose or abuse of process for a person appointed pursuant to s 601NF of the Corporations Act as a receiver of the property of a scheme to apply for the issue of examination summonses under s 596B of the Act. [41]-[45]

Re Stansfield DIY Wealth Pty Limited (in liq) (2014) 291 FLR 17, distinguished.

Evans v Wainter Pty Ltd (2005) 145 FCR 176, considered.

Cases Cited

Ariff v Fong (2007) 63 ACSR 384.

Australian Securities and Investments Commission v Tasman Investment Management Ltd (2006) 202 FLR 343.
Banksia Securities Ltd (Receivers and Managers Appointed), Re (2013) 278 FLR 421.
Bruce v LM Investment Management Ltd (2013) 94 ACSR 684.
Equititrust Ltd, Re (2011) 254 FLR 444.
Evans v Wainter Pty Ltd (2005) 145 FCR 176.
Excel Finance Corp Ltd, Re; Worthley v England (1994) 52 FCR 69.
Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd (2007) 156 FCR 501.
HongKong Bank of Australia v Murphy (1992) 28 NSWLR 512.
LM Investment Management Ltd (in liq) v Bruce (2014) 102 ACSR 481.
Moage Ltd (in liq), Re; Sheahan v Pitterino (1997) 77 FCR 81.
O'Brien v Wily (2009) 76 NSWLR 428; 234 FLR 366.
Peat Resources of Australia Pty Ltd, Re; Ex parte Pollock (2004) 181 FLR 454.
Rubicon Asset Management Ltd (2009) 77 NSWLR 96.
Saraceni v Jones (2012) 42 WAR 518; 259 FLR 398.
Southern Equities Corp Ltd (in liq), Re; Bond v England (1997) 194 LSJS 401.
Southland Coal Pty Ltd (in liq), Re (2006) 58 ACSR 113.
Stacks Managed Investments Ltd, Re (2005) 219 ALR 532.
Stansfield DIY Wealth Pty Ltd (in liq), Re (2014) 291 FLR 17.
Westfield Management Ltd v AMP Capital Property Nominees Ltd (2012) 247 CLR 129.

Application

RM Derrington QC, with *MJ Luchich*, for the applicant.

B Roberts SC, with *M dell Gallego*, for the examinees.

Cur adv vult

15 May 2015

Burns J.

- 1 Examination summonses were issued by the court on 30 January 2015 and, on 12 February 2015, served on the examinees - Paula McLuskie, Michael Reid, Mandy Downs and Rebecca Burrows. They contend that the summonses were issued beyond power or are otherwise an abuse of process of the court, and seek their discharge.¹
- 2 The application to discharge the summonses is made out of time, and an extension is sought accordingly. As relief in aid of their application, the examinees also seek access to the affidavit material which was filed in support of the issue of the summonses.

Factual and procedural history

- 3 The applicant for the issue of the summonses, David Whyte, is the receiver of the property of the LM First Mortgage Income Fund (the Fund), having been

¹ Pursuant to r 11.5 of the *Corporations Proceedings Rules* (being Sch 1A to the *Uniform Civil Procedure Rules 1999*).

appointed as such by an order of this Court made in 2013.² The Fund was originally constituted in 1999 for the purpose of establishing a pooled mortgage unit trust to be operated as a managed investment scheme under the *Corporations Act 2001* (Cth) (the Act), and was registered as such. By a provision of the constitution for the scheme, the property of the Fund was, and is, held by the responsible entity — LM Investment Management Limited (LMIM) — on trust for its members.³ The business of the Fund involved the making of secured loans to developers of real property, described in the constitution as “mortgage investments”.⁴

4 In August 2009, LMIM engaged Ernst & Young (EY) to audit the Fund along with other schemes in relation to which LMIM was the responsible entity.⁵ The examinees, as either members or employees of EY, are said to have been involved in the audits undertaken with respect to the Fund.⁶

5 On 19 March 2013, LMIM went into voluntary administration and, subsequently, its administrators resolved to wind up the scheme. They were restrained from commencing the winding up until the court determined applications separately made by a member of the Fund (Mr Shotton), two members of a feeder fund (Mr and Mrs Bruce) and the Australian Securities and Investments Commission (ASIC). Those applications came on for hearing before Dalton J over several days in July 2013 and her Honour’s decision was handed down on 8 August 2013.

6 For Mr and Mrs Bruce, it was argued that a temporary responsible entity for the Fund be appointed by the court to replace LMIM pursuant to ss 601N and 601FP of the Act, and the responsible entity of the feeder fund in relation to which they were members was nominated for that purpose. ASIC, on the other hand, sought orders for the winding up of the Fund, the appointment of independent liquidators to take responsibility for ensuring that the Fund was wound up in accordance with its constitution, the appointment of those liquidators as receivers of the property of the Fund and a grant of “wide powers to exercise as receivers”.⁷ By the end of the hearing, Mr Shotton also sought the appointment of receivers.⁸

7 Dalton J found the application brought by Mr and Mrs Bruce to be incompetent, and dismissed it for that reason.⁹ However, her Honour granted the relief sought by Mr Shotton and ASIC. In particular, LMIM in its capacity as responsible entity was directed pursuant to s 601ND(1)(a) of the Act to wind up the Fund and Mr Whyte was appointed under s 601NF(1) to take responsibility for ensuring that the Fund was wound up in accordance with its constitution. Further, Mr Whyte was appointed pursuant to s 601NF(2) as receiver of the

2 See *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684.

3 See cl 2.2. Such a provision reflects the position under the Act: s 601FC(2).

4 See cl 13.2.

5 See Affidavit of William Sugden affirmed on 6 March 2015; paras 8–10.

6 See Affidavit of Scott Couper sworn on 12 March 2015; exhibits SC-1 and SC-9.

7 See *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684, at [33].

8 *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684.

9 *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684, at [20].

property of the Fund and a number of orders were made to assist him in that regard. Relevantly, Dalton J ordered pursuant to s 601NF(2) that Mr Whyte:

- (a) have, in relation to the property of the Fund, the powers set out in s 420 of the Act;¹⁰
- (b) be authorised to take all steps necessary to ensure the realisation of property of the Fund held by LMIM as responsible entity of the Fund by exercising any legal right of LMIM in relation to that property;¹¹ and
- (c) be authorised to bring, defend or maintain any proceedings on behalf of the Fund in the name of LMIM as is necessary for the winding up of the Fund in accordance with clause 16 of its constitution.¹²

8 As to the decision to appoint Mr Whyte as the receiver of the property of the Fund, her Honour said this:

The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In *Equititrust*¹³ that was the view of Applegarth J and he used a mechanism - constituting the person charged with winding the scheme up as receiver - to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case.¹⁴

9 Subsequently, LMIM brought an appeal against the order made by her Honour pursuant to s 601NF(1) appointing Mr Whyte.¹⁵ No separate argument was directed to the appropriateness of the orders made under s 601NF(2).¹⁶ The Court of Appeal dismissed the appeal on 6 June 2014.

10 Approximately one month earlier, Mr Whyte had applied to ASIC to be granted “eligible applicant” status for the purposes of the examination provisions contained in Division 1 of Part 5.9 of the Act. On 13 June 2014, ASIC approved his application in these terms:

The Australian and Securities Investments Commission authorises the applicant as an eligible applicant for the purposes of Division 1 of Part 5.9 of the Act in relation to the Company.¹⁷

11 On 17 November 2014, the application for the issue of examination summonses was filed on behalf of Mr Whyte. Notice of that application was given to the liquidators of LMIM, but there was no appearance on their behalf at the hearing of the application before Mullins J, which took place on 27 November 2014.¹⁸ Amongst other orders, Her Honour ordered pursuant to

10 See para 6 of the order.

11 See para 7(a) of the order and the additional powers which are expressly conferred, including the power on the part of Mr Whyte to appoint receivers.

12 See para 7(b) of the order.

13 *Re Equititrust Ltd* (2011) 254 FLR 444.

14 *Re Equititrust Ltd* (2011) 254 FLR 444 at [121].

15 See *LM Investment Management Ltd (in liq) v Bruce* (2014) 102 ACSR 481.

16 *LM Investment Management Ltd (in liq) v Bruce* (2014) 102 ACSR 481, at [7] per Fraser JA.

17 See Affidavit of Alexander Zivkovic sworn on 12 March 2015; exhibit ASZ-4.

18 *Ibid*; paras 10-12.

s 596B of the Act that summonses be issued to the examinees for their examination (and production of documents) before a Magistrate at Brisbane, which examination was specified to be with respect to “the examinable affairs” of LMIM as responsible entity for the Fund.

12 Pursuant to the orders made by Mullins J, the summonses were duly issued and, on 12 February 2015, served on the examinees.¹⁹

Overview of the examinees’ arguments

13 Before turning to a consideration of the particular contentions advanced on behalf of the examinees to attack the summonses, some broad observations can usefully be made.

14 The argument for invalidity developed by counsel for the examinees in written and oral submissions was premised on what was submitted to be the “peculiar nature of the role of a receiver appointed under section 601NF of the *Corporations Act* for the receivership of property of a managed investment scheme”.²⁰ This peculiarity, they argued, arose because - unlike the provision applying to the winding up of unregistered managed investment schemes²¹ - 601NF was limited in its scope and would not support the making of an order for the conduct of examinations. Indeed, it was submitted that the power conferred by s 601NF(2) to give directions about how a registered scheme is to be wound up would not allow for the making of orders interfering with third party rights.

15 It may be accepted that the argument as to the limited scope of the power conferred by s 601NF(2) not only has much force, it is well-supported by authority. Although I would not go so far as to embrace all that has been said about the limits of that power, it is unnecessary in the context of this application to decide that question. That is because the summonses were not issued pursuant to s 601NF(2); they were issued pursuant to s 596B after a receiver who had been appointed pursuant to s 601NF(2) had successfully applied to ASIC to be granted “eligibility status”. Moreover, neither the appointment of that receiver (Mr Whyte) nor the grant by ASIC of eligibility status has been criticised by the examinees, let alone challenged.²² As such, all that remained for the court to be satisfied about on the hearing of the application to issue the summonses was whether, taking the most benign limb of s 596B(1)(b), the examinees may be able to give information about the examinable affairs of a corporation, namely, LMIM, as responsible entity of the Fund.²³

16 However, although it was accepted by the examinees that Dalton J relied on s 601NF(2) “entirely regularly” to appoint Mr Whyte as receiver,²⁴ it was nonetheless argued that some limitation was to be found either in the terms of her Honour’s orders or implied from a construction of the Act which operates to curtail Mr Whyte’s entitlement as receiver to exercise the very powers the Act confers on him to carry out the obligations entrusted to him by an order of this

19 Ibid; paras 13-19.

20 T. 1-5.

21 Sections 601EE.

22 See, for example, T. 1-8, 9 and para 4 of the Outline of Submissions of the Examinees dated 13 March 2015.

23 Section 596B(1)(b)(ii). And see, *Hightoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at [41] per French J.

24 T. 1-9.

Court. Put another way, the examinees' argument was to the effect that a receiver appointed by the court under s 601NF(2) would be placed in charge of a form of external administration that was forensically inferior to, for example, a receivership initiated by an ordinary creditor. I can find no such limitation in either her Honour's orders or on a proper reading of the Act.

- 17 To the contrary, by the orders made, Mr Whyte was expressly given all of the powers of a receiver under s 420 of the Act, and more. He was authorised to take all steps necessary to ensure the realisation of property of the Fund held by LMIM as the responsible entity and to bring, defend or maintain any proceedings on behalf of the Fund in the name of LMIM as is necessary for the winding up of the Fund. Otherwise, there is no warrant for concluding that the examination provisions in Part 5.9 of Chapter 5 of the Act are beyond the reach of a receiver appointed under a provision of Chapter 5C of the Act, and especially not when no such limitation is expressed in either Chapter.

Chapter 5C

- 18 Chapter 5C of the Act provides for the registration, regulation and winding up of managed investment schemes. Its earliest incarnation is to be found in the *Managed Investments Act 1998* (Cth). It repealed the prescribed interest provisions contained in the *Companies Act 1981* (Cth) and inserted Chapter 5C into the *Corporations Law* which is now found in the Act.²⁵
- 19 In the course of his reasons for dismissing the appeal from the orders made by Dalton J,²⁶ Fraser JA (with whom Gotterson JA and Daubney J agreed) had this to say regarding the statutory scheme:

Part 5C.9 of the *Corporations Act 2001* regulates the winding up of registered schemes. Provisions are made for winding up of a registered scheme where that is required by the scheme's constitution (s 601NA), where the members of the scheme want it to be wound up (s 601NB), and where the responsible entity of the registered scheme considers that a purpose of the scheme has been or cannot be accomplished (s 601NC). Provisions are also made for winding up by order of the Court where the Court thinks it is just and equitable to make the order or where execution or other process on a judgment, decree or order of a Court in favour of a creditor against the responsible entity of the scheme in that capacity has been returned unsatisfied (s 601ND). (In this case the winding up order was made on the just and equitable ground). Where the scheme must be wound up, s 601NE(1) requires that the responsible entity of the registered scheme "must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2)...".

The critical provision for the purposes of this appeal is s 601NF(1). Section 601NF 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

²⁵ For the history of Chapter 5C, see *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at [10]-[12].

²⁶ *LM Investment Management Ltd (in liq) v Bruce* (2014) 102 ACSR 481.

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:
- (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.²⁷

Particular contentions

20 Turning then to the examinees' particular contentions, they were as follows:

- First, it was submitted that the orders made by Dalton J do not allow Mr Whyte to conduct examinations;²⁸
- Secondly, it was submitted that an examination under s 596B is confined to an examination about a "corporation's examinable affairs"²⁹ and that Mr Whyte's appointment "does not extend over the affairs of any corporation as defined under the Act";³⁰
- Thirdly, it was submitted that the "proper scope" of the power conferred by s 596B was "confined to the investigation of the affairs of a corporation which is ancillary to an external appointment under Chapter 5 of the Act"³¹ and, for that reason, it would be "collateral to, and inconsistent with, the purpose for the conferral of that power"³² to deploy it "in furtherance of an agreement to administer the affairs of the Fund".³³ In short, it was submitted that such an "improper purpose would be an abuse of the court's processes";³⁴
- Fourthly, it was submitted that it may be inferred that the "existence of authorities denying a receiver appointed under s 601NF the powers of a liquidator"³⁵ was not drawn to the attention of Mullins J on the hearing of the application to issue the summonses and, for that reason, the summonses should be set aside because there had been a failure to "make full and frank disclosure of material matters"³⁶ on the hearing of what was essentially an ex parte application.

The first contention — no power to order, or to conduct, an examination

21 As I have already touched on, it was accepted on behalf of the examinees that s 601NF(2) empowers the court to "give directions (by order) that the person appointed to take responsibility for ensuring the winding up of a scheme ... act as a receiver of the property of the scheme".³⁷ However, it was submitted that s 601NF(2) does "not empower the court to make an order affecting the rights

²⁷ *LM Investment Management Ltd (in liq) v Bruce* (2014) 102 ACSR 481 at [8], [9].

²⁸ Outline of Submissions of the Examinees dated 13 March 2015; para 25.

²⁹ Outline of Submissions of the Examinees dated 13 March 2015; para 26.

³⁰ *Ibid.*

³¹ Outline of Submissions of the Examinees dated 13 March 2015; para 27.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Outline of Submissions of the Examinees dated 13 March 2015; para 29.

³⁶ *Ibid.*

³⁷ Outline of Submissions of the Examinees dated 13 March 2015; para 48(a).

of and imposing duties on third parties (such as an order for the conferral of power to require the production of documents and conduct examinations”.³⁸

22 That acceptance and the following submission were, it was argued, based on a consideration of decisions such as *Re Stacks Managed Investments Ltd*,³⁹ *Re Rubicon Asset Management Ltd*⁴⁰ and *Re Equititrust Ltd*.⁴¹

23 Then, the following submission was made:

The Examinees submit it can be inferred from her Honour’s remarks that her Honour generally accepts the proposition that s 601NF(2) does not give the court power to make an order that will affect the rights of and impose duties on third parties. Viewed objectively, that is the proper construction of the orders. Accordingly, in accordance with established authority, the Examinees submit that in carrying out the appointment, and specifically in performing his function as receiver of the property of the Fund, Mr Whyte is not permitted to conduct examinations.

If the limited nature of the s 601NF(2) power is accepted, it follows that there is no basis upon which a summons could be issued on the application of Mr Whyte. Therefore, the Summonses as issued were beyond the power of the Court to issue and should be discharged.⁴²

24 The short disposition of that submission is to state, as I have already have, that the summonses were issued pursuant to s 596B and not s 601NF(2). That occurred after Mr Whyte had been appointed by the court as receiver and authorised by ASIC as an “eligible applicant”. No issue has been taken with either that appointment or that authorisation.

25 That said, it is significant that, when appointing Mr Whyte as receiver, Dalton J was cognizant that claims against various persons might in the future be advanced on behalf of the Fund. These, her Honour observed, were “the type of claims which are normally investigated, and if necessary, pursued by insolvency practitioners during the course of a company winding-up”.⁴³ Her Honour continued:

Clause 16.7(a) of the constitution obliges a responsible entity winding up the fund to realise its assets. If there are claims to be made on behalf of the fund ... then those choses in action would constitute property which the responsible entity, winding-up the scheme, would have power to pursue.

26 Further, Dalton J did consider the scope of the power conferred on the court by s 601NF(2), but only so far as it was necessary to do in order to determine whether that provision supported the appointment of a receiver. On the question of scope, her Honour said:

Sections 601NE and 601NF(1) provide that the scheme is to be wound up “in accordance with its constitution and any orders” which the court makes under s 601NF(2). There has been some consideration in the cases as to the width of the court’s power under s 601NF(2) to make directions (by order) about how a registered scheme is to be wound up, and I am grateful to Applegarth J for the

38 Outline of Submissions of the Examinees dated 13 March 2015; para 48(b).

39 *Re Stacks Managed Investments Ltd* (2005) 219 ALR 532.

40 *Rubicon Asset Management Ltd (administrators appointed)* (2009) 77 NSWLR 96.

41 *Re Equititrust Ltd* (2011) 254 FLR 444.

42 Outline of Submissions of the Examinees dated 13 March 2015; paras 51 and 52.

43 See *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684 at [41]. And at [110].

review which is found in *Equitrust*⁴⁴ at [42]-[49], and his own views expressed at [50] and following in that case. While the scope of the power may not yet be fully explored, it is clear that there is not a wholesale importation of the scheme of company liquidation into the area of managed investment schemes. This is consistent, in my view, with the idea that it is generally the responsible entity which winds up the scheme in accordance with its constitution. Certainly this contrasts with for example, the public aspects of a liquidation.⁴⁵

27 In the event, Dalton J was satisfied that s 601NF(2) gave the court power, by order, to give directions that the person appointed to take responsibility for ensuring a registered scheme is wound up act as receiver of the property of the scheme. In addition, her Honour decided that Mr Whyte “should in substance and effect conduct the winding-up of the fund”.⁴⁶ Having done so, her Honour selected the same mechanism that had been used by Applegarth J in *Equitrust*, that is, “constituting the person charged with winding the scheme up as receiver - to give that person the necessary powers.”⁴⁷

28 Her Honour then went on to give Mr Whyte all of the powers of a receiver under s 420 of the Act, as well as authorising him to take all steps necessary to ensure the realisation of property of the Fund held by LMIM as the responsible entity and to bring, defend or maintain any proceedings in the name of LMIM as are necessary for the winding up of the Fund. No limitation in the exercise of those powers was expressed, or may sensibly be inferred. To the contrary, far from giving life to some lesser form of receivership, her Honour must respectfully be taken to have made these orders with it in mind that there may be chases in action which “would constitute property which the responsible entity, winding-up the scheme, would have power to pursue”.⁴⁸

29 As for s 601NF(2), it is a remedial provision which gives the court a “great deal of flexibility”.⁴⁹ Its true scope is prescribed by the words of the statute. In point, the power conferred is as wide as it needs to be to achieve its evident purpose — to give directions about how a registered scheme is to be wound up if “the Court thinks it necessary to do so”.⁵⁰ That may be, as the section provides, for the reason that the provisions in the scheme’s constitution are inadequate or impracticable, or it may be for another reason.

30 When determining whether it is necessary to give directions and, if so, what directions, it will always be relevant for the court to consider the legitimate interests of the members of the relevant scheme and the composition, by chose in action or otherwise, of the property of that scheme as well as the means by which that property can be realised. In this case, the power conferred by

44 *Re Equitrust Ltd* (2011) 254 FLR 444.

45 See *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684 at [46].

46 *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684; at [121].

47 *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684.

48 *Bruce v LM Investment Management Ltd (admins apptd) (in its capacity as responsible entity of the LM First Mortgage Income Fund)* (2013) 94 ACSR 684 at [41].

49 *Australian Securities and Investments Commission v Tasman Investment Management Ltd* (2006) 202 FLR 343 at [19] per Austin J.

50 The expression, “if the Court thinks it necessary to do so”, appears in both subsections (1) and (2) of s 601NF. Its meaning was considered by Fraser JA in *LM Investment Management Ltd (in liq) v Bruce* (2014) 102 ACSR 481 at [136]-[138].

s 601NF(2) was used to appoint a receiver as the most appropriate mechanism to realise the scheme property. Whilst the examinees accept that as a proposition, they argue that the achievement of that object - the realisation of the scheme property - is to proceed without the benefit of the full range of powers ordinarily conferred on a receiver. I do not accept that argument.

The second contention — a corporation's examinable affairs

31 The provisions of the Act governing the examination of persons about a corporation can be found in Part 5.9 of Chapter 5. Chapter 5 is entitled "External Administration", and relevantly includes, in Part 5.2, provisions that both regulate and empower receivers of the property of corporations.

32 Division 1 of Part 5.9 makes provision for both mandatory and discretionary examinations; the former being the subject of s 596A and the latter being the subject of s 596B. The summonses in question were of course issued pursuant to s 596B.

33 Section 596B empowers the court to summon a person for examination about "a corporation's examinable affairs" if an "eligible applicant" applies for the summons⁵¹ and the court is satisfied that: (1) the person has either taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation;⁵² or (2) may be able to give information about examinable affairs of the corporation.⁵³

34 Section 9 of the Act defines "corporation" to have "the meaning given by section 57A". Section 57A(1) in turn provides that "corporation" includes:

- (a) a company; and
- (b) any body corporate ...; and
- (c) an unincorporated body that under the law of its place or origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.

35 The terms "eligible applicant" and "examinable affairs" are also defined in s 9, as follows:

eligible applicant, in relation to a corporation, means:

- (a) ASIC; or
- (b) a liquidator or provisional liquidator of the corporation; or
- (c) an administrator of the corporation; or
- (d) an administrator of a deed of company arrangement executed by the corporation; or
- (e) a person authorised in writing by ASIC to make:
 - (i) applications under the Division of Part 5.9 in which the expression occurs; or
 - (ii) such an application in relation to the corporation.

examinable affairs, in relation to a corporation means:

- (a) the promotion, formation, management, administration or winding up of the corporation; or
- (b) any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or

51 Section 596B(1)(a).

52 Section 596B(1)(b)(i).

53 Section 596B(1)(b)(ii). And see, *Hightoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at [41] per French J.

- (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b).

36 As can be seen from para (b) of the definition of "examinable affairs", they will embrace anything that is included in the corporation's affairs because of s 53 of the Act. Section 53 is, relevantly, in these terms:

For the purposes of the definition of "examinable affairs" in section 9, ... the affairs of a body corporate include:

...

- (h) the circumstances under which a person acquired or disposed of, or became entitled to acquire or dispose of, shares in, debentures of, or interests in a managed investment scheme made available by, the body;
- (j) where the body has made available interests in a managed investment scheme - any matters concerning the financial or business undertaking, scheme, common enterprise or investment contract to which the interests relate; and
- (k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning, any matters referred to in a preceding paragraph.

37 Here, LMIM made available interests in a managed investment scheme, namely, the Fund. So much is made clear from the terms of the constitution for the Fund.⁵⁴ Under it, interests in the scheme property are described as "units"⁵⁵ and LMIM, as trustee of the scheme including the scheme property⁵⁶ as well as the responsible entity for the scheme, is authorised to offer units for subscription or sale.⁵⁷ Once subscribed or sold, the holder of a unit became a member of the scheme.⁵⁸ That of course occurred, and Mr Shotton was one such member.

38 As such, any matters concerning the financial or business undertaking, scheme, common enterprise or investment contract to which the interests in the Fund relate will be examinable as affairs of LMIM. To the point, any matters relating to, or arising out of, any audits conducted with respect to the Fund are properly to be regarded as examinable affairs of a corporation, namely, LMIM.

39 For the examinees, however, it was argued "Mr Whyte's appointment does not extend over the affairs of any 'corporation' as defined by the Act" and, for that reason, s 596B, "on its terms, has no application to a receiver of property of a scheme"⁵⁹ It is difficult to see how that argument sits comfortably in the face of the provisions to which I have just referred.

40 Indeed where it has been conceded that Mr Whyte was an "eligible applicant" for the purposes of s 596B(1)(a) of the Act, there can be no issue about Mr Whyte's standing to apply for examination summonses.⁶⁰ The only issue possibly arising is whether the involvement of the examinees in the audit of the

54 See affidavit of Alexander Zivkovic sworn on 12 March 2015; exhibit ASZ-1.

55 Clause 1.

56 Clauses 2.1 and 2.2.

57 Clause 5.1.

58 Clause 1.

59 Outline of Submissions of the Examinees dated 13 March 2015; para 54.

60 As to which, see *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69; *Saraceni v Jones* (2012) 42 WAR 518; 259 FLR 398, at [107].

Fund is caught by the definition of “examinable affairs”, and that is to be resolved by a combined reading of ss 9 and 53 of the Act. For the reasons I have already advanced, it clearly is.

41 To the extent it was argued that Mr Whyte was appointed as a receiver of the property of the Fund, as opposed to the property of a corporation, even if correct, that feature does not in some way make a receiver ineligible to apply for an examination summons.⁶¹ In any event, the terms of the orders made by Dalton J make it clear that Mr Whyte was tasked to realise the property of the Fund held by the corporation, LMIM, as responsible entity.⁶²

42 In support of the argument that the subject matter of this receivership could not be regraded as “property of a corporation”, the examinees sought to rely on *Re Stansfield DIY Wealth Pty Ltd (in liq)*.⁶³ However, the court was there concerned with a company in liquidation which had been, but no longer was, the trustee of particular property. The question for determination was whether the liquidator could sell that property. The remarks made by Brereton J,⁶⁴ on which the examinees relied, must be viewed in that light. This case is concerned with a different statutory question.

43 Further, although true it is that the provisions governing managed investment schemes appear in Chapter 5C and not Chapter 5 of the Act, there is nothing in either chapter which limits the extent to which a receiver appointed under Chapter 5C can avail himself of the examination powers in Chapter 5. Indeed, the inclusion of reference in s 53 to matters concerning managed investment schemes, the location of the very provision empowering receivers⁶⁵ and the realisation that receiverships are a defined form of external administration⁶⁶ are strongly to the opposite effect.

The third contention — abuse of process

44 It follows that I do not accept the foundation for the third of the examinees’ contentions that the “proper scope” of the power conferred by s 596B was “confined to the investigation of the affairs of a corporation which is ancillary to an external appointment under Chapter 5 of the Act”⁶⁷ and that, for this reason, it would be an abuse of the court’s processes for a receiver appointed to realise the property of a managed investment scheme to make use of the examinations power.

45 The judgment of Lander J in *Evans & Ors v Wainter Pty Ltd*⁶⁸ which was relied on by the examinees does not lead to a different conclusion. As his Honour said, the “question of what is a proper purpose must be determined by

61 See, for example, *Hong Kong Bank of Australia v Murphy* (1992) 28 NSWLR 512; *Re Peat Resources of Australia Pty Ltd; Ex parte Pollock* (2004) 181 FLR 454; *Re Southland Coal Pty Ltd (in liq)* (2006) 58 ACSR 113; *Re Banksia Securities Ltd (Receivers and Managers Appointed)* (2013) 278 FLR 421.

62 Order 7(a).

63 *Re Stansfield DIY Wealth Pty Limited (in liq)* (2014) 291 FLR 17.

64 *Re Stansfield DIY Wealth Pty Limited (in liq)* (2014) 291 FLR 17 at [16].

65 That is, s 420, appearing in Chapter 5.

66 See s 9 and the definition of “externally-administered body corporate”.

67 Outline of Submissions of the Examinees dated 13 March 2015; para 27.

68 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176.

reference to the legislation itself because it is the legislation which gives the power to issue a summons for an examination”.⁶⁹ On my view of the legislation, no question of improper purpose arises in this case.

The fourth contention — material non-disclosure

46 Given that, as I find, there is no substance in the examinees’ challenge to the validity of the summonses, no question of non-disclosure on the application before Mullins J can arise.⁷⁰

The ancillary applications

47 The examinees sought an extension of time for the making of this application.⁷¹ For completeness, I should make it clear that, if there had been merit in any of the examinees’ contentions, I would have been disposed to grant the extension.

48 Leave was also sought on behalf of the examinees to inspect the affidavit of Mr Whyte filed on 17 November 2014 and “any other affidavit material filed in support of the application for the issue of the summonses”.⁷² As to this, it was common ground that it was necessary for the examinees to satisfy me, amongst other things, of the existence of an arguable case for setting aside the summonses before a grant of leave could be considered.⁷³ For the reasons I stated when considering the examinees’ contentions, I am by no means satisfied that an arguable case exists. Shortly stated, I am not persuaded that any error attended the issue of the summonses.⁷⁴ Leave to inspect the affidavit material filed in support of the issue of the summonses is refused.

Costs

49 I shall hear the parties on the question of costs.

Orders accordingly

Solicitors for applicant: *Gadens Lawyers*.

Solicitors for the examinees: *King & Wood Mallesons*.

ANTHONY HALL

69 *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [250].

70 The duty of disclosure on an application for examination summonses is discussed by Lander J in *Re Southern Equities Corporation Ltd (in liq)*; *Bond v England* (1997) 194 LSJS 401.

71 Pursuant to r 7(1) of the *Uniform Civil Procedure Rules 1999* and r 1.10 of the *Corporations Proceedings Rules* (Schedule 1A to the *Uniform Civil Procedure Rules*).

72 See s 596C.

73 See *Ariff v Fong* (2007) 63 ACSR 384, at [21]; *Re Moage Ltd (in liq)*; *Sheahan v Pitterino* (1997) 77 FCR 81, 67.

74 As to the need to identify such an error, see *O’Brien v Wily* (2009) 76 NSWLR 428; 234 FLR 366 at 434 per Barrett J.

SUPREME COURT OF QUEENSLAND

CITATION: *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283

PARTIES: **JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
(first applicant)

AND

LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
(second applicant)

v

DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001
(respondent)

FILE NO/S: BS3508/15
DIVISION: Trial Division
PROCEEDING: Application
DELIVERED ON: 15 October 2015
DELIVERED AT: Brisbane
HEARING DATE: 20 July 2015
JUDGE: Jackson J

ORDER: **The order of the court is that:**

- 1. The parties submit minutes of the orders to be made to give effect to these reasons within 21 days of this order.**
- 2. The further hearing of the application is adjourned to a date to be fixed.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the second applicant is the responsible entity of a managed investment scheme – where the first applicants are the liquidators of the second applicant – where the second applicant was directed to wind up the scheme – where the respondent was appointed to ensure that the scheme is wound up – where the respondent was appointed by the court as the receiver of the scheme property – where the first applicants applied to the court for directions to ascertain the powers and responsibilities of the first applicants and the respondent – whether there is a conflict between the applicants and respondent’s powers and responsibilities under the *Corporations Act 2001* (Cth) and the court orders

CORPORATIONS – WINDING UP - where the first applicants are the liquidators of the second applicant – where the second applicant is the responsible entity of a managed investment scheme – where the second applicant was directed to wind up the scheme – where the respondent was appointed to ensure that the scheme is wound up – where the respondent was appointed by the court as the receiver of the scheme property – where first applicants applied to the court for directions to ascertain the powers and responsibilities of the first applicants and the respondent – whether there is a conflict between the first applicant and respondent’s powers and responsibilities under the *Corporations Act 2001* (Cth) and the court orders

Bankruptcy Act 1966 (Ch), ss 58, 116(2)(b)
Corporations Act 2001 (Cth), ss 9, 111AC(2), 111AFA, 111AR, 111AT, 292, 298, 301, 302, 314, 319, 330, 331AAA, 340, 342, 420, 471A, 474, 477, 485, 511, 530A, 530B, 531, 539, 553, 555-564, 588FC, 588 FE, 588FF, 588M, 601AC, 601AD, 601FC, 601FD, 601FH, 601FS, 601GA, 601GB, 601HG, 601ND, 601NE, 601NF, 1317H, 1321
Joint Stock Companies Act 1856 (Imp)
Joint Stock Companies Act 1862 (Imp)
Law of Property Amendment Act 1859 (Imp)
Property Law Act 1974 (Qld), s 199
Trusts Act 1973 (Qld), ss 65, 72, 96

Corporations Regulations 2001 (Cth), rr 5.6.47, 5.6.48, 5.6.49, 5.6.52-5.6.56

Aitcherson v Lee (1856) 28 LT (OS) 115, cited
Australian Securities Commission v Melbourne Asset Management nominees Pty Ltd (1994) 49 FCR 334
Bass v Permanent Trustee Company Ltd (1998) 198 CLR 334; [1999] HCA 9, followed
Bruce v LM Investments Management Ltd (2013) 94 ACSR 684; [2013] QSC 192, related
Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of

Taxation (2009) 239 CLR 346; [2009] HCA 32, cited
Capelli v Shephard (2010) 29 VR 242; [2010] VSCA 2,
 referred to
Commission of Inland Revenue v Newmarket Trustees Ltd
 [2012] 3 NZLR 207; [2012] NZCA 351, cited
Commissioner of Taxation v Everett (1980) 143 CLR 440;
 [1980] HCA 6, cited
Chief Commissioner of Stamp Duties v Buckle (1998) 192
 CLR 226; [1998] HCA 4, cited
Enviroinvest Ltd (rec and mgrs apptd) (in liq) (2010) 81
 ACSR 145; [2010] VSC 549, referred to
Hall v Poolman (2009) 254 ALR 333; [2009] NSWCA 64,
 referred to
Horwarth Corporate Pty Ltd v Huie (1999) 32 ACSR 413;
 [1999] NSWSC 583, cited
Investa Properties Ltd v Westpac Property Funds
Management Ltd (2001) 187 ALR 462; [2001] NSWSC
 1089, cited
Jessup v Queensland Housing Commission [2002] 2 Qd R
 270; [2001] QCA 312, cited
J W Murphy & P C Allen; re BPRC Ltd (in liq) (1996) 19
 ACSR 569, referred to
Kemtron Pty Ltd v Commissioner of Stamp Duties [1984] 1
 Qd R 576, referred to
Macedonian Orthodox Community Church St Petka Inc v
Petar (2008) 237 CLR 66; [2008] HCA 42, followed
Miller v Cameron (1936) 54 CLR 572; [1936] HCA 13, cited
Re Equititrust Ltd (2011) 254 FLR 444; [2011] QSC 353,
 cited
Re Indopal Pty Ltd (1987) 12 ACLR 54, considered
Re Matheson; ex parte Worall v Matheson (1994) 49 FCR
 454, cited
Re Mento Developments (Aust) Pty Ltd (in liq) (2009) 73
 ACSR 622; [2009] VSC 343, cited
Re Obie Pty Ltd [1984] 1 Qd R 371, considered
Re Reid Murray Holdings Ltd (in liq) [1969] VR 315,
 referred to
Re Royal British Bank, ex parte Marcus (1856) 26 LJ Bk 1,
 cited
Re Royal British Bank, ex parte Shore (1857) 26 LJ Bk 17,
 cited
Re Stacks Managed Investments Ltd (2005) 219 ALR 532;
 [2005] NSWSC 753, cited
Re Stansfield DIY Wealth Pty Ltd (in liq) (2014) 291 FLR 17;
 [2014] NSWSC 1484, cited
Ron Kingham Real Estate Pty Ltd v Edgar [1999] 2 Qd R
 439, cited
Saunders v Vautier (1841) 4 Beav 115; 49 ER 282; (1841) Cr
 & Ph 240; 41 ER 482, cited
Thorne Developments Pty Ltd v Thorne (2015) 106 ACSR
 481; [2015] QSC 156, cited

University of New South Wales v Moorhouse (1975) 133 CLR 1; [1975] HCA 26, followed

COUNSEL: S Doyle QC with J Peden for the applicant
S Brown QC with D de Jersey for the respondent

SOLICITORS: Russells for the applicant
Tucker & Cowen for the respondent

Introduction

- [1] **JACKSON J:** This amended application (“the application”) is for directions in two winding ups. The first is a winding up in insolvency of the second applicant LM Investment Management Limited (“the applicant”) as a company under the *Corporations Act 2001* (Cth) (“CA”). The applicant is managed by the first applicant liquidators appointed to wind it up (“the liquidators”).
- [2] The second winding up is of a managed investment scheme that is a registered scheme under s 601EB of the CA. The scheme is known as the LM First Mortgage Investment Fund (“FMIF”). The applicant is the responsible entity of the FMIF. The scheme is constituted as a trust of which the applicant is trustee, both under the scheme constitution and the CA.
- [3] On 21 August 2013, the “Court”¹ made an order under s 601ND(1) of the CA directing the applicant to wind up the FMIF. Thereupon, s 601NE(1) of the CA provides that the applicant, as responsible entity, must ensure that the scheme is wound up in accordance with its constitution and any orders of the Court made under s 601NF(2) of the CA. Under the latter subsection, the Court may, by order, give directions about how the FMIF is to be wound up if the Court thinks it necessary to do so.
- [4] At the time of making the order directing the applicant to wind up the FMIF, the Court made an order under s 601NF(1) of the CA appointing the respondent to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders under s 601NF(2).
- [5] Also at the same time, the Court made orders under s 601NF(2), appointing the respondent receiver of the assets of the FMIF and giving him powers to carry out actions necessary for the winding up of the FMIF.
- [6] Collectively, I will refer to those orders as “the existing orders”. It will be necessary to consider them in more detail later in these reasons.
- [7] The present application raises questions under the CA and the existing orders as to the relative powers and responsibilities of the applicant and the respondent in the winding up of the FMIF in the context of the simultaneous winding up of the applicant as a company.
- [8] The application raises questions that in some respects do not seem to have required decision in earlier cases. In particular, the disputed questions revolve around the extent of the overlap of the duties and powers of the applicant and its

¹ *Corporations Act 2001* (Cth), s 9, definition “Court”.

liquidators on the one hand and the duties and powers of the respondent, on the other hand.

- [9] This dispute and the need to resolve of some of the questions debated is lamentable. In any event, the administration of the winding up of the FMIF is proving extremely costly. The respondent's expenses to date have significantly diminished the assets. At the end of the present application, the disputing parties will seek to have their costs met from the assets scheme property. The investors who are members of the scheme already face a huge shortfall between the amounts that they invested in the scheme and any distribution they might receive on the winding up of the scheme. They have no interest in the resolution of legal questions that will not see the scheme property realised to better advantage or distributed at a minimum of expense.

Some historical aspects

- [10] In part, at least, the need to resolve the present questions is the product of the unwieldy statutory structure for winding up a managed investment scheme. That structure can result in dual responsibilities to ensure that the winding up is carried out in accordance with the scheme's constitution and any orders made by the court under s 601NF(2) of the CA. As previously stated, that responsibility is cast upon the applicant as the responsible entity by s 601NE(1) of the CA and the existing orders. It is also cast upon the respondent by s 601NF(1) and the existing orders.
- [11] On many occasions, the resolution of questions that arise in the administration of the winding up of a company or group of companies or a managed investment scheme or schemes is a practical exercise. It does not call for historical analysis of the current statutory structure that regulates the processes. The present questions could be resolved in that way without wider discussion. But they are symptoms of an underlying infirmity that should not pass unnoticed.
- [12] They also present an opportunity to mention the early academic career of the late Dr Bruce Harvey McPherson. He was affectionately known to his peers at the Bar as "the Doc", at a time when few legal practitioners achieved a doctoral thesis. Dr McPherson became a star in the Queensland legal firmament as a Judge, Senior Puisne Judge and Judge of the Court of Appeal of this Court as well as for his academic and historical writings. That stellar career began with a brilliant thesis upon the law of winding up of companies that formed the basis of *The Law of Company Liquidation*, first published in 1968, and still published under the name *McPherson's Law of Company Liquidation*, both in Australia and in a separate edition in the United Kingdom.² A mark of the author's pre-eminence in the field is that his work was exported from Australia to the United Kingdom. The reason to recall McPherson's work is his discussion of the nineteenth century development of the statutory framework for the winding up of joint stock companies.
- [13] Before the statutes that formed the basis of modern company law were passed, the winding up of a joint stock company was attended by overwhelming

² See M Gronow and R Mason, *McPherson's Law of Company Liquidation*, 5th edn, 2006, Thomson Lawbook Co; A Keay, *McPherson's Law of Company Liquidation*, 3rd edn, 2013, Sweet & Maxwell.

substantive and procedural difficulties. The joint stock company was treated at law as a partnership. This presented grave risks for the creditor and member alike. The creditor was unable to get at company property by way of execution unless they were able to join and serve all the members of the firm, a near impossible practical task for a larger firm whose membership kept changing. The member was personally liable upon the company's debts and was unable to leave the company in a way that would terminate their ongoing liability for the firm's debts. Creditors pursued individual members of worth. The members of a failing company faced debtor's prison or absconded to the colonies to avoid the crushing burden of meeting all of the company's debts as an individual.

- [14] The first attempts to reform these processes for joint stock companies by statute occurred in the 1840s, the time of Dickens. They led to a contest between the Court of Bankruptcy and the Court of Chancery. The story is told through the *Royal British Bank* case.³ McPherson recounts the fractured methods for winding up a joint stock company under the first statutes that applied, including the unseemly contest for control between the assignee, representing the creditors, and the official manager, representing the members.⁴ Further details are not critical to my present purpose, even though they make good reading.
- [15] The root problem lay, in part, in the absence of an efficient legal method for the collection of the assets of the firm to be wound up, the ascertainment of its liabilities, the discharge of the liabilities so far as the assets would go, and the distribution of any surplus to the members or investors after that.
- [16] In the case of companies, the solution came with the development of the model of incorporation of a company as a separate legal personality and the appointment of a liquidator to manage the company through the winding up process, initially under the *Joint Stock Companies Act 1856 (Imp)*. The debts of the company were converted into a right to prove in the winding up. The liquidator was not an assignee of the assets, as was the assignee in personal bankruptcy.⁵ The assets continued to be the assets of the company throughout the winding up process. When the process was complete, the debts paid so far as the assets would go, and any remaining or assets distributed, the company was dissolved.⁶ The separate legal personality ceased.⁷ There was no legal liability for any unpaid debt. There was no legal personality to hold any undistributed asset, which passed *bona vacantia* to the Crown.⁸
- [17] This model for winding up a registered company was replicated under the *Companies Act 1862 (Imp)* and was adopted, continued and developed in this country through successive iterations of companies legislation until today, in the

³ *Aitcherson v Lee* (1856) 28 LT (OS) 115; *Re Royal British Bank, ex parte Marcus* (1856) 26 LJ Bk1; *Re Royal British Bank, ex parte Shore* (1857) 26 LJ Bk 17.

⁴ B. McPherson, *The Law of Company Liquidation: being the law relating to liquidation of limited liability companies*, 2nd edn, 1980, Lawbook Co, 12-17.

⁵ This is still true – see *Corporations Act 2001 (Cth)*, s 474.

⁶ See now *Corporations Act 2001 (Cth)*, s 601 AC.

⁷ See now *Corporations Act 2001 (Cth)*, s 601AD(1).

⁸ See now *Corporations Act 2001 (Cth)* ss 601AD(1A), 601AD(2).

case of the winding up of a company under the *Corporations Act* 2001 (Cth). It does not apply to a managed investment scheme.⁹

Winding up a trust

- [18] In practical terms (and in all cases for registered schemes)¹⁰ such schemes are usually a species of investment trust. In approaching the winding up of a registered scheme, the core difference between a scheme and a company is that although business people and lawyers alike in common parlance often refer to a trust as though it has separate legal personality, it does not.
- [19] The modern law to wind up an insolvent trust remains largely unaffected by statute.¹¹ Leaving the rule in *Saunders v Vautier*¹² to one side, there is no power to wind up a private trust if none is contained in the trust instrument or under statute.¹³
- [20] The relevant statutes mostly deal with the insolvency of the trustee. Where the trustee is an individual, that insolvency is dealt with under the *Bankruptcy Act* 1966 (Cth). But the assets of the trust are not necessarily in play, because they are not property divisible among the creditors of the bankrupt.¹⁴ Similarly, where the trustee is a company, the insolvency is dealt with by the *Corporations Act* 2001 (Cth). But the assets of the trust are not necessarily in play, because they are not property of the corporation,¹⁵ although the liquidator of a company trustee has the power to administer a trust of which the company is trustee.¹⁶ In both scenarios, there is an important exception, which forms part of the property of the bankrupt or the property of the company.
- [21] That exception is the right of indemnity, called a right of exoneration or a right of recoupment,¹⁷ that a trustee has against the trust assets for a liability properly incurred as trustee. The personal right is supported by a proprietary right in the form of lien or charge over the trust assets to the extent of the right of indemnity.¹⁸
- [22] When a trustee of a solvent trust becomes insolvent, it is a usual outcome, although it is not inevitable, that the trustee will be removed and replaced.¹⁹ Unless statute intervenes, the removal of the trustee does not transfer the trustee's

⁹ *Re Stacks Managed Investments Ltd* (2005) 219 ALR 532.

¹⁰ *Corporations Act* 2001 (Cth), s 601FC(2) and *Investa Properties Ltd v Westpac Property Funds Management Ltd* (2001) 187 ALR 462, 472 [40].

¹¹ *Horwarth Corporate Pty Ltd v Huie* (1999) 32 ACSR 413.

¹² (1841) 4 Beav 115; 49 ER 282; (1841) Cr & Ph 240; 41 ER 482.

¹³ *Horwarth Corporate Pty Ltd v Huie* (1999) 32 ACSR 413, 414-415 [8]-[13].

¹⁴ *Bankruptcy Act* 1966 (Ch), s 116(2)(b); cf *Re Matheson; ex parte Worall v Matheson* (1994) 49 FCR 454, 460E as to vesting of title of "property of the bankrupt" under s 58.

¹⁵ *Re Obie Pty Ltd* [1984] 1 Qd R 371.

¹⁶ *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17, 19 [5]; *Commission of Inland Revenue v Newmarket Trustees Ltd* [2012] 3 NZLR 207, [71].

¹⁷ *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226, 245-247 [47]-[51].

¹⁸ *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346, 358 [43].

¹⁹ *Thorne Developments Pty Ltd v Thorne* (2015) 106 ACSR 481, 494 [59]; *Commission of Inland Revenue v Newmarket Trustees Ltd* [2012] 3 NZLR 207, [70]; *Re Matheson; ex p Worral v Matheson* (1994) 49 FCR 462-463; *Miller v Cameron* (1936) 54 CLR 572, 575, 579 and 582.

liabilities to the new trustee. The former trustee's right of indemnity against trust assets for properly incurred debts is not lost.²⁰

Provisions to wind up a registered scheme

- [23] It is against this background that the statutory provisions of the CA operate for the winding up of a registered scheme. Subject to the relevant statutory provisions, the principles discussed above apply to the insolvency of a registered scheme and the corporate trustee or responsible entity of the scheme.²¹
- [24] In the case of a registered scheme, s 601FS(1) of the CA provides that “if the responsible entity... changes the rights obligations and liabilities of the former responsible entity in relation to the scheme become the rights obligations and liabilities of the new responsible entity”, subject to exceptions set out in s 601NF(2), including the maintenance of the former responsible entity's right of indemnity for expenses incurred as responsible entity.
- [25] The constitution for a registered scheme must have provisions for the winding up of the scheme,²² but those provisions are not given statutory force, per se. There is no liquidator who winds up the scheme as a separate legal personality. There is no-one who is given the statutory powers of the liquidator of a company. The rights of the creditors are not converted into a right to prove in the winding up of the scheme.
- [26] As previously mentioned, the responsible entity may be directed by order of the Court to wind up a registered scheme.²³ There are other pathways to a winding up by the responsible entity. Under each of those pathways, the responsible entity is obliged under s 601NE(1) to ensure the winding up in accordance with the constitution and any order of the court made under s 601NF(2).
- [27] In the winding up of a company in insolvency, it is a common question whether the former officers have breached their duties to the company, usually the duties under ss 181-184 of the CA. An advantage of the appointment of a liquidator to wind up a company is that the liquidator is an independent person. A liquidator must often consider the question of the liability of a former officer to the company. Any correlative right to compensation²⁴ is part of the property of the company.
- [28] These advantages do not apply where by order of the Court a responsible entity is directed to wind up an insolvent registered scheme. A responsible entity²⁵ and an officer²⁶ of the responsible entity owe duties analogous to some of the duties of an officer of a company. But there is no independent liquidator to consider the responsible entity's liability or the liability of an officer of the responsible entity.

²⁰ *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 349, 358 [43].

²¹ See R I Barrett, *Insolvency of Registered Managed Investment Schemes*, Paper delivered to the Banking and Financial Services Law Association at Queenstown, New Zealand, July 2008.

²² *Corporations Act 2001* (Cth), s 601GA(1)(d).

²³ *Corporations Act 2001* (Cth), s 601ND(1).

²⁴ For example, *Corporations Act 2001* (Cth), s 1317H.

²⁵ *Corporations Act 2001* (Cth), s 601FC.

²⁶ *Corporations Act 2001* (Cth), s 601FD.

- [29] However, s 601NF(1) enables the Court to order the appointment of another person to ensure that a registered scheme is wound up in accordance with the constitution and any order of the court made under s 601NF(2) of the CA.
- [30] In some cases,²⁷ the result has followed that an order is made directing the responsible entity to wind up the scheme, while also making an order that an independent person is appointed to ensure that the scheme is wound up in accordance with its constitution and any order of the court made under s 601NF(2). Two different legal entities are thereby given the responsibility for achieving the same outcome. Putting to one side cases where the responsible entity is or might become paralysed, there is no apparent reason why, in general, that is thought to be a good idea. Where there is any question as to the responsible entity's liability for events that preceded the winding up, it is better to have someone independent to make relevant decisions.
- [31] There is a potential for conflict between a responsible entity charged with the responsibility under s 601NE(1) and a person appointed under s 601NF(1) charged with the same responsibility over their respective roles in the winding up of a registered scheme. The hapless creditors and members can derive no benefit from such conflict.
- [32] Where there is a real question as to the responsible entity's conduct that must be considered in the winding up of a registered scheme, the Court's usual approach should be to give the management of the winding up to the appointed person as an independent person.²⁸ In this case that is the respondent.
- [33] The existing orders in this case are in part adapted to that end. They give to the respondent power to deal with the assets of the FMIF so as to collect and realise those assets. That is what he has been doing, subject to the rights of a secured creditor and the receivers appointed by that creditor.
- [34] But that approach will not readily solve all the problems that arise when the responsible entity charged with the responsibility under s 601NE(1) is also a company in liquidation, for the reasons that follow.
- [35] In a practical sense, the winding up of the FMIF requires that the debts of the applicant properly incurred as responsible entity and trustee (and other debts properly incurred by the respondent) be ascertained and paid from the property of the FMIF held on trust. The debts of the applicant, including those it incurred as responsible entity and trustee for the FMIF, are liabilities that the liquidators would ordinarily deal with by the process of proofs of debt in the winding up of the applicant.
- [36] The liquidators are under a duty to do so under the relevant provisions of the CA.
- [37] Those debts properly incurred by the applicant as trustee would ordinarily be dealt with by reference to a trustee's right of indemnity, whether by way of exoneration or recoupment, from the assets of the trust.

²⁷ *Re Equititrust Ltd* (2011) 254 FLR 444; cf *Capelli v Shephard* (2010) 29 VR 242, 245 [5].

²⁸ I pass by the discussion in some of the cases whether a potential for conflict justifies the conclusion that the appointment of a person under s 601NF(1) is "necessary".

[38] In *Re Obie Pty Ltd*,²⁹ Thomas J said:

“The property of a company which passes into the custody and control of a liquidator upon a winding up is commonly referred to as the “available assets” of the company. These comprise the items of property (including choses in action) which the liquidator must get in and in due course apply as directed by the *Companies (Queensland) Code* or by any other relevant statute. However the available assets do not include property which the company holds on trust (*Quistclose Investments Ltd. v. Rolls Razor Ltd.* [1970] A.C. 567, 580) or property which has been mortgaged or charged (*Re United Pacific Transport Pty. Ltd.* [1968] Qd.R. 517 at 521; McPherson, *The Law of Company Liquidation* (2nd ed.) p. 279).”³⁰

[39] Where a company being wound up in insolvency carried on business as trustee of a trust, the process of the liquidator realising the assets of the company should reflect the legal truth that the assets of the trust are not beneficially the property of the company, but the company’s right of indemnity and the lien that supports that right for debts properly incurred as trustee support a practical approach to the realisation of the assets held on trust and the use of the proceeds to indemnify the company trustee for properly incurred debts.

[40] Section 601FH(a) of the CA expressly provides that a provision of a registered scheme’s constitution or other instrument that would deny a responsible entity that is being wound up a right to be indemnified out of the scheme property that it would have had if the company were not being wound up is void. In Queensland, there is a cognate provision that applies to a trust under the *Trusts Act 1973* (Qld).³¹

[41] As well, s 601FH(b) provides that the right of the company to be indemnified out of the scheme property may only be exercised by the liquidator of the company. In this case, that is, the liquidators of the applicant.

[42] Absent an identified source of power to the contrary, the respondent has no power to deal with the debts of the applicant in the winding up of the applicant, including those debts incurred as responsible entity or trustee, and no power to deal with the applicant’s right of indemnity out of the scheme property. The powers of the applicant in those respects are to be exercised by the liquidators.

[43] The respondent relies on the existing orders as a relevant source of power. This contention was put at two levels.

The effect of s 601NF(1)

[44] First, the respondent submitted that the applicant’s responsibilities and powers to wind up the FMIF were displaced by the order appointing the respondent as the person to take responsibility for ensuring that the FMIF is wound up. He

²⁹ [1984] 1 Qd R 371.

³⁰ [1984] 1 Qd R 371, 376.

³¹ *Trusts Act 1973* (Qld), s 65 and 72; *Jessup v Queensland Housing Commission* [2002] 2 Qd R 270, 275; *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441; and *Kemtron Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 585.

relied on the order made under s 601NF(1) as well as the orders made under s 601NF(2) as leading to that conclusion.

- [45] I agree that the powers to make orders under s 601NF(1) and (2) include the power to make orders that could have the effect of dealing with and paying the creditors of a responsible entity of a registered scheme, at least subject to s 601FH. One express example of a case where such an order might be made under s 601NF(1) is where the responsible entity has ceased to exist. An order appointing a person to take responsibility for ensuring that a scheme is wound up in accordance with its constitution would require the person to do all things necessary to wind up the scheme that might have been done by the responsible entity if it had continued to exist. In such circumstances, it is likely to be necessary to make an appropriate order under s 601NF(2).
- [46] But it is another thing to say that an order under s 601NF(1) appointing a person to take responsibility for ensuring that a scheme is wound up necessarily has that effect.
- [47] That is because when an order is made by the court under s 601ND(1) to direct the responsible entity to wind up a scheme, s 601NE(1) expressly provides that the responsible entity must ensure that the scheme is wound up in accordance with its constitution and any orders made under s 601NF(2).
- [48] In the present case, the responsibility of the applicant under s 601NE(1) to ensure that the FMIF is wound up in accordance with its constitution is engaged. An order made under s 601NF(2) can override those constitutional requirements. But an order made under s 601NF(1) appointing a person to take responsibility for ensuring that a scheme is wound up in accordance with its constitution does not have that effect, per se.
- [49] The result of that analysis is that the distribution of powers between the applicant and the respondent in the present case is to be ascertained in substance from the operation of the existing orders made under s 601NF(2).

The operation of the order made under s 601NF(2)

- [50] Second, the respondent submitted that the existing orders gave him power to generally conduct the winding up of the FMIF, including the subject matter of creditors and the ascertainment of the applicant's entitlement to indemnity from the scheme property.
- [51] The existing orders do not say so much outright. They provide, relevantly, as follows:

“1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) (“the Act”) LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 (“LMIM”) in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 (“FMIF”) subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte (“Mr Whyte”), Partner of BDO Australia Limited (“BDO”), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (“the appointment”).

...

5. Pursuant to sections 601NF(2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.

6. Pursuant to sections 601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.

...

7. Without derogating in any way from in any way from (sic) the Appointment or the Receiver’s powers pursuant to these Orders, Mr Whyte is authorised to:

- (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

...

- (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
- (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property...”

[52] An issue was raised as to the proper construction of the existing orders. The respondent sought to rely upon findings made by the Judge in the reasons given for making the orders.³² The applicant sought to rely on the transcript of part of the hearing dealing with the form of orders made and her Honour’s refusal to make requested further orders. I will return to these points. But the jumping off point is the operation of the text of the existing orders as made.

[53] First, par 1 directs the applicant to wind up the FMIF subject to the later paragraphs of the order. The qualification is important.

³² See *Bruce v LM Investments Management Ltd* (2013) 94 ACSR 684.

- [54] Second, par 2 appoints the respondent to take responsibility for ensuring that the FMIF is wound up. There is an unfortunate nuance introduced by the word “ensuring”, because it is arguably consistent with the applicant having the primary role to wind up and the respondent having a secondary role of ensuring that it is done. However, that is not what is intended, having regard to the text and operation of par 1 and the subsequent paragraphs of the existing orders. The explanation lies in the language of s 60NF(1) itself, which refers to an order appointing a person “to take responsibility for ensuring” the winding up. In my view, that language does not require that the respondent’s role is to be a secondary role. It depends on the orders that were made.
- [55] Third, par 5 appointed the respondent as the receiver of the property of FMIF and par 6 gave him the powers set out in s 420 of the CA. There is a disconformity in that form of order, because the powers in s 420, on their face, relate to the “property of a corporation” and other aspects of a corporation’s affairs. However, in context, par 6 should be construed to confer those powers upon the respondent in relation to the scheme property of the FMIF.
- [56] There are two important powers under s 420. Under s 420(1) a receiver has power to do all things necessary or convenient to be done for or in connection with or as incidental to the attainment of the objectives for which the receiver was appointed. Further, under s 420(2)(h) a receiver has the power to carry on any business of the “corporation”.
- [57] Neither party made a particular submission as to whether the respondent has power to carry on the business of the FMIF as a scheme for the purpose of winding up the FMIF. However, the express power in par 7 to take all steps necessary to ensure the realisation of the property of the FMIF is also consistent with the existence of such a power for the purpose of realising the scheme property.
- [58] Fourth, par 7(a)(iii) authorised the respondent to take all steps necessary to ensure the realisation of the scheme property of the FMIF including dealing with any creditors with security over that property.
- [59] In my view, none of the other powers of the respondent is concerned with any power to pay or deal with creditors of the applicant in respect of debts incurred by the applicant as responsible entity and trustee for the FMIF.
- [60] A usual consequence of a receiver’s power to carry on the business of a corporation is that the receiver has authority as agent of the corporation to pay pre-receivership debts. It might be suggested that the power conferred on the respondent under s 420(2)(h), *mutatis mutandis*, has that effect in relation to the business of the FMIF, although none of the parties made that submission.
- [61] However, a receiver’s authority as agent of the corporation to pay pre-receivership debts is sometimes said to be terminated when a winding up order is made against the corporation. It is unnecessary to essay the limits to that statement which clearly exist.
- [62] That is because whatever be the true principle as to the extent of the powers of a receiver of a corporation that goes into liquidation, it is important in the present

case not to look too far away from s 601NF(2) and the meaning and operation of an order appointing a receiver made under that subsection. If the order, properly construed, authorises the respondent to carry on the business of the FMIF, in my view it follows that it is intended that the respondent have the power to pay the debts of the applicant incurred in carrying on that business. Having regard to par 7(a), in my view, that power is conferred by the order at least in relation to taking all steps necessary to ensure the realisation of the property of the FMIF.

- [63] And, as previously stated, par 1 of the existing orders directing the applicant to wind up the fund is subject to paras 6 and 7 of the order.
- [64] The respondent's counsel strongly pressed the contention that the effect of making par 1 subject to the other orders of the existing orders, including par 2 appointing the respondent and par 5 conferring on him the power under s 420(1) of the CA, effectively displaces the applicant's responsibility to ensure that the scheme is wound up under s 601NE(1).
- [65] The parties positions were framed in correspondence exchanged before the hearing of the application and refined by their submissions during the hearing. So, for the liquidators and the applicant it was submitted that the respondent's powers and functions were those of a receiver appointed to collect and realise the scheme property, after which he must relinquish possession of that property to the applicant. In my view, that is not what the existing orders provide or mean on their proper construction. There is no provision that possession of the scheme property is to be transferred to the applicant.
- [66] For the respondent it was submitted that the applicant's role in the winding up of the scheme was limited to not much more than maintaining its suspended financial services licence. In my view, that is not what the existing orders provide or mean on their proper construction. There is no provision that the role of the applicant is to be so limited.
- [67] In the light of those findings as to the proper construction of the existing orders, it is unnecessary to consider the contentions of the parties as to the effect of the Court's reasons generally or upon the argument for other orders that were not made on the application for the existing orders. For completeness, I record that, in my view, no different result would be reached if those matters are taken into account.

Conflict of powers and responsibilities

- [68] Turning to more specific points, par 2 of the application read together with pars 1 to 4 of Sch 1 to the application seek directions as to whether the liquidators are responsible in the winding ups for many functions including the following:
- (a) to pay the expenses and liabilities of the applicant as far as they relate to the FMIF as determined in accordance with ss 477(1)(b), (c), (d), 506(3) and 562 of the CA;
 - (b) to recover the assets of the FMIF which are available only to the liquidators because of Part 5.7B of the CA;
 - (c) to manage and deal with members, units and capital of the FMIF as required by the constitution, in particular cls 3.6, 16.6, 16.7(c),

16.7(f), 16.7(g), 18.2 and 21.1 of the constitution as well as some other “parts” of the constitution identified as parts 9,10,12,22 and 28 ; and

- (d) to determine and report upon the financial status of the FMIF as required by identified clauses and parts of the the constitution.

Payment of expenses and liabilities of the applicant relating to the FMIF

- [69] The powers under s 477(1)(b) of the CA is a power of a liquidator of a company to pay any class of creditors in full. The powers under s 477(1)(c) and (d) are powers of a liquidator to compromise claims of creditors and claims by and against other persons, including debtors.
- [70] By referring in the application to paying “expenses and liabilities of the applicant”, it appears that the liquidators intend to refer to the identified powers of a liquidator in relation to a creditor of or claimant against the applicant. By referring to them as far as they relate to the FMIF, it appears that the liquidators are interested in debts of or claims against the applicant which it incurred or became obliged to pay as trustee of the FMIF.
- [71] The CA makes detailed provision as to creditors and claimants of the applicant. They include that debts are admissible to proof,³³ that a creditor may lodge³⁴ or the liquidator may admit informally³⁵ or call for proofs of debt,³⁶ that the court may fix a day after which proofs will be excluded³⁷ and many provisions that affect the priorities of secured and unsecured creditors.³⁸ There are procedural provisions as to the liquidator’s consideration of a proof of debt.³⁹ And there are rights of appeal from the liquidator’s admission or rejection of a proof of debt.⁴⁰
- [72] None of this applies to the respondent in relation to the FMIF.
- [73] There is no cause, per se, for the respondent to be involved in the statutory process under the CA for the applicant to ascertain and pay creditors for claims made against the applicant. Although the respondent suggested in correspondence before the hearing that he might in some way deal with the creditors, instead of the statutory process, he did not press that submission at the hearing.
- [74] Instead, he submitted that it was premature for there to be any consideration of the applicant’s debts incurred as trustee. I reject that submission. I add that in my view an individual appointed by the court under s 601NF(1) with the powers of the respondent is, in effect, an officer of the court who should eschew tactical positions that will not progress the winding up as quickly and inexpensively as is possible.

³³ *Corporations Act 2001 (Cth)*, s 553.

³⁴ *Corporations Regulations 2001 (Cth)*, r 5.6.49.

³⁵ *Corporations Regulations 2001 (Cth)*, r 5.6.47.

³⁶ *Corporations Regulations 2001 (Cth)*, r 5.6.48.

³⁷ *Corporations Act 2001 (Cth)*, s 485.

³⁸ *Corporations Act 2001 (Cth)*, s 555-564.

³⁹ *Corporations Regulations 2001 (Cth)*, rr 5.6.52-5.6.56.

⁴⁰ *Corporations Act 2001 (Cth)*, s 1321.

- [75] Nevertheless, it is for the liquidators to get on with the process of ascertaining the creditors and claimants. It is not suggested that they are all related to the FMIF.
- [76] How should the question of the applicant's right to an indemnity in respect of any such debts or claims be dealt with? After all is said and done, the present problem is not dissimilar to the problem faced when a company that is trustee of a trust becomes insolvent.
- [77] For example, in *Re Indopal Pty Ltd*,⁴¹ a trustee company went into liquidation. Under the trust deed, the company's appointment as trustee was terminated upon it entering liquidation. It was unclear whether, or the extent to which, the trustee was entitled to an indemnity from the trust assets for debts incurred as trustee. McLelland J appointed a receiver and manager of the trust assets to protect the company's interest under the lien it had for any right of indemnity.⁴² His Honour also took the view that the court had an inherent or implied discretionary power to determine any question arising in the winding up that would enable determination of the question of the company's right to an indemnity.
- [78] In my view, the court also has power under s 601NF(2) to make a necessary order as to the mechanism to deal with the right of indemnity as a liability to be paid from the assets of the FMIF, particularly having regard to the provision in s 601FH(b) that the right of indemnity may only be exercised by the liquidators of the applicant.
- [79] At the hearing of the application, I requested the parties to give thought to the form of an appropriate process to be framed in an order under s 601NF(2). It seems to me that the process should require the applicant to identify debts or claims for which it claims to be entitled to an indemnity and to submit the same with any reasonably requested information to the respondent. The respondent as receiver should be empowered by order to admit or reject the claimed right against the assets of the FMIF. If necessary, either party should be able to apply for the Court's approval of the outcome or determination of any dispute.

Voidable transactions and insolvent trading

- [80] Part 5.7B provides for a liquidator to apply to recover property of a company or compensation in respect of voidable transactions.⁴³ Perhaps oversimplifying, voidable transactions include insolvent transactions, unfair loans and unreasonable director-related transactions, as defined.⁴⁴ Insolvent transactions are broken down into unfair preferences and uncommercial transactions.⁴⁵ As well, the liquidator may apply to recover loss to the company for loss from a director for insolvent trading.⁴⁶

⁴¹ (1987) 12 ACLR 54.

⁴² See also the cases collected in *Re Stansfield DIY Wealth Pty Ltd (in liq)* (2014) 291 FLR 17, 26 [31]-[33].

⁴³ *Corporations Act* 2001 (Cth), s 588FF.

⁴⁴ *Corporations Act* 2001 (Cth), s 588FE.

⁴⁵ *Corporations Act* 2001 (Cth), s 588FC.

⁴⁶ *Corporations Act* 2001 (Cth), s 588M(2).

- [81] These are rights conferred on a liquidator. If any rights of that kind may be available to the liquidators and if any amount recovered by exercising those rights may be held on trust for the FMIF, they must still be pursued by the liquidators, not the respondent.
- [82] Although the respondent is appointed receiver of the property of the FMIF under par 5 of the existing orders and authorised to bring proceedings on behalf of the FMIF in the name of the applicant by par 7(b) of the existing orders, neither of those orders authorises the respondent to bring proceedings pursuant to rights that are expressly conferred upon the liquidators by the CA.
- [83] It is unnecessary to say more at this stage. There may be a question whether an amount recoverable by the liquidators under Part 5.7B of the CA is held on trust for the FMIF once recovered. But the parties did not identify any particular claims or items of that kind and it is not appropriate to deal with the question further in the absence of a factual context.

Members units and capital

- [84] By par 3 of Sch 1 to the application, the applicant and the liquidators seek particular directions as to a dozen provisions or parts of the constitution, including cls 3.6, 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1 of the constitution. They should be dealt with separately.
- [85] First, the applicant pursuant to ss 601NF(2) and the liquidators pursuant to s 511(1) of the CA seek a direction as to whether the liquidators are, in the winding up of the applicant and of the FMIF responsible for and shall discharge the functions, duties and responsibilities set out in cl 3.6 of the constitution.
- [86] Clause 3.6 confers power upon the responsible entity to divide the scheme property into a number of units other than the pre-existing number.
- [87] Section 601NE(3) of the CA provides that “interests” must not be issued in a registered scheme at a time after the responsible entity has become obliged to ensure the scheme is wound up. “Interest” is defined in s 9 of the CA to mean a right to benefits produced by the scheme. It may be that a division under cl 3.6 would be a prohibited issue of an interest. However, the respondent did not ultimately contend that the power under cl 3.6 was terminated by the making of the existing orders, so I will not consider that question further.
- [88] The respondent’s primary point in opposition to the direction sought as to the liquidators’ responsibility as to any power of the applicant to act under cl 3.6 is that the question raised is hypothetical because there is no live dispute or occasion as to whether the power should be exercised. There are no facts raised as to why the power should be exercised.
- [89] There is thus no order sought by the applicant under s 601NF(2) of the CA about how the scheme is to be wound up, except in an hypothetical sense. In those circumstances, I do not think “it is necessary to” give a direction as to whether the liquidators are responsible for and shall discharge the functions, duties and responsibilities set out in cl 3.6 of the constitution.

- [90] As to s 511(1) of the CA, the liquidators of a company in voluntary winding up may make an application to determine any question arising in the winding up of the company. Section 511 appears in Part 5.5 of the CA, which deals with a voluntary winding up. Section 511 is not the appropriate section where the company is being wound up by the Court, as in this case.
- [91] For a compulsory winding up by the Court, the appropriate section is s 479(3) of the CA. It provides that: “[t]he liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.” I will treat the application as one made under that subsection.
- [92] Section 479(3) has statutory predecessors, in s 379(3) of the *Companies (Queensland) Code*, s 237(3) of the *Companies Act 1961* (Qld), s 202(3) of the *Companies Act 1931* (Qld), ultimately stretching back to s 23 of the *Companies (Winding Up) Act 1890* (Imp). The similarity between s 479(3) and the statutory provisions for judicial advice to a trustee,⁴⁷ stemming from Lord St Leonard’s Act, in s 30 of the *Law of Property Amendment Act 1859* (Imp), is apparent.
- [93] The purpose of the section has been analysed. In *J W Murphy & P C Allen; re BPRC Ltd (in liq)*⁴⁸ McLelland CJ said that “[i]t is to be emphasized that an application for directions... is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up.”
- [94] However, there is a contrary line of authority as to whether the section empowers the court to make binding orders in the nature of judgments determining substantive rights for the parties to the application.⁴⁹ And in the light of the judgments of the High Court in *Macedonian Orthodox Community Church St Petka Inc v Petar*,⁵⁰ any statement of a narrow view of the extent of the power granted under the section should be treated cautiously. Even before that case, a wide view of the court’s power was taken in *Re Reid Murray Holdings Ltd (in liq)*,⁵¹ although Adam J resorted to the Court’s inherent jurisdiction rather than specifically relying on s 237(3) of the *Companies Act 1961* (Vic). And in *Hall v Poolman*,⁵² the New South Wales Court of Appeal accepted that the principles set out in *Macedonian Orthodox Community Church St Petka Inc v Petar* apply to an application for judicial directions under s 479(3).
- [95] In any event, there seems to me to be every reason to think that, generally speaking, the court “will not answer a question which may never arise”, as seems to be the approach under provisions stemming from Lord St Leonard’s Act.⁵³ I emphasise that this is a matter of discretion, not power. And, in my view, it must be recognised that the power of the Court to give directions under s 479(3) of the

⁴⁷ In Queensland, the power is now contained in s 96 of the *Trusts Act 1973* (Qld).

⁴⁸ (1996) 19 ACSR 569, 570.

⁴⁹ *Australian Securities Commission v Melbourne Asset Management nominees Pty Ltd* (1994) 49 FCR 334.

⁵⁰ (2008) 237 CLR 66, 89-90 [55]-[58].

⁵¹ [1969] VR 315.

⁵² (2009) 254 ALR 333, followed in *Re Mento Developments (Aust) Pty Ltd (in liq)* (2009) 73 ACSR 622, 633 [48].

⁵³ *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66, 85, [43].

CA includes power to give advice not constrained by the principle that a declaration as to a purely hypothetical matter is not a proper exercise of judicial power.⁵⁴ The well-known principles that affect hypothetical questions in proceedings for a declaration *inter partes*,⁵⁵ do not apply, in my view. But, as in the case of an application under provisions stemming from Lord St Leonard's Act, I do not consider it appropriate to answer a question which may never arise.

- [96] In my view, the Court should not answer the question whether the liquidators are, in the winding up of the applicant and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in cl 3.6, because it is a question that may never arise.

Managing scheme property

- [97] Second, the applicant under s 601NF(2) and the liquidators under s 511(1) of the CA seek a direction as to whether the liquidators are, in the winding ups of the applicant and of the FMIF responsible for and shall discharge the functions, duties and responsibilities set out in cls 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1 of the constitution. Those provisions are as follows:

“16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.

16.7 Subject to the provisions of this clause 16 upon winding up of the Scheme the RE must:

...

- (c) subject to any special rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;

...

- (f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.

- (g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.

⁵⁴ *Bass v Permanent Trustee Company Ltd* (1998) 198 CLR 334, 355-357 [45]-[48].

⁵⁵ *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 10; *Bass v Permanent Trustee Company* (1998) 198 CLR 334.

...

18.2 Payment of Debts

The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.

...

21.1 Custodian to hold as agent of RE

The Scheme Property will be held in the same of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement.”

- [98] The general point that this part of the application exposes is whether these are functions to be carried out by the applicant in the winding up under the existing orders. In this respect, the application is one for directions about how a registered scheme is to wound up and, in my view, is brought by the applicant under s 601NF(2) of the CA.
- [99] As to cl 16.6, in my view, the obligation of the applicant to manage the FMIF until such time as all winding up procedures have been completed is subject to the appointment of the respondent as a person responsible for ensuring that the FMIF is wound up under par 2 of the existing orders having regard to his appointment as receiver and the powers granted to him under pars 3 to 7 of the existing orders.
- [100] As to cl 16.7, in my view, the applicant's obligation under cl 16.7(c) to distribute the net proceeds of realisation among the Members in the same proportion specified in cl 12.4 is affected by the existing orders. The respondent is the receiver of and has possession of the scheme property of the FMIF under par 5 of the existing orders. The applicant is not in possession of any part of the scheme property. The applicant's obligation to make any distribution cannot be exercised until it is in possession of scheme property. That will not occur unless an order is made that the respondent go out of possession of the scheme property. In substance, the applicant's obligation under cl 16.7(c) is suspended by the operation of the existing orders.
- [101] Although it may not be necessary to resolve this part of the application, I would add that the parties' submissions traversed two further questions.
- [102] First, as previously stated, the applicant and the liquidators submitted that when the respondent has completed collecting and realising the assets of the FMIF he will be obliged to relinquish possession of them to the applicant. In my view, he is not authorised to do so without an order of the Court.
- [103] Second, the respondent submitted that he is authorised under the existing orders to make distributions to the members of the FMIF. In my view, neither his appointment under s 601NF(1) of the CA nor the provisions of the existing orders made under s 601NF(2) of the Act clearly authorises him to make distributions

without further order in the circumstance that the existing orders also direct the applicant to wind up the FIFa.

- [104] The substance of his existing appointment includes his appointment as receiver. As previously observed, the power under s 420(1) of the CA is that a receiver has power to do all things necessary or convenient to be done for or in connection with or as incidental to the attainment of the objectives for which the receiver was appointed. The respondent argued that power extended to the attainment of the objectives under the order appointing the respondent as the person to take responsibility for ensuring that the FMIF is wound up.
- [105] While I accept that that is a cogent argument, the specific orders made as to the respondent's powers to realise the property of FMIF and bring, defend or maintain proceedings are indicative of a narrower focus, notwithstanding that they are expressed to be "without derogating in any way from the Appointment or the Receiver's powers pursuant to these Orders".
- [106] In the result, it seems to me to be appropriate to clarify the position by making a direction under s 601NF(2) that the respondent is not to make a distribution to the members of the FMIF without the authority of an order of the Court.
- [107] The applicant's right under cl 16.6(f) to retain any part of the scheme property which in its opinion may be required to meet any actual or contingent liability of the Scheme is, in my view, affected by the operation of par 5 of the existing orders. The applicant is not in possession of the scheme property. There is an assumption underlying cl 16.6(f) that the responsible entity has possession. While not in possession of the property, the right to retain property for the required purpose cannot be engaged.
- [108] The applicant's correlative obligation under cl 16.7(g) to distribute anything retained which is subsequently not required is also not one that can be engaged, also because it is not in possession of any of the scheme property.
- [109] As to cl 18.2, the applicant's power to set aside any money from the scheme property which in the applicant's opinion is sufficient to meet any present or future liability of the scheme is, in my view, affected by the existing orders. Again, the assumption underlying cl 18.2 is that the applicant is in possession of the money. While not in possession of the property, the power to set aside money from that property cannot be engaged. Under the existing orders, if the applicant is in possession of scheme property the respondent is to obtain possession of the property.
- [110] Clause 21.1 provides that the scheme property will be held in the name of the Custodian as agent for the responsible entity on the terms and conditions as detailed in the Custody Agreement. The appointment of the respondent as receiver of the property of the FMIF could operate inconsistently with possession of the Custodian provided for in cl 21.1. However, the applicant did not tender evidence that there was in fact any problem of that kind or that it affected the applicant.
- [111] In my view, this is another a question that may never arise. In any event, the Court should not answer the question whether the liquidators are, in the winding

up of the applicant and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in cl 21.1, because that clause does not provide for a function of the applicant. It provides for a function of the Custodian.

Register of members and membership

- [112] Third, the applicant under s 601NF(2) and the liquidators under s 511(1) of the CA seek a direction as to whether the liquidators are, in the winding ups of the applicant and of the FMIF responsible for and shall discharge the functions, duties and responsibilities set out in other “parts” of the constitution identified as parts 9,10,12,22 and 28
- [113] I mention cl 22 of the constitution next, because it is convenient to deal with it before cls 9 and 10. Clause 22 provides that the responsible entity must keep and establish a register of members and any other registers required by law. The applicant submits that it is required to do so, not the respondent. I agree. There is nothing in the existing orders that charges the respondent with that function and thereby relieves the applicant from doing so. Paragraph 8(a) of the existing orders assumed that the applicant had the register and nothing to the contrary was expressly provided.
- [114] As a matter of fact, the respondent has maintained a register of members since August 2013. In my view, that is not what the existing orders provide for, except to the extent that the provision under par 2 of the existing orders that the respondent is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution might have that effect. If the applicant is not maintaining the register of members, that paragraph of the existing orders authorises the respondent to do so.
- [115] Clause 9 of the constitution provides for the transfer of units in the scheme. The applicant is responsible for recording a transfer, subject to its powers to refuse registration. There is a difference here between the effect of a winding up order for a registered scheme and a winding up order for a company. In the case of a company, under s 468A of the CA, a transfer of shares made after the commencement of the winding up is void, subject to exceptions. There is no express restriction of that kind in the case of a registered scheme. The interest of a member of the FMIF is assignable at law under s 199 of the *Property Law Act 1974 (Qld)*.⁵⁶ It is unnecessary to discuss the alternative method of assignment in equity. The constitution of the FMIF, as a “document that is legally enforceable as between the member and the members and the responsible entity”,⁵⁷ creates rights and obligations as between the applicant and a member wanting to transfer their units under cl 9 of the constitution.
- [116] Accordingly, a member of the FMIF is entitled to such a transfer until the FMIF is wound up. The existing orders make no provision about the applicant’s rights and obligations under cl 9. In my view, the functions under cl 9 are presently a responsibility of the applicant. There is nothing that charges the respondent with those functions and thereby relieves the applicant from doing so.

⁵⁶ *Commissioner of Taxation v Everett* (1980) 143 CLR 440, 447.

⁵⁷ *Corporations Act 2001 (Cth)*, s 601GB.

- [117] Clause 10 of the constitution deals with the transmission of units in the event of a member's death, bankruptcy or other legal disability. The existing orders make no provision about the applicant's rights and obligations under cl 10. In my view, the functions under cl 10 are presently a responsibility of the applicant. There is nothing in the existing orders that charges the respondent with those functions and thereby relieves the applicant from doing so.
- [118] The respondent's affidavits show that, like the register of members, he has assumed responsibility for effecting transfers and transmissions. If the applicant is not managing the transfers and transmission, paragraph 2 of the existing orders authorises the respondent to do so.
- [119] However, in my view the better course going forward is for a specific order to be made under s 601NF(2) that the respondent be responsible for the functions under cls 22, 9 and 10 of the constitution.
- [120] Clause 12 of the constitution provides for distributions to members. It is related to cl 11 that defines distributable income. In my view, cl 12 is only indirectly relevant. The power of distribution on a winding up of the FMIF is that conferred by cl 16.7(c) of the constitution. That clause picks up the proportions provided for under cl 12.4.
- [121] I have previously mentioned that, in my view, the respondent is not authorised to transfer possession of the property of the FMIF to the applicant without the authority of an order of the Court.
- [122] In my view, the Court should not answer the question whether the liquidators are, in the winding up of the applicant and of the FMIF, responsible for and shall discharge the functions, duties and responsibilities set out in cl 12, because it is a question that may never arise.
- [123] Clause 28 of the constitution provides that the responsible entity may at any time call and convene a meeting of Members and must do so when required by law. The applicant submits that it is the party with that power and obligation, not the respondent.
- [124] On the face of it, there is nothing in the existing orders that charges the respondent with those functions. If it were necessary to call a meeting to ensure the realisation of the property of the FMIF, he might be able to do so under par 2 and par 7(a) of the existing orders, but that is not the sole function of cl 28. It might be necessary for the applicant or the respondent to call a meeting of members to discharge their responsibilities under s 601NE(1) or s 601NF(1) respectively.
- [125] In the circumstances, in my view, it is unnecessary to say more. At present, it is not suggested that either the applicant or the respondent needs to call a meeting for any particular purpose. In my view, at this juncture, the Court should not make a direction about the responsibility of the liquidators or the applicant to call a meeting at a general level.

Financial and directors' reports and audit obligations under the CA

- [126] Paragraph 3 of the application and pars 1 to 8 of Sch 2 to the application seek directions as to whether the applicant is responsible for the following in the winding ups:
- (a) to prepare, for each financial year, a financial report for the FMIF pursuant to Div 1 Pt 2M.3 of the CA;
 - (b) to have the financial report audited in accordance with Div 3 of Pt 2M.3 of the CA;
 - (c) to report to members of the FMIF in accordance with Div 4 of Pt 2M.3 of the CA;
 - (d) to lodge with ASIC the report pursuant to Div 5 of Pt 2M.3 of the CA;
 - (e) to prepare for each half-year a financial report for the FMIF pursuant to Div 2 of Pt 2M.3 of the CA;
 - (f) to lodge with ASIC the half-yearly financial report for the FMIF and the auditor's report pursuant to Div 3 of Pt 2M.3 of the CA; and
 - (g) to engage a registered company auditor an audit firm or an authorised company audit company in relation to the FMIF's compliance plan under s 601HG of the CA.
- [127] The parties did not devote any detailed submissions as to the extent of the applicant's financial or members' reporting or audit obligations under the CA generally, or the extent of the application of provisions of Ch 2M of the CA to the FMIF. The submissions made were directed to some aspects of those obligations in the winding up of the scheme. It is necessary to start more generally.
- [128] Under Pt 2M.3 of the CA, as a registered scheme, the FMIF was required to prepare an annual financial report⁵⁸ and an annual directors' report.⁵⁹ The financial report of a registered scheme for a financial year must be audited.⁶⁰ And a registered scheme must report to members⁶¹ and lodge the financial report with ASIC.⁶²
- [129] As well, because there may be 100 or more people who reside in this jurisdiction and hold interests in the FMIF, units in the FMIF may be ED Securities.⁶³ If the securities in the FMIF are ED Securities, the undertaking of the FMIF is a "disclosing entity" for the purpose of the CA.⁶⁴ If the undertaking of the FMIF is a disclosing entity, it must prepare a financial report for each half-year and have the financial report audited or reviewed in accordance with Div 3 of Part

⁵⁸ *Corporations Act 2001* (Cth), s 292(1). The section does not say by whom, but it must be the responsible entity.

⁵⁹ *Corporations Act 2001* (Cth), s 298(1).

⁶⁰ *Corporations Act 2001* (Cth), s 301(1).

⁶¹ *Corporations Act 2001* (Cth), s 314(1).

⁶² *Corporations Act 2001* (Cth), s 319(1).

⁶³ *Corporations Act 2001* (Cth), s 111AFA(2).

⁶⁴ *Corporations Act 2001* (Cth), s 111AC(2).

2M.3 of the CA.⁶⁵ It must lodge with ASIC such a half-yearly financial report and auditor's report.⁶⁶

- [130] The responsible entity of a registered scheme must appoint an auditor.⁶⁷
- [131] The operation of these provisions is not automatically suspended when a registered scheme is ordered to be wound up.
- [132] In the case of a company ordered to be wound up in insolvency or by the Court, s 471A of the CA provides that a person cannot exercise and must not purport to perform or exercise a function or power as an officer of the company. Accordingly, the directors cannot prepare a financial report a directors' report for the purposes of Ch 2M, let alone have them audited. As well, s 330 of the CA provides that an auditor of a company ceases to hold office if an order is made by the Court for the winding up of the company.
- [133] Section 530A of the CA requires each officer to deliver all books of the company in the officer's possession to the liquidator. The liquidator is entitled to possession of the books of the company.⁶⁸ The liquidator must keep proper books.⁶⁹ Chapter 5 contains a quite different reporting regime for a liquidator. The liquidator must lodge accounts and a statement of position at 6 monthly intervals.⁷⁰ ASIC has the power to require an audit of the account and statement of position.⁷¹
- [134] Despite the foregoing, ASIC takes the view that at least some companies being wound up may have to comply with Part 2M.3 of the CA. Accordingly, the ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251 ("the instrument"), s 5, provides that a company does not have to comply with Pt 2M.3 if it would otherwise have been required to lodge a report under that Part if as at the relevant day a liquidator is appointed to the company.⁷²
- [135] These provisions do not apply in the winding up of a registered scheme.
- [136] Instead, the applicant submits that its responsibilities as responsible entity under Ch 2M are not altered by the existing orders. In general, I agree. There is a qualification in relation to the audit obligations of a registered scheme. Section 331AD of the CA provides that if the Court makes an order directing the responsible entity to wind up the scheme an auditor of the registered scheme ceases to hold office.
- [137] As well, in *Enviroinvest Ltd (rec and mgrs apptd) (in liq)*⁷³ the court doubted that the requirements to have a financial report audited for a financial year and to obtain an audit report applied to a managed investment scheme in the course of being wound up, because "Division 3" (presumably Pt 2M.3) presupposes the

⁶⁵ *Corporations Act 2001* (Cth), s 302(b).

⁶⁶ *Corporations Act 2001* (Cth), s 302(c).

⁶⁷ *Corporations Act 2001* (Cth), s 331AAA.

⁶⁸ *Corporations Act 2001* (Cth), s 530B.

⁶⁹ *Corporations Act 2001* (Cth), s 531.

⁷⁰ *Corporations Act 2001* (Cth), s 539(1).

⁷¹ *Corporations Act 2001* (Cth), s 539(2).

⁷² Section 5 appears to have been made under s 341 of the CA.

⁷³ (2010) 81 ACSR 145, 155 [42].

active role of directors and a continuing business or undertaking. I am not persuaded that reasoning is sufficient to dispose of the case of a registered scheme, although I accept that the cessation of the role of directors of a company being wound up and the provisions of s 539 of the CA are cogent reasons in favour of s 301 of the CA not continuing to apply in the winding up of a company. However, in my view, that reasoning does not speak directly to the winding up of a registered scheme.

- [138] The respondent appears to have obtained the books and records of the applicant in relation to the FMIF under par 3 of the existing orders. The applicant does not have access to the books and records of the respondent's activities as receiver of the FMIF under the existing orders since they were made. Yet, the financial reporting obligations under Pt 2M.3 of the CA appear to continue.
- [139] The respondent submits that there are provisions under which the applicant's obligations to prepare financial reports and audit obligations may be suspended or relieved.
- [140] First, the respondent submits that s 7 of the instrument can relieve a responsible entity from compliance with Pt 2M.3 and s 601HG of the CA. That section applies if either:
- (a) the responsible entity (in this case the applicant) has lodged a notice under reg 5C.9.01 of the Regulations in the approved form, telling ASIC that the winding up of the scheme has commenced; or
 - (b) a person appointed under s 601NF(1) of the CA (in this case the respondent) has lodged a notice telling ASIC that the person has been appointed by the Court to take responsibility for ensuring that the scheme is wound up in accordance with the scheme's constitution.
- [141] I was informed by the parties at the hearing of the application that the respondent had lodged a notice telling ASIC of his appointment under s 601NF(1). However, there is a further requirement under s 7, namely that either the responsible entity or the person appointed under s 601NF(1) must lodge a copy of a "scheme insolvency resolution".
- [142] A "scheme insolvency resolution" is defined in s 4 of the instrument to mean "a resolution to the effect that for a period of at least 12 months the scheme property has been insufficient to meet the debts of the responsible entity of the scheme incurred in that capacity as and when they were due and payable."
- [143] No such resolution has been lodged, on the evidence. Nevertheless, it seems at least possible that one could be lodged.⁷⁴ If it is done, the applicant will be relieved of the ongoing reporting obligations under Pt 2M.3.
- [144] I note that for a registered scheme being wound up, s 13 of the instrument, in effect, inserts a provision into the CA providing for different reporting

⁷⁴ As to insolvency of a registered scheme generally, see *Capelli v Shephard* (2010) 29 VR 242, [89] ff.

obligations of a responsible entity or person appointed under s 601NF(1). The operation of that section was not referred to by the parties in submissions.

- [145] Second, the respondent submits that under s 111AT(1) of the CA, ASIC may by writing exempt the applicant from all or specified disclosing entity provisions. By s 111AR of the CA, the provisions of Ch 2M of the CA as they apply to disclosing entities are disclosing entity provisions.
- [146] I note that s 340(1) of the CA (read together with s 340(3)) in effect provides that, on an application authorised by a resolution of “the directors” in relation to a registered scheme, ASIC may make an order in writing relieving a registered scheme from all or specified requirements of Pts 2M.2, 2M.3 and 2M.4 of the CA. Regulatory guide 174 issued by ASIC in May 2015 corresponds. Under s 342 of the CA, it is a condition of making an order under s 340 that ASIC must first be satisfied that compliance would make the financial reports or other reports misleading, or be inappropriate or impose unreasonable burdens.
- [147] It may be that the applicant can apply for individual relief from the requirements of the relevant provisions in Pt 2M under s 340(1). However, “the directors” are required to authorise and sign the application. There may be a question as to who “the directors” of a registered scheme are or why they should be required to authorise the application in the case of a registered scheme that is being wound up by a responsible entity in liquidation. However, the parties did not address s 340 in submissions, so I will not consider it further.
- [148] The point of the foregoing summary is not to resolve whether if any of these applications is made the applicant will be relieved. That is hypothetical. At present, the applicant is not relieved.
- [149] I would add that the applicants and liquidators’ affidavits and the applicant and liquidators’ counsel in submissions also referred to the applicants’ obligations in relation to its taxation affairs.⁷⁵ However, no paragraph of the application raised that subject matter. I was informed by the respondent’s counsel that the secured creditor’s receivers were attending to submission of BAS statements, but there was no elaboration of the basis for that.
- [150] There was no sufficient identification of the relevant obligations or the respective parties’ positions under the relevant taxation legislation for me to consider whether any direction is required on this account.
- [151] In my view, an appropriate direction to make is to the effect that if the applicant is unable to obtain relief from the financial reporting obligations of Pt 2M.3 of the CA, the respondent must provide to the applicant reasonably requested information to enable the applicant to comply with those obligations.
- [152] I will hear the parties as to the appropriate form of order.

Reports on the financial status of the FMIF

⁷⁵ The affidavit referred to s 161 and Pt III Div 6 of the *Income Tax Assessment Act 1936* (Cth) and ss 31.5 and 184.1 of *A New Tax System (Goods and Services) Act 1999* (Cth).

- [153] By par 2 of the application and par 4 of Sch 1 to the application the applicant seeks directions as to the liquidators' responsibilities under seven provisions or parts of the constitution, being cls 16.10, 27.1 and 27. 4 of the constitution and parts 11, 12 and 14 of the constitution. They too should be dealt with separately. For convenience, I will deal with them in an order different to that in the application.
- [154] Clause 27.4 of the constitution provides that the accounts of the scheme must be kept and prepared in accordance with the applicable accounting standards and the CA and that the responsible entity must report to members concerning the affairs of the scheme and their holdings as required by the CA.
- [155] To the extent that cl 27.4 requires compliance with the CA, there is nothing to be added to the prior discussion of the applicant's obligation to keep accounts or report to members under the provisions of the CA. If the applicant is relieved from the requirements of the CA, cl 27.4 will not be engaged. There may be a question whether cl 27.4, properly construed, independently obliges the applicant to keep and prepare accounts, but the applicant made no submissions about that. In my view, it would not be appropriate to enter upon that question in the absence of any specific argument about it.
- [156] Clause 27.1 of the constitution provides, in effect, that the responsible entity must appoint an auditor:
- (a) to regularly audit the accounts in relation to the scheme and perform the other duties required of the scheme's auditors under the constitution and the law; and
 - (b) of the compliance plan for the scheme.
- [157] In my view, cl 27.1 operates as a constitutional requirement that the responsible entity appoint an auditor apart from the CA, so as to perform the audits required under the constitution and the CA. Those under the CA have been mentioned previously. As to the operation of an independent obligation to audit under the constitution, the operation of cl 27.1 would depend on the operation of cl 27.4, as also previously mentioned.
- [158] The requirement that the responsible entity must appoint an auditor of the compliance plan for the scheme reflects the positive statutory obligation under s 601HG(1) of the CA that a responsible entity must ensure that at all times a registered auditor is engaged to audit compliance with the scheme's compliance plan. In the result, in my view, it is unnecessary to say more about the operation of cl 27.1 or the applicant's obligations under that clause.
- [159] Clause 27.5 additionally requires the responsible entity to cause the scheme auditor to audit and report on the scheme's accounts and the compliance plan auditor to audit and report on the compliance plan. Each of those audits is to be done in the manner required by the CA. Having regard to the discussion of the operation of audits required by the CA set out previously, it is unnecessary to say more as to the operation of cl 27.5 or the applicant's obligations under it.
- [160] Clause 16.10 of the constitution provides that the responsible entity shall arrange for an auditor to audit the final accounts of the scheme after the scheme is wound

up. There is no equivalent audit requirement provided for in the CA. The applicant submits that the responsibility to arrange for the audit is its obligation. I agree. But the time has not arrived for that audit and will not do so for many months.

[161] Thus, the respondent submits that any direction about carrying out the audit arranging function under cl 16.10 would be premature. I agree.

[162] Nevertheless, it may clarify the parties' positions to record my view that the existing orders do not provide for the respondent to arrange any of the audits. No order has been made under s 601NF(2) which alters the effect of the operation of the constitution or the CA in relation to the applicant's audit obligations.

Parts 11, 12 and 14 of the constitution

[163] Paragraph 2 of the application and par 4 of Schedule 1 to the application also seek directions as to whether the liquidators are responsible for and shall discharge the functions, duties and responsibilities "to determine and report upon the financial status of the FMIF as required by... parts 11, 12 and 14 of the constitution". There are no such parts of the constitution. However, it may be that the applicants intended to refer to the clauses in the constitution bearing those numbers.

[164] Clauses 11 and 12 of the constitution deal with distributions of distributable income and capital distributions. I have previously dealt with cl 12. Similarly, in my view, the Court should not answer the question whether, in the winding up of the applicant and of the FMIF, the liquidators are responsible for and shall discharge the functions, duties and responsibilities set out in cl 11, because it is a question that may (in fact will probably never) never arise.

[165] Clause 14 of the constitution deals with a complaints procedure. The liquidators and the applicant made no reference to this clause in their submissions and no facts are raised that suggest any question has arisen as to the applicant dealing with complaints under the procedure or otherwise. In my view, it is unnecessary to make any direction as to cl 14.

[166] Other orders sought and disposition

[167] The application also seeks an order that the liquidators' remuneration, and the costs and expenses of discharging the functions duties and responsibilities for which they are responsible shall be paid from the scheme property of the FMIF, including the costs of the application.

[168] However, at the hearing, the applicant's and liquidators counsel requested that the hearing of that part of the application be adjourned until the determination of the directions questions dealt with in these reasons. The respondent did not oppose that approach.

[169] I will hear the parties as to the orders that should be made consistently with these reasons.

6 me

Cor: Mullins J
12/02/15
Leave to file and read together
with exhibits (if any) hereto
LLA Associate

SUPREME COURT OF QUEENSLAND

**SUPREME COURT
OF QUEENSLAND**

REGISTRY: BRISBANE
NUMBER: 12317/14

12 FEB 2015

~~Filed~~ Plaintiff:
BRISBANE

**LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 089 343 288**

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

Seventh Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461**

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985
IN THEIR CAPACITY AS JOINT AND SEVERAL
TRUSTEES OF THE LM MANAGED
PERFORMANCE FUND**

OUTLINE OF SUBMISSIONS ON BEHALF OF THE APPLICANT/PLAINTIFF

Outline of submissions
Filed on behalf of the applicant/plaintiff

Summary

1. This is an application made pursuant to s.500(2) *Corporations Act* 2001 for leave nunc pro tunc to commence and proceed against the seventh defendant with the proceeding in which this application was filed.
2. Leave should be granted because:
 - (a) the claim for which leave is sought raises serious questions to be tried;
 - (b) the seventh defendant has insurance which responds to the circumstances of the claim;
 - (c) given the complexity of the winding up, which is likely to take some time to complete, the action is unlikely to interfere with the orderly winding up of the seventh defendant.

Background

3. The relevant background is as follows.
4. Mr David Whyte was appointed by order of Dalton J made on 21 August 2013 pursuant to s.601NF(1) *Corporations Act* 2001 to take responsibility for ensuring that the LM First Mortgage Income Fund ("FMIF") is wound up in accordance with its constitution. Mr Whyte was also appointed pursuant to s.601NF(2) as receiver of the property of the LM First Mortgage Income Fund.
5. LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) ("LMIM") was placed into liquidation on 1 August 2013. It is the Responsible Entity of the FMIF¹.
6. Pursuant to the order of Dalton J, Mr Whyte is authorised to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM as are necessary for the winding up of the FMIF.
7. In exercise of those powers, this proceeding was commenced by claim filed on 19 December 2014.
8. The essence of the claim set out in the accompanying statement of claim is as follows.
9. In March 2003 Permanent Trustee Australia Limited as custodian of LMIM as responsible entity of the FMIF loaned \$16 million to Bellpac: statement of claim paragraph 5. Bellpac granted a first registered mortgage over various real property ("the property") as security for the loan: statement of claim paragraph 7.

¹ Affidavit of David Whyte sworn 4 February 2014 paragraphs 5 and 14.

10. In June 2006 LMIM as trustee for the LM Managed Performance Fund ("MPF") loaned \$6 million to Bellpac: statement of claim paragraph 10. Bellpac granted it a third registered mortgage over the property as security for the loan: statement of claim paragraph 11.
11. Also in June 2006, LMIM as responsible entity of the FMIF, LMIM as trustee for the MPF, Bellpac and various other entities entered a deed of priority pursuant to which LMIM as responsible entity for the FMIF was granted first priority to the extent of the amount of \$33.8 million plus interest (and other sums), LMIM as trustee for the MPF was granted second priority to the extent of the amount of \$11 million plus interest (and other sums) and LMIM as trustee of the MPF was required to provide a release of any security held by it where an asset the subject of any security held by Permanent Trustee Australia Limited was sold pursuant to a bona fide sale for approximately fair market value: statement of claim paragraph 12.
12. Bellpac was in default under the loan provided to it by FMIF at all times from about March 2006, entitling FMIF to exercise its rights under the security given to it by Bellpac for the loan: statement of claim paragraph 13.
13. In September 2004, Bellpac sold certain assets, including the security property, to Gujarat NRE Coking Coal Limited ("Gujarat"): statement of claim paragraph 17. Bellpac and Gujarat subsequently fell into dispute as to their rights and obligations pursuant to the instruments entered by them to effect the sale and proceedings were commenced in relation to those disputes in 2009: statement of claim paragraphs 19 and 22.
14. In about July 2009, the first to sixth defendants (being directors of LMIM) decided that LMIM as responsible entity of the FMIF was no longer in a position to fund the proceedings that had been commenced and they caused LMIM as trustee for the MPF to thereafter fund the proceedings to the extent of not more than \$1,380,431.51: statement of claim paragraphs 23 and 24.
15. A mediation of the proceedings occurred in November 2010 and in June 2011 deeds were entered compromising the proceedings. Pursuant to the settlement, Gujarat was obliged to pay Permanent Trustee Australia Limited a settlement sum of \$35.5 million exclusive of GST: statement of claim paragraphs 26 to 30.
16. In June 2011 the first to sixth defendants as directors of LMIM executed a deed poll pursuant to which they proposed to split the proceeds recovered pursuant to the settlement in the ratio 65% to FMIF and 35% to MPF: statement of claim paragraphs 32.
17. It is alleged that there was no necessity for the deed splitting the settlement amount in the ratio provided for pursuant to the deed, because Permanent Trustee Australia Limited sold the property to Gujarat as mortgagee exercising power of sale for FMIF and because of the terms of the deed of priority summarised above in paragraph 11: statement of claim paragraphs 33 and 34.

18. LMIM as trustee of the MPF subsequently received the sum of \$15,546,147.85 from the proceeds payable to Permanent Trustee Australia Limited as custodian of LMIM as responsible entity for the FMIF: statement of claim paragraph 35.
19. Against the seventh defendant, the plaintiff claims:
- (a) an order pursuant to s.1317H *Corporations Act* 2001 for compensation or damages in an amount of \$15,546,147.85 together with interest;
 - (b) declarations that the seventh defendant is entitled to be indemnified out of the assets of the MPF in respect of its liability to the plaintiff and that the seventh defendant has a lien or charge over the assets and undertakings of the MPF in respect of its liability to the plaintiff.
20. Mr Whyte swears to the following circumstances relevant to this application:
- (a) he holds copies of insurance policies which respond to the circumstances raised by the claim²;
 - (b) the claim raises a serious question to be tried³;
 - (c) the matters raised by the claim are not such as can be dealt with in the normal proof of debt procedure nor will they unleash an “avalanche of litigation”⁴;
 - (d) given the complexity of the winding up, which is likely to take some time to complete, the action is unlikely to interfere with the orderly winding up of LMIM⁵;
 - (e) the proceeding is necessary to protect the interests of the investors of the FMIF and to maximise the return to those investors⁶.

Submissions

21. Section 500 *Corporations Act* 2001 provides:
- (1) Any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding up is void.
 - (2) After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.
 - (3) The Court may require any contributory, trustee, receiver, banker, agent, officer or employee of the company to pay, deliver, convey, surrender or transfer forthwith or

² Affidavit of David Whyte sworn 4 February 2014 paragraphs 23 and 25.

³ Affidavit of David Whyte sworn 4 February 2014 paragraph 27(a)

⁴ Affidavit of David Whyte sworn 4 February 2014 paragraph 27(c)

⁵ Affidavit of David Whyte sworn 4 February 2014 paragraph 27(e)

⁶ Affidavit of David Whyte sworn 4 February 2014 paragraph 27(f).

within such time as the Court directs to the liquidator any money, property of the company or books in his, her or its hands to which the company is prima facie entitled.

22. The stay on proceedings pursuant to s.500(2) ensures that:
- once a step has been taken which causes the company to be in external administration, individual creditors are no longer able to recover their debts from the company separately but must abide by a system of rateable distribution out of the assets of the company in accordance with the principles of the Law.⁷
23. Section 500(2) is concerned with substantive proceedings brought against a company in liquidation, rather than procedural applications by defendants in proceedings brought by the company: *BPM Pty Ltd v HPM Ltd* (1996) 14 ACLC 857.
24. Leave may be granted pursuant to s.500(2) retrospectively, to validate proceedings already commenced: *Oceanic Life Limited v Insurance and Retirement Planning Services Pty Ltd (in liq)* (1993) 11 ACSR 516 at 521; *Home Corp Projects (No 100) v Australian Home Mortgage* (2001) 19 ACLC 1,491. That appears to be consistent with the use of the alternative “is to be proceeded with or commenced” in s.500(2).
25. The circumstances in which the Court has refused to grant leave have typically been:
- (a) where it appears that there is no possibility, should a judgment be given against it, that the company would be able to meet any part of the judgment⁸;
or
 - (b) where the proposed proceedings are frivolous, vexatious or an abuse of process and likely to be struck out if allowed to proceed⁹.
26. On the other hand, leave has been granted when it is shown that there is a serious question to be tried in the proceeding¹⁰ or where it is shown that the company has insurance against the proposed claim¹¹.
27. In this case, not only does the seventh defendant have insurance which responds to the circumstances raised by the claim, but the seventh defendant’s liquidators have also consented to leave being given to the plaintiff to proceed with the claim. The matters alleged in the statement of claim raise serious questions to be tried. The person responsible for causing the proceeding to be commenced (Mr Whyte) is an officer of the Court who is acting pursuant to orders of the Court. He has sworn that the proceeding raises serious questions.

⁷ *Re Summit Design & Construction Pty Ltd* (1999) 33 ACSR 301 at 304.

⁸ The Court “should not give its imprimatur to fruitless proceedings which would only involve a waste of public time and money”: *Haviland v Joslow (No 4) & Ors* [1979] 2 NSWLR 318 at 319.

⁹ *Oceanic Life Limited v Insurance and Retirement Planning Services Pty Ltd (in liq)* (1993) 11 ACSR 516 at 520.

¹⁰ *Home Corp Projects (No 100) v Australian Home Mortgage* (2001) 19 ACLC 1,491 at [21].

¹¹ *Oceanic Life Limited v Insurance and Retirement Planning Services Pty Ltd, (in liq)* (1993) 11 ACSR 516 at 521.

28. There can, therefore, be no question that the proceedings are frivolous or vexatious or liable to be struck out, or that the liquidators anticipate that there is no prospect of any judgment obtained by the plaintiff being satisfied, if not in full then at least in part, from the assets of the seventh defendant.

Conclusion

29. Leave should be granted in accordance with the draft consent order.

David de Jersey

Counsel for the
applicant/plaintiff

Dated: 12 February 2015

12^{LT} /

SUPREME COURT
OF QUEENSLAND
19 FEB 2015
Filed
BRISBANE

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

**LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288**

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

Seventh Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461**

AND

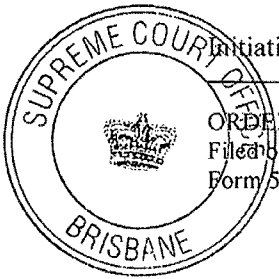
Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES
OF THE LM MANAGED PERFORMANCE FUND**

ORDER

Before: Mullins J

Date: 12 February 2015

Initiating document: Interlocutory Application filed 4 February 2015

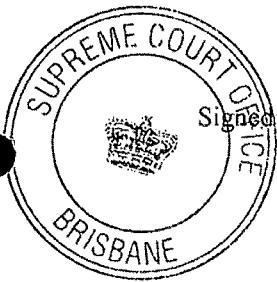


ORDER
Filed on Behalf of the Plaintiff
Form 59 Rule 661

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
BNEDOCS Order (12_02_15) 71

THE ORDER OF THE COURT, BY CONSENT, IS THAT:

1. Pursuant to section 500(2) of the *Corporations Act 2001* (Cth), the applicant plaintiff be granted leave nunc pro tunc to commence and proceed with Supreme Court Proceeding numbered 12317 of 2014 against the seventh defendant, LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461.
2. The liquidators of the seventh defendant are reserved liberty to apply to the Court to revoke the grant of leave pursuant to this order.
3. The plaintiff may not enforce any judgment against the seventh defendant without leave of the Court, with such leave not to be sought without the plaintiff first giving the liquidators of the seventh defendant seven days' notice in writing of its intention to do so.
4. The costs of this application be costs in the proceeding.



[Handwritten Signature]

Deputy Registrar



**IN THE FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE**

File No: BRG187/2015

**LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & MANAGERS
APPOINTED) (IN LIQ) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE
LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
Applicant

PETER CHARLES DRAKE
First Respondent

JASON WALTER BETTLES AND RAJENDRA KUMAR KHATRI
Second Respondents

ORDER

BEFORE: JUDGE JARRETT
DATE: 16 March 2015
MADE AT: BRISBANE

APPEARANCES: Mr De Jersey, of Counsel appearing for the Applicant
Ms Manning, Solicitor appearing for the First Respondent
There being no appearance by the Second Respondents

THE COURT ORDERS THAT:

1. Pursuant to s.58(3) of the *Bankruptcy Act* 1966 the applicant be granted leave, to the extent that such leave is necessary, to take fresh steps in and continue with Supreme Court Proceeding numbered 12317 of 2014 against the first respondent, Peter Charles Drake.
2. No order as to costs.

By the Court

DATE ENTERED: 16 March 2015


Registrar

9
SUPREME COURT
OF QUEENSLAND

27 APR 2015

FILED
BRISBANE

SUPREME COURT OF QUEENSLAND

37g
REGISTRY: BRISBANE
NUMBER: 12317/14

Plaintiff: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288**

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

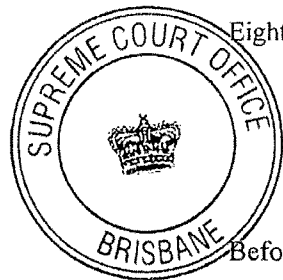
AND

Seventh Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461**

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES
OF THE LM MANAGED PERFORMANCE FUND**

ORDER



Before: Jackson J

Date: 8 April 2015

ORDER
Filed on Behalf of the Plaintiff
Form 59 Rule 661

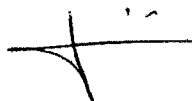
GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
BNEDOCS Order (8 April 15)

Initiating document: Application filed by email to the Commercial List Manager on 12 March 2015

THE ORDER OF THE COURT IS THAT:

1. The proceeding be placed on the Commercial List.
2. The plaintiff be granted leave *nunc pro tunc* pursuant to rule 72 of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)*, to the extent that such leave is necessary, to take any further step in and continue with the proceeding against the first defendant, Peter Charles Drake.
3. Directions be made for the future conduct of the proceeding as follows:
 - (a) the first to fourth defendants and the sixth defendant (collectively, referred to as the **Director Defendants**) are to file and serve any interlocutory application (**interlocutory application**), together with any further supporting affidavits, in relation to the following matters within 14 days of the listing of this matter on the Commercial List:
 - (i) whether the Director Defendants are excused from compliance with, and from the operation of, rules 149(1)(b), 149(1)(c), 150, 157, 165 and 166 of the UCPR;
 - (ii) whether, if the Director Defendants are excused from compliance with, and from the operation of rules 149(1)(b), 149(1)(c), 150, 157, 165 and 166 of the UCPR, the defences of the Director Defendants, at a minimum, must:
 - (A) state with respect of each allegation of fact in the statement of claim, whether the allegation is admitted, not admitted or denied; and
 - (B) give notice of any intention to rely upon any statutory defence or ground of dispensation;
 - (iii) the timing of delivery of the notices of intention to defend and defences of the Director Defendants;
 - (iv) the timing of delivery of the plaintiff's reply to the Director Defendants' defences;
 - (b) the plaintiff is to file and serve any material in response to the interlocutory application within 7 days from service of the interlocutory application and supporting affidavits;
 - (c) the interlocutory application be listed for hearing before His Honour Justice Jackson at 10am on 30 April 2015.
4. The costs of and incidental to this application be the parties' costs in the proceeding.

Signed:



SUPREME COURT
OF QUEENSLAND

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 12317/14

Handwritten initials

Plaintiff: 17 JUN 2015

FILED
BRISBANE

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS &
MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208
461 AS RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288

AND

First Defendant:

PETER CHARLES DRAKE

AND

Second Defendant:

LISA MAREE DARCY

AND

Third Defendant:

EGHARD VAN DER HOVEN

AND

Fourth Defendant:

FRANCENE MAREE MULDER

AND

Fifth Defendant:

JOHN FRANCIS O'SULLIVAN

AND

Sixth Defendant:

SIMON JEREMY TICKNER

AND

Seventh Defendant:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS &
MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208
461

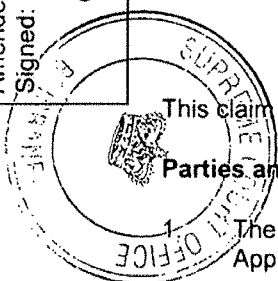
AND

Eighth Defendant:

KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND

Amended pursuant to Rule 378 of the Uniform Civil Procedure Rules 1999 (Qld).
Signed: *Gadens*
Dated: 17 June 2015

Gadens Lawyers



FURTHER AMENDED STATEMENT OF CLAIM

This claim in this proceeding is made in reliance on the following facts:

Parties and roles

The seventh defendant, LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 (LMIM);

- (a) is and was at all material times a company duly incorporated and capable of suing in its own name;

17 JUN 2015

FURTHER AMENDED STATEMENT OF CLAIM

Filed on behalf of the Plaintiff
Form 16 Rules 22, 146

- (b) is and was at all material times the Responsible Entity (**RE**) of the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**);
 - (c) was, until order of this Honourable Court on 12 April 2013 (**LM Order**), trustee of the trust named The LM Managed Performance Fund (**MPF**);
 - (d) was placed into voluntary administration on 19 March 2013 and John Park and Ginette Muller of FTI Consulting were appointed voluntary administrators;
 - (e) had receivers and managers, Joseph Hayes and Anthony Connelly of McGrathNicol, appointed to certain of its property held in its capacity as RE of FMIF on 11 July 2013 by Deutsche Bank AG (**Deutsche**);
 - (f) was placed into liquidation on 1 August 2013 following a resolution of its creditors that it be placed into liquidation and that John Park and Ginette Muller be appointed liquidators (**Liquidators**).
2. At all material times each of the first to sixth defendants was a director of LMIM.
3. By Order of this Honourable Court dated 21 August 2013 (**FMIF Order**), David Whyte (**Receiver**), Partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd:
- (a) was appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (**Appointment**);
 - (b) was appointed as receiver of the property of the FMIF;
 - (c) has, in relation to the property of FMIF for which he is appointed receiver, the powers set out in s 420 of the *Corporations Act 2001* (Cth) (**Act**); and
 - (d) without derogating in any way from the Appointment or the Receiver's powers pursuant to the FMIF Order, was authorised to, inter alia:
 - (i) take all steps necessary to ensure the realisation of property of FMIF held by LMIM as RE of the FMIF by exercising any legal right of LMIM as RE of the FMIF in relation to the property including but not limited to:
 - (A) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate or finalise the sale of the property;
 - (B) providing a response as appropriate to matters raised by receivers of property of LMIM as RE of the FMIF to which receivers have been appointed;
 - (C) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of the property;
 - (D) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (E) executing contracts, transfers or releases or any such other documents as are required to carry out any of the above;
 - (ii) bring, defend or maintain any proceedings on behalf of FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions;

- (e) is entitled to bring and does bring these proceedings in the name of LMIM as RE of the FMIF.
- 4. Further, by the LM Order, LMIM was removed as trustee of the MPF and ~~the Eighth Defendants~~, Korda Mentha Pty Ltd ACN 100 169 391 and Calibre Capital Pty Ltd ABN 66 108 318 985, were appointed joint and several trustees of the MPF.
- 4A. On or about 5 January 2015, Calibre Capital Pty Ltd ABN 66 108 318 985 resigned as trustee of the MPF.

Bellpac loans

- 5. On or about 10 March 2003, Permanent Trustee Australia Limited as custodian of LMIM as RE of the FMIF (**PTAL**) entered into a loan agreement with Bellpac (**FMIF Bellpac Loan Agreement**).
- 6. Pursuant to the FMIF Bellpac Loan Agreement, PTAL agreed to advance and did advance the sum of \$16M to Bellpac (**FMIF Bellpac Loan**).
- 7. As security for the FMIF Bellpac Loan, Bellpac granted to:
 - (a) a first registered mortgage (**PTAL Mortgage**) over land known as "Balgownie No 1 Colliery Wollongong" in the state of New South Wales (**Property**); and
 - (b) a registered charge over Bellpac (**PTAL Charge**).
- 8. Between December 2003 and July 2008, the FMIF Bellpac Loan Agreement was varied.
- 9. On or about 23 June 2006 LMIM as trustee for the MPF entered into a loan agreement with Bellpac (**MPF Bellpac Loan Agreement**).
- 10. Pursuant to the MPF Bellpac Loan Agreement, LMIM as trustee for the MPF agreed to advance and did advance the sum of \$6M to Bellpac (**MPF Bellpac Loan**).
- 11. As security for the MPF Bellpac Loan, Bellpac granted to LMIM as trustee for the MPF:
 - (a) a registered mortgage over the Property (which was registered as the third registered mortgage) (**MPF Mortgage**); and
 - (b) a registered charge over Bellpac (**MPF Charge**).
- 12. On or about 23 June 2006 LMIM as RE of the FMIF, LMIM as trustee for the MPF, GPC No. 11 Pty Ltd, GPC No. 12 Pty Ltd, GPC No. 8 (Bulli) Pty Ltd, Austcorp Project No. 20 Pty Ltd and Bellpac entered into a Deed of Priority (**Deed of Priority**) pursuant to which:
 - (a) by clause 3.1(1) LMIM as RE for the FMIF was granted first priority to the extent of the Principal Amount of \$33.8M plus Interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
 - (b) by clause 3.1(2) LMIM as trustee for the MPF was granted second priority to the extent of the Principal Amount of \$11M plus Interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
 - (c) by clause 8, LMIM as trustee for the MPF was required to provide a release of any security held by it where an asset the subject of any security held by PTAL was sold pursuant to a bona fide sale for approximately fair market value;
 - (d) by clause 3.2, subject to any prior right in favour of any other person, all money received by, inter alia, Bellpac, LMIM as RE of the FMIF or LMIM as trustee of the MPF, in respect of the Security (as that term is defined therein) must be applied in order of the priority set out in clause 3.1.

13. From in or about March 2006 Bellpac was in default under the FMIF Bellpac loan and PTAL as custodian of LMIM as RE of the FMIF was entitled to exercise rights under the PTAL Mortgage and the PTAL Charge.
14. On or about 6 May 2009 PTAL appointed receivers and managers to Bellpac.
15. On or about 30 July 2009 voluntary administrators were appointed to Bellpac.
16. On or about 3 September 2009, Bellpac was placed into liquidation following a resolution of its creditors.

Bellpac sale of the Property to Gujarat

17. On or about 22 September 2004 Bellpac and GPC Equipment Pty Ltd (**GPC**) and Gujarat NRE Coking Coal Limited (formerly Gujarat NRE Minerals Limited)(**Gujarat**), Bounty Industries Australia Pty Limited (**Bounty**) and Coalfields (NSW) Pty Limited (**Coalfields**) entered into a Land and Asset Sale Agreement (**LASA**) pursuant to which Bellpac agreed to sell to Gujarat and Coalfields certain assets including, inter alia, the Property.
18. In addition to the LASA, Bellpac and GPC and Gujarat and Coalfields entered into certain other agreements on or about 3 December 2004 which, inter alia, amended the LASA (**2004 Agreements**).
19. A dispute arose between Bellpac and Gujarat as to the parties' rights, obligations and liabilities under the LASA and the 2004 Agreements (**Dispute**).
20. In 2007 and 2008 Bellpac and Gujarat executed settlement deeds (**Settlement Deeds**) in order to resolve the Dispute.
21. In 2009, a dispute arose between LMIM, PTAL and Bellpac and Gujarat and Coalfields as to the parties' rights, obligations and liabilities under and as a consequence of the LASA, the 2004 Agreements and the Settlement Deeds (**2009 Dispute**).
22. Legal proceedings were commenced by:
 - (a) Gujarat against Bellpac in or about May 2009 (**Gujarat proceedings**);
 - (b) LMIM, PTAL and Bellpac against Gujarat, Coalfields, Bounty and GPC in or about November 2009 (**Bellpac proceedings**);
 - (c) by Coalfields against Bellpac and Gujarat by cross-claim in the Gujarat proceedings (**Coalfields cross-claim**),together (the **Proceedings**).

Funding of the Proceedings

23. In or about July 2009 the first to sixth defendants formed the view that LMIM as RE of the FMIF was not in a position to fund the Proceedings.

Particulars

The best particulars that the plaintiff can presently provide are that each of the first to sixth defendants executed the Deed Poll which stated, inter alia, that they had given careful consideration to, inter alia, the circumstances described in the Background to the Deed Poll.

24. From in or about July 2009, as registered mortgagee of the Property with second priority under the Deed of Priority, LMIM as trustee of the MPF:
 - (a) funded the Proceedings as second mortgagee in an amount of not more than \$1,380,431.51; and
 - (b) drew down such funding against the MPF Bellpac Loan.

Mediation Heads of Agreement

25. In or about November 2010, a non-binding Heads of Agreement recording Agreement in Principle was executed in the course of a mediation between the parties to the Proceedings (**Mediation Heads of Agreement**).
26. Pursuant to the Mediation Heads of Agreement:
 - (a) the Property was to be sold to Gujarat or its nominee by either the liquidator of LMIM (with mortgagees' consent) or via a mortgagee sale for an amount up to \$65.5M as follows:
 - (i) \$15.5M to be paid by:
 - (A) An instalment of \$1M within 1 month; and
 - (B) \$14.5M within 6 months;
 - (ii) Vendor finance for \$46-50M (to be updated on amortisation);
 - (b) LMIM was to pay \$1.3M to Coalfields (NSW) Pty Limited ACN 111 369 110 to secure its release of certain caveats over the Property;
 - (c) LMIM was to be granted an option to purchase a half share in the Property for \$15M in certain circumstances.
27. The parties continued to negotiate a settlement of the Proceedings between November 2010 and June 2011.

Settlement of the LMIM Bellpac proceedings

28. On or about 21 June 2011:
 - (a) LMIM in its capacity as RE for FMIF, PTAL, Bellpac, Gujarat and Southbulli Holdings Pty Limited (**Southbulli**) executed a Deed of Release pursuant to which the parties agreed to settle all of their disputes, including the disputes in the Proceedings and to regulate their relationship (**Deed of Release**);
 - (b) simultaneously with the execution of the Deed of Release, PTAL, LMIM in its capacity as RE for FMIF, Bellpac, Gujarat, Southbulli and Coalfields executed a Deed of Settlement and Release pursuant to which these parties agreed to settle their differences in respect of the Proceedings (**Deed of Settlement and Release**); and
 - (c) PTAL, as mortgagee exercising power of sale under the PTAL Mortgage, entered into a contract to sell the Property to Gujarat for a purchase price of \$10M exclusive of GST (**Gujarat Contract**).
29. By clause 7 of the Deed of Release Gujarat was obliged to pay to PTAL the settlement sum of \$35.5M exclusive of GST by way of bank cheque simultaneously with the execution and delivery of that deed.
30. By clause 2 of the Deed of Settlement and Release:
 - (a) PTAL was to pay to Coalfields the sum of \$1.3M by bank cheque simultaneously with the execution and delivery of that deed;
 - (b) the sum of \$1.3M was to be held in trust until completion of the Gujarat Contract; and
 - (c) if the Gujarat Contract was terminated the sum of \$1.3M, together with any accretions thereon, was to be refunded in full to PTAL.

Advice

- 30A. On or about 6 December 2010 LMIM as RE of the FMIF and as trustee of the MPF instructed WMS Chartered Accountants (**WMS**) to provide an opinion about what would be a fair and reasonable split of the likely proceeds from the Proceedings.

Particulars

The instructions were in writing and contained in an email from David Monaghan on behalf of LMIM to Aaron Lavell of WMS (and copied to the second and sixth defendant) dated 6 December 2010.

- 30B. On or about 14 March 2011 LMIM as RE of the FMIF and as trustee of the MPF instructed Allens Arthur Robinson (**Allens**) to provide advice as to whether a proposed split of proceeds from the Proceedings of 65% for the FMIF and 35% for the MPF was "legally acceptable" given that LMIM was in a position of conflict being the RE of the FMIF and the trustee of the MPF.

Particulars

The instructions were in writing and contained in emails from David Monaghan on behalf of LMIM to John Beckinsale of Allens dated 14 March 2011 and 17 March 2011.

- 30C. The instructions provided to WMS and Allens pleaded in paragraphs 30A and 30B above:
- (a) did not include copies of the Gujarat Contract, the Deed of Release or the Deed of Release and Settlement;
 - (b) did not otherwise state, as was the fact, that:
 - (i) settlement of the Proceedings was to be effected:
 - A. in part by a contract in the form of the Gujarat Contract, pursuant to which PTAL as mortgagee exercising power of sale would agree to sell the Property to Gujarat;
 - B. in part by a deed in the form of the Deed of Release to which LMIM as trustee of the MPF would not be a party;
 - C. in part by a deed in the form of the Deed of Release and Settlement to which LMIM as trustee of the MPF was not a party;
 - (ii) the consent by LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the documents in subparagraph (i) above;
 - (c) did not include a copy of the Deed of Priority or otherwise state, as was the fact, that the Deed of Priority included the provisions pleaded in paragraph 12 above;
 - (d) did not state, as was the fact, that:
 - (i) LMIM as trustee of the MPF funded the Proceedings as second mortgagee; and
 - (ii) drew down such funding against the MPF Bellpac Loan.
- 30D. On or about 7 March 2011 WMS provided a report containing the opinion sought and referred to in paragraph 30A above (**WMS Report**).
- 30E. On or about 28 March 2011 Allens provided the advice sought and referred to in paragraph 30B above (**Allens Advice**).

Deed Poll

31. On or about 21 June 2011, a Deed Poll was executed by the first to sixth defendants as directors of LMIM as RE of the FMIF and as trustee of the MPF.
- 31A. Prior to execution of the Deed Poll and prior to the payment pleaded in paragraph 35 below, each of the first to sixth defendants knew, or ought to have known, the facts pleaded in paragraphs 5-22, 24-30 and 30A-30E above.

Particulars

The best particulars of knowledge and the facts from which knowledge can be inferred that the plaintiff can presently provide are as follows:

- (a) Each of the first to sixth defendants as directors of LMIM had access to the books and records of that company which included:
- (i) the FMIF Bellpac Loan Agreement and Deeds of Variation;
 - (ii) the MPF Bellpac Agreement;
 - (iii) the FMIF Charge, the PTAL Mortgage and the Deed of Priority;
 - (iv) the MPF Charge, the MPF Mortgage and the Deed of Priority;
 - (v) loan statements showing the balance, from time to time, outstanding with respect to the FMIF Bellpac Loan;
 - (vi) loan statements showing the balance, from time to time, outstanding with respect to the MPF Bellpac Loan;
 - (vii) the existence of default under the FMIF Bellpac Loan;
 - (viii) statements showing the drawdown of costs including costs related to the funding of the Proceedings against the MPF Bellpac Loans;
 - (ix) in relation to the Proceedings, court documents, the Mediation Heads of Agreement, the Deed of Release, the Deed of Settlement and Release, the Gujarat Contract;
 - (x) conflict records dated 1 June 2010 and October 2010;
 - (xi) the Conflicts Management Policy dated July 2005 updated as at September 2009;
 - (xii) the Deed of Release;
 - (xiii) the Deed of Settlement and Release;
 - (xiv) the Gujarat Contract;
 - (xv) the WMS Report (which included the instructions provided by LMIM);
 - (xvi) the Allens Advice (which included the instructions provided by LMIM);
- (b) Each of the first to sixth defendants:
- (i) executed the Deed Poll which stated, inter alia, that they had given careful consideration to, inter alia, the circumstances described in the Background to the Deed Poll;
 - (ii) were informed of the proposed terms of settlement of the Proceedings on or about 10 and 24 November 2010;

- (iii) took part in directors' discussions about the terms of settlement of the Proceedings in or about March 2011;
 - (iv) were informed of the existence of the WMS Report;
 - (v) discussed with David Monaghan a draft of the WMS Report in December 2010;
 - (vi) were informed of the existence of legal advice about the proposed split of the proceeds of settlement of the Proceedings;
- (c) At material times until in or about June 2012, the first, second, third, fourth and sixth defendants were part of the LM Credit Committee and/or the LM Arrears Committee with access to the financial records of the FMIF and/or the MPF;
- (d) Additionally, in the case of the first defendant, he:
 - (i) executed the Deed of Priority;
 - (ii) executed the FMIF Bellpac Loan Agreement and the MPF Bellpac Loan Agreement;
 - (iii) was aware that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings such as rates from in or about August 2010;
 - (iv) was informed by the second defendant in March 2011 that the second defendant had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (iv) executed the Deed of Settlement and Release;
- (e) Additionally, in the case of the second defendant, she:
 - (i) executed the Deed of Priority;
 - (ii) was informed by David Monaghan in August 2010 that LMIM as trustee for the MPF was funding the proceedings as second mortgagee;
 - (iii) knew that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings and approved payments such as rates in or about August 2010;
 - (iv) was copied in on the email of 6 December 2010 providing instructions to WMS;
 - (v) was provided with a draft of the WMS Report on 21 December 2010;
 - (vi) instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (vii) was provided with a copy of the Allens Advice on 29 March 2011;
 - (viii) executed the Deed of Release;
- (f) Additionally, in the case of the third defendant, he:
 - (i) knew that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the

- Proceedings and approved payments such as rates in or about August 2010;
- (ii) was informed by the second defendant on 14 March 2011 that the second defendant had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (ii) was provided with a copy of the Allens Advice on 7 April 2011;
- (g) Additionally, in the case of the fourth defendant, she:
- (i) was informed by the second defendant on 14 March 2011 that the second defendant had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
- (h) Additionally, in the case of the sixth defendant, he:
- (i) was informed by David Monaghan in August 2010 that there was no funding agreement in place regarding LMIM funding the Proceedings and that one was not necessary because it was simply a situation of LMIM as trustee of the MPF as second mortgagee funding the proceedings;
 - (ii) was copied in on the email of 6 December 2010 providing instructions to WMS;
 - (iii) was provided with a draft version of the WMS report on 15 December 2010;
 - (iv) was provided with a copy of the Allens Advice on 7 April 2011;
 - (v) knew that LMIM as trustee of the MPF as second mortgagee was funding costs in relation to the Property other than the costs of the Proceedings in or about August 2010;
 - (vi) was informed by the second defendant on 14 March 2011 that the second defendant had instructed David Monaghan to seek advice from Allens regarding the split of the proceeds of settlement of the Proceedings to supplement the advice in the WMS Report;
 - (vii) executed the Deed of Settlement and Release and the Deed of Release;
- (i) Each of the first to sixth defendants ought to have known those facts because a reasonable person in the position of the first to sixth defendants would have identified those facts upon raising or making enquiry and upon considering the books and records available to them as set out in paragraph (a) of these particulars and the information set out in sub-paragraphs (b), (c), (d), (e), (f), (g) and (h) of these particulars.

32. The Deed Poll provided, inter alia, that:

- (a) **"Settlement Proposals** means the Bellpac Settlement and the Proceeds Split";
- (b) **"Proceeds Split** means the proposal between FMIF and MPF under which it is proposed to split the proceeds that it has recovered from the litigation in the ratio of 65% of the proceeds to the FMIF and 35% of the proceeds to MPF";
- (c) **"Bellpac Settlement** means the principal agreement that has been reached between LM and Gujarat pursuant to which LM will inter alia sell the Bellpac Land to Gujarat and settle the litigation with Gujarat for a total consideration of \$45.5 Million and the RE will pay \$1.3m to Coalfields to secure the withdrawal of certain caveats";

- (d) "The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation";
 - (e) "after giving full and comprehensive consideration to all of the relevant issues, the directors have concluded ..." inter alia:
 - (i) "there is a need for the FMIF RE to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF trustee";
 - (ii) "LM as trustee of MPF will comply with its general law fiduciary duties as a trustee if it agrees to the Settlement Proposals pursuant to which MPF will be obliged to release its security over the Bellpac Land".
33. At the time LMIM as trustee of the MPF agreed to fund the Proceedings the first to sixth defendants:
- (a) had not considered that MPF's contribution to the funding of the Proceedings was to be recognised by providing MPF with a share of any proceeds recovered by the litigation;
 - (b) had an expectation that if LMIM and PTAL were successful in the Proceedings and the Property was developed by LMIM as RE for the FMIF then:
 - (i) the amount owed under the FMIF Bellpac loan would be repaid in full; and
 - (ii) the amount owed under the MPF Bellpac loan would be repaid in part and possibly in full.
34. In reaching the conclusions and decision stated in the Deed Poll referred to in paragraph 32 above the first to sixth defendants:
- (a) failed to have proper regard or give adequate consideration to the fact that, in circumstances where, as they knew or ought to have known:
 - (i) pursuant to the Gujarat Contract, PTAL sold the Property to Gujarat as mortgagee exercising power of sale; and
 - (ii) in any event the Deed of Priority contains the terms pleaded in paragraph 12 above,LMIM as trustee of the MPF could not have prevented the sale of the Property to Gujarat under the Gujarat Contract by refusing to provide a release of the MPF Mortgage over the Property;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(a)(v), 31A(a)(vi), 31A(a)(vii), 31A(a)(ix), 31A(a)(xiv), 31A(b)(i), 31A(d)(i), 31A(d)(ii), 31A(e)(i) and 31A(i).

- (b) failed to have proper regard or give adequate consideration to the fact that there was no necessity for LMIM as RE of FMIF to reach agreement with LMIM as trustee of the MPF about sharing the amounts payable to PTAL under the Deed of Release or the Gujarat Contract because, as they knew or ought to have known:
 - (i) LMIM as trustee of the MPF was not a party to the Deed of Release nor the Gujarat Contract;
 - (ii) the agreement of LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(a)(v), 31A(a)(vi), 31A(a)(vii), 31A(a)(viii), 31A(a)(ix), 31A(a)(xii), 31A(a)(xiii), 31A(a)(xiv), 31A(b)(i), 31A(b)(ii), 31A(b)(iii), 31A(d)(i), 31A(d)(ii), 31A(d)(iv), 31A(e)(i), 31A(e)(viii), 31A(h)(vii) and 31A(i).

- (c) failed to have proper regard or give adequate consideration to the fact that, as they knew or ought to have known:
- (i) LMIM as trustee of the MPF was a subsequent mortgagee of the Property and a subsequent charge holder over the assets of Bellpac;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(b)(i), 31A(d)(i), 31A(e)(i) and 31A(i).

- (ii) the terms of the Deed of Priority included those pleaded in paragraph 12 above;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(iv), 31A(b)(i), 31A(d)(i), 31A(e)(i) and 31A(i).

- (iii) LMIM as trustee of the MPF was funding the Proceedings as second mortgagee and was drawing down such funding against the MPF Bellpac loan;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(iv), 31A(a)(vi), 31A(a)(viii), 31A(a)(x), 31A(a)(xi), 31A(d)(iii), 31A(e)(ii), 31A(e)(iii), 31A(f)(i), 31A(h)(i), 31A(h)(v) and 31A(i).

- (iv) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage;

Particulars

The plaintiff relies upon the particulars set out above in paragraphs 31A(a)(i), 31A(a)(iii), 31A(a)(v), 31A(a)(vii), 31A(a)(ix), 31A(a)(xii), 31A(a)(xiii), 31A(a)(xiv) and 31A(i).

- (v) PTAL was, as at 22 June 2011, owed the sum of \$52,480,469.12 by Bellpac comprising the Principal Amount, Interest, Other Moneys and Enforcement Expenses (as those terms are defined in the Deed of Priority); and

Particulars

The plaintiff relies upon the particulars set out above in paragraph 31A(a)(i), 31A(a)(ii), 31A(a)(iii), 31A(a)(v), 31A(a)(vii) and 31A(i).

- (vi) LMIM as trustee for the MPF was not entitled to any amount beyond that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;

Particulars

The plaintiff relies upon the particulars set out above in paragraph 31A above.

- (d) failed to instruct, or provide further instructions to Allens and WMS about the facts and circumstances pleaded in subparagraphs (a), (b) and (c) above or otherwise about the

terms of the Gujarat Contract, the Deed of Release or the Deed of Settlement and Release;

Particulars

The plaintiff relies upon the particulars set out above in paragraph 31A(a)(xv), 31A(a)(xvi), 31A(b)(iv), 31A(b)(v), 31A(b)(vi), 31A(d)(iv), 31A(e)(iv), 31A(e)(v), 31A(e)(vi), 31A(e)(vii), 31A(f)(ii), 31A(f)(iii), 31A(g)(i), 31A(h)(ii), 31A(h)(iii), 31A(h)(iv), 31A(h)(vi) and 31A(i).

- (e) in the premises pleaded in subparagraph (d) above, failed to ensure that the Allens Advice and the WMS Report were premised upon correct facts;
- (f) in the premises pleaded in subparagraphs (d) and (e) above:
 - (i) failed to provide proper instructions or further instructions to Allens and WMS;
 - (ii) failed to have proper regard or give adequate consideration to the fact the WMS Report and the Allens Advice omitted material matters;
 - (iii) nonetheless, placed reliance upon the Allens Advice and the WMS Report in signing the Deed Poll;
- (g) in the premises pleaded in subparagraphs (a), (b) and (c) above failed to have proper regard or give adequate consideration to the different interests of the FMIF and the MPF.

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

- 35. LMIM as trustee of the MPF received the sum of \$15,546,147.85 (**Settlement payment**) from the proceeds payable to PTAL as custodian of LMIM as RE of the FMIF pursuant to the terms of the:
 - (a) Gujarat Contract; and
 - (b) Deed of Release.

Particulars

- (a) on or about 21 June 2011, LMIM as trustee for the MPF received:
 - (i) the sum of \$12,747,810.53; and
 - (ii) separately, the sum of \$858,282.79;
 - (b) on or about 29 June 2011, an amount of \$4,545.94 was refunded by LMIM as trustee for the MPF to Gujarat for an overpayment made on settlement;
 - (c) on or about 8 September 2011, LMIM as trustee for the MPF received the sum of \$1,944,600.47.
- 36. On the basis of the conclusions and the decision recorded in the Deed Poll, LMIM as RE of the FMIF agreed to make and further caused, permitted or directed the Settlement payment to be made to LMIM as trustee of the MPF from the amounts payable to LMIM as RE of the FMIF and PTAL pursuant to the terms of the:
 - (a) Gujarat Contract; and
 - (b) Deed of Release.
 - 37. The Settlement payment was scheme property which ought to have been held by LMIM as RE of the FMIF for the benefit of the members of the FMIF.

- 37A. Had the first to sixth defendants had proper regard and given adequate consideration to the facts and matters pleaded in paragraph 34 above LMIM as RE of the FMIF would not have agreed to make, cause, permit or direct the Settlement payment to LMIM as trustee of the MPF and would have determined that:
- (a) LMIM as trustee of the MPF had no entitlement to be paid the Settlement payment or in the alternative, had no entitlement to receive any payment beyond that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) it was not in the interests of the members of the FMIF to do so; and
 - (c) it would cause detriment, in the form of depletion of its assets, to LMIM as RE of the FMIF if the Settlement payment was made or in the alternative, if an amount beyond that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount was paid to LMIM as trustee of the MPF.
- 37B. LMIM as trustee of the MPF accepted and retained the Settlement payment.

Contraventions of s 180 and 182 of the Corporations Act

38. At all material times in their capacity as directors of LMIM, the first to sixth defendants owed duties to LMIM as RE of the FMIF under:
- (a) section 180(1) of the Act and at general law to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in LMIM's circumstances, and occupied the office held by, and had the same responsibilities within LMIM as the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) section 182(1) of the Act and at general law not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to LMIM.
39. By causing LMIM as RE of the FMIF to agree to make and to cause, permit or direct the Settlement payment to be made to LMIM as trustee of the MPF the first to sixth defendants:
- (a) failed to exercise their powers and discharge their duties with a reasonable degree of care and diligence in breach of the duty pleaded in paragraph 38(a) above in the premises pleaded in paragraphs 34(a) to 34(f) and 37A above;
 - (b) improperly used their position as directors of LMIM to gain an advantage for the MPF in breach of the duty pleaded in paragraph 38(b) above in the premises pleaded in paragraphs 34(a), 34(b), 34(g) and 37A above.
- 39A. As a result of the breaches of duty pleaded in paragraph 39 above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, by the amount paid to it in excess of that which was necessary to reimburse the LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
- 39B. LMIM as RE of the FMIF has suffered damage being the amount of the Settlement payment or, in the alternative, the amount paid to it in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
40. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment or, in the alternative, the amount paid to it in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

LMIM's involvement in contraventions by directors

41. LMIM as trustee of the MPF knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

42. By reason of the matters pleaded in paragraph 39(b) and 41 above LMIM as trustee of the MPF was involved in the contravention of the duty pleaded in paragraph 39(b) above and was itself in contravention of section 182(2) of the Act.
- 42A. As a result of the breach of duty pleaded in paragraph 42 above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, by the amount paid to it in excess of that which was necessary to reimburse the LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
- 42B. As a result of the matters pleaded in paragraph 42A above and the contravention pleaded in paragraph 42 above, the LMIM as RE of the FMIF has suffered damage in the amount of the Settlement payment or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
43. In the premises LMIM as trustee of the MPF is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment or, in the alternative, the amount paid to it in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

Contravention of s 601FD of the Corporations Act

44. At all material times in their capacity as officers of LMIM as RE of the FMIF, the first to sixth defendants owed duties under:
- (a) section 601FD(1)(b) of the Act to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) section 601FD(1)(c) of the Act to act in the best interests of members of the FMIF and, if there is a conflict between the members' interests and the interests of the RE, give priority to the members' interests;
 - (c) section 601FD(1)(e) not to make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the FMIF.
45. By causing LMIM as RE of the FMIF to agree to make and to cause, permit or direct the Settlement payment to be made to LMIM as trustee of the MPF the first to sixth defendants:
- (a) failed to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively in breach of the duty pleaded in paragraph 44(a) above in the premises pleaded in paragraphs ~~34(a) to 34(f)~~ and 37A above;
 - (b) did not act in the best interests of the members of the FMIF and give priority to the interests of the members of the FMIF in breach of the duty pleaded in paragraph 44(b) above in the premises pleaded in paragraphs ~~34(a), 34(e), 34(g)~~ and 37A above;
 - (c) improperly used their position as officers of the RE of FMIF to gain an advantage for the MPF in breach of the duty pleaded in paragraph 44(c) above in the premises pleaded in paragraphs ~~34(a), 34(b), 34(g)~~ and 37A above.

- 45A. As a result of the breaches of duty pleaded in paragraph 45 above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, by the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
- 45B. As a result of the matters pleaded in paragraph 45A above and the contraventions pleaded in paragraph 45 above, the LMIM as RE of the FMIF has suffered damage in the amount of the Settlement payment or, in the alternative, in the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
46. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment or, in the alternative, in the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

LMIM's involvement in contraventions by officers

47. LMIM as trustee of the MPF knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-31 and 32-37, 37A and 37B above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

48. By reason of the matters pleaded in paragraphs 45 and 47 above LMIM was involved in the contraventions of the duties pleaded in paragraph 45 above and was itself in contravention of sections 601FD(1)(b), 601FD(1)(c) and 601FD(1)(e) of the Act.
- 48A. As a result of the breaches of duty pleaded in paragraph 48 above, the assets of LMIM as RE of the FMIF were depleted by the amount of the Settlement payment or, in the alternative, by the amount paid to it in excess of that which was necessary to reimburse the LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
- 48B. As a result of the matters pleaded in paragraph 48A above and the contraventions pleaded in paragraph 48 above, the LMIM as RE of the FMIF has suffered damage in the amount of the Settlement payment or, in the alternative, in the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse LMIM as trustee of the MPF for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.
49. In the premises, LMIM as trustee of the MPF is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount.

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

50. As former trustee of the MPF LMIM has a right of indemnity out of the assets of the MPF with respect to any liability of LMIM in these proceedings.
51. Any right of indemnity of LMIM as former trustee of the MPF operates as an equitable lien over the assets of the MPF.
52. The eighth defendant holds the assets of the MPF subject to any right of indemnity and lien of LMIM over those assets.

53. LMIM is insolvent.
54. By reason of the matters pleaded in paragraphs 50 to 53 above, the plaintiff is entitled to be subrogated to LMIM's right of indemnity and lien to the extent of LMIM's liability in these proceedings.

The Plaintiff claims the following relief:

1. As against the first defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the first defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) Costs.
2. As against the second defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the second defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount ;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) Costs.
3. As against the third defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the third defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) Costs.
4. As against the fourth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the fourth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
 - (c) Costs.
5. As against the fifth defendant:

- (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the fifth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
- (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
- (c) Costs.

6. As against the sixth defendant:

- (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the sixth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount;
- (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
- (c) Costs.

7. As against the seventh defendant:

- (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the seventh defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85 or, in the alternative, the amount paid to LMIM as trustee of the MPF in excess of that which was necessary to reimburse it for the contribution it made to the funding of the Proceedings together with interest at a commercial rate upon that amount ;
- (b) Interest under s 58 of the *Civil Proceedings Act 2011 (Qld)* on the amount in subparagraph (a) above from 8 September 2011 until the date of judgment; and
- (c) Costs.

8. As against the seventh and eighth defendant a declaration that:

- (a) The seventh defendant is entitled to be indemnified out of the assets of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
- (b) The seventh defendant has a lien or charge over the assets and undertakings of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
- (c) The plaintiff is entitled to be subrogated to the rights of the seventh defendant in respect of the assets of the MPF.

Signed:



Description: Solicitors for the Plaintiff

Dated: 14 May 2015 17 June 2015

NOTICE AS TO DEFENCE

Your Defence must be attached to your Notice of Intention to Defend.

SUPREME COURT OF QUEENSLAND
SUPREME COURT
OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 12317 of 2014

53w

- 1 JUL 2015

Plaintiff:

FILED
BRISBANE

LM INVESTMENT MANAGEMENT
LIMITED (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288

AND

First Defendant:

PETER CHARLES DRAKE

AND

Second Defendant:

LISA MAREE DARCY

AND

Third Defendant:

EGHARD VAN DER HOVEN

AND

Fourth Defendant:

FRANCINE MAREE MULDER

AND

Fifth Defendant:

JOHN FRANCIS O'SULLIVAN

AND

Sixth Defendant:

SIMON JEREMY TICKNER

AND

Seventh Defendant:

LM INVESTMENT MANAGEMENT
LIMITED (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
ACN 077 208 461

AND

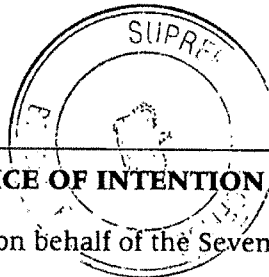
Eighth Defendant:

KORDAMENTHA PTY LTD
ACN 100 169 391 ~~AND CALIBRE CAPITAL
PTY LTD ABN 66 108 318 985~~ IN ITS
CAPACITY AS JOINT AND SEVERAL
TRUSTEES OF THE LM MANAGED
PERFORMANCE FUND

NOTICE OF INTENTION TO DEFEND

Filed on behalf of the Seventh Defendant

Form 6 Rule 139



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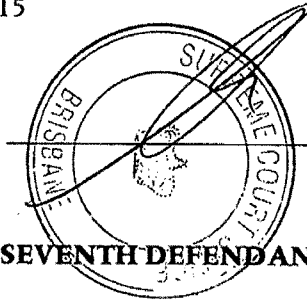
NOTICE OF INTENTION TO DEFEND

TAKE NOTICE that the Seventh Defendant intends to defend this proceeding.

The facts relied on by the Seventh Defendant are set out in the attached Defence.

Filed in the Brisbane Registry on 1 July, 2015

Registrar:



PARTICULARS OF THE SEVENTH DEFENDANT

Name: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) ACN 077 208 461**

Seventh Defendant's residential or business addresses: C/- FTI Consulting
22 Market Street
BRISBANE QLD 4000

Seventh Defendant's Solicitor's name and firm name: Ashley Tiplady
Russells

Seventh Defendant's Solicitor's business address: GPO Box 1402, Brisbane, Queensland, 4001

Seventh Defendant's Address for service: Level 18, 300 Queen Street, Brisbane, Queensland, 4000

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Signed: Russells. Russells
Russells

Description: Solicitors for the Seventh Defendant

Dated: 1 July, 2015

SUPREME COURT OF QUEENSLAND

**REGISTRY: Brisbane
NUMBER: 12317 of 2014**

Plaintiff: **LM INVESTMENT MANAGEMENT
LIMITED (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288**

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCINE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

Seventh Defendant: **LM INVESTMENT MANAGEMENT
LIMITED (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
ACN 077 208 461**

AND

DEFENCE

Filed on behalf of the Seventh Defendant

Form 18

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Eighth Defendant:

**KORDAMENTHA PTY LTD
ACN 100 169 391 ~~AND CALIBRE CAPITAL
PTY LTD ABN 66 108 318 985~~ IN THEIR ITS
CAPACITY AS JOINT AND SEVERAL
TRUSTEES OF THE LM MANAGED
PERFORMANCE FUND**

Filed in the Brisbane registry on | July 2015

DEFENCE ON BEHALF OF THE SEVENTH DEFENDANT

The seventh defendant relies upon the following facts in defence of the plaintiff's claim as set out in the further amended statement of claim filed 17 June 2015 ("FASC").

The seventh defendant:

- (a) adopts the definitions used in the FASC unless a contrary intention is expressed;
 - (b) refers to the first to sixth defendants as the "**Directors**"; and
 - (c) says that the seventh defendant is in liquidation and that this defence is prepared on the instructions of the liquidators, who do not have personal knowledge of all of the events the subject of the allegations in the FASC and by reason thereof the seventh defendant is unable to admit particular allegations that are made against the seventh defendant (the "**Liquidators' position**")
1. The seventh defendant admits the allegations in paragraph 1 of the FASC.
 2. As to paragraph 2 of the FASC, the seventh defendant:
 - (a) says that the first defendant was a director of the seventh defendant from 31 January 1997 until 9 January, 2015;
 - (b) says that the second defendant was a director of the seventh defendant from 12 September 2003 until 21 June 2012;
 - (c) says that the third defendant became a director of the seventh defendant on 22 June 2006 and remains a director as at the date of this defence;

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- (d) says that the fourth defendant became a director of the seventh defendant on 30 September 2006 and remains a director as at the date of this defence;
 - (e) says that fifth defendant was a director of the seventh defendant from 27 November 2007 until 30 September 2012;
 - (f) says that the sixth defendant was a director of the seventh defendant from 18 September 2008 until 13 July 2012; and
 - (g) otherwise does not admit the allegation to the extent that it is expressed as being relevant "at all material times" because it is unclear what are the material times the subject of that allegation.

3. As to paragraph 3 of the FASC, the seventh defendant:

- (a) admits the allegations in sub-paragraphs (a), (b), (c) and (d);
- (b) in response to sub-paragraph (e), admits that Mr Whyte is entitled to bring these proceedings in the name of LMIM as RE of the FMIF, subject to sub-paragraph (c) below;
- (c) says in response to sub-paragraph (e), that to the extent that these proceedings include relief claimed against the seventh defendant arising from any allegations concerning s.182 of the Act, it denies that Mr Whyte has any authority to bring such proceedings, because a claim pursuant to s.182 of the Act is available to a corporation in respect of its assets and not in respect of any property of a managed investment scheme.

4. The seventh defendant admits the allegations in paragraph 4 of the FASC.

4A. As to paragraph 4A of the FASC, the seventh defendant:

- (a) admits that Calibre Capital Pty Ltd purported to resign as alleged; and
- (b) does not admit that the purported resignation was effective as a matter of law for the reason that the effectiveness of the purported resignation is not a matter within the knowledge of the seventh defendant.

5. As to paragraph 5 of the FASC, the seventh defendant admits the allegation and says further that the seventh defendant was also a party to the agreement as RE of the FMIF.

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6. The seventh defendant admits the allegations in paragraph 6 of the FASC.
 7. The seventh defendant admits the allegations in paragraph 7 of the FASC on the basis that:
 - (a) it is a typographical error that the term "PTAL" has been omitted from the words in the first line ending "... *Bellpac granted to*" and that the term "PTAL" should be included therein;
 - (b) the land as described as "Balgownie No. 1 Colliery Wollongong", defined as the Property, is in fact a reference to all those pieces or parcels of land contained in Deed of Conveyance registered book 697 Number 898, excepting all those pieces or parcels of land situated on the Bellambi Village reserve in the county of Camden and Colony (now State of New South Wales) being allotments number 1 and 2 of block 6 having a frontage to Leahy Crescent and lying at the corner of Bellambi Road and John Street thence on the east by a line bearing North to the corner of Leahy Crescent and John Street aforesaid thence on the North by Leahy Crescent to the Northeast corner of Lot 3 of block 6 of the village of Bellambi aforesaid thence on the West by a line bearing South to the Southeast corner of Lot 3 of block 6 aforesaid and thence on the South by the Bellambi Road to the commencing point (which excepted land is more recently described as the land on limited qualified folio identifier A/53015) and the subject of registered mortgage No. 9481438R;
 - (c) the reference to a registered charge over Bellpac is a reference to the fixed and floating charge dated 21 March 2003 and registered in the Australian Register of Company Charges as No. 931141.
 8. As to paragraph 8 of the FASC, the seventh defendant:
 - (a) admits the allegation that the FMIF Bellpac Loan Agreement was varied;
 - (b) otherwise does not admit any particular variations that were effected, for the reason that no particulars have been provided of any variation that is to be alleged to be material to the matters the subject of the FASC.
 9. The seventh defendant admits the allegations in paragraph 9 of the FASC.
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10. The seventh defendant admits the allegations in paragraph 10 of the FASC.
11. As to paragraph 11 of the FASC, the seventh defendant:
- (a) admits the allegations in sub-paragraph (a) to the extent that a mortgage was granted by Bellpac to LMIM, but otherwise denies the allegations as untrue because:
 - (i) the MPF Mortgage was not over the same land that comprised the Property in that the MPF Mortgage did not encumber the land contained in Auto-Consol 8643-188 and Folio Identifier 130/751301, but instead and additionally secured additional lots described as Folio Identifier 66/751301 and Folio Identifier 67/751301;
 - (ii) the MPF Mortgage secured indebtedness of Great Pacific Capital Limited ACN 096 781 716 as debtor;
 - (iii) the seventh defendant does not admit that the MPF Mortgage was registered as third registered mortgage for the reason that the seventh defendant has made reasonable inquiries and by reason of the Liquidators' position is uncertain as to the truth of that allegation;
 - (b) admits that the MPF Charge was granted on the basis that it is a reference to the fixed and floating charge registered on 18 July 2006 in the Australian Register of Company Charges as no. 1327826.
12. As to the allegations in paragraph 12 of the FASC, the seventh defendant admits that a Deed of Priority was entered into as alleged but denies that the terms of clause 8 are as alleged because clause 8 in fact provides:
- "If an asset which is subject to a Security is sold pursuant to a bona fide sale for approximately fair market value and the full proceeds of sale are distributed in accordance with this Deed, each mortgagee must provide a release of their respective securities to the extent that they relate to the sold assets."*
13. The seventh defendant does not admit the allegations in paragraph 13 of the FASC by reason of the Liquidators' position.
14. The seventh defendant admits the allegations in paragraph 14 of the FASC.
15. The seventh defendant admits the allegations in paragraph 15 of the FASC.
16. The seventh defendant admits the allegations in paragraph 16 of the FASC.
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17. As to paragraph 17 of the FASC, the seventh defendant admits that the LASA was entered into, but denies that it was on or about 22 September 2004 for the reason that the LASA was dated 21 October 2004.
18. As to paragraph 18 of the FASC, the seventh defendant:
- (a) admits that an agreement on or about 3 December 2004 entitled "Amendment Deed Bellpac No. 1 Colliery" effected amendments to the LASA;
 - (b) otherwise does not admit the allegations as insufficient particulars are provided of which agreements are referred to by the plaintiff.
19. As to paragraph 19 of the FASC, the seventh defendant:
- (a) admits that there has been dispute in the past between Bellpac and Gujarat as alleged;
 - (b) otherwise does not admit the allegations for the reasons that insufficient particulars have been provided by the plaintiff to enable the seventh defendant to identify what is being alleged against it.
20. As to paragraph 20 of the FASC, the seventh defendant:
- (a) admits that Bellpac and Gujarat executed settlement deeds dated 12 September 2007 and 23 July 2008;
 - (b) does not admit the allegation that those settlement deeds are the same Settlement Deeds referred to in the FASC for the reason that no particulars have been provided of the dates of the Settlement Deeds;
 - (c) does not admit whether the settlement deeds were executed in order to resolve the Dispute for the reason that the seventh defendant has made reasonable inquiries and by reason of the Liquidators' position;
 - (d) otherwise does not admit the allegations to the extent that they might refer to other documents than the settlement deeds referred to in sub-paragraph (a) above.
21. As to paragraph 21 of the FASC, the seventh defendant:
- (a) admits that as at 2009 disputes existed between LMIM, PTAL, Bellpac, Gujarat and Coalfields;
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- (b) says further that the disputes included those set out in paragraph 22 of the FASC;
- (c) says further that by November 2009 the primary dispute involving LMIM was that:
- (i) Gujarat had reneged on its obligations under the Settlement Deeds;
 - (ii) shortly after 6 May 2009, Gujarat informed LMIM that Gujarat intended to continue to occupy the Bellpac land until 2023 for no consideration, but Gujarat was prepared to purchase the land for \$7M;
 - (iii) LMIM as RE for the FMIF and as trustee of the MPF was thereby put in a very difficult position in that the Property was practically unsaleable, with Gujarat the only real purchaser of the Property, and with LMIM receiving nothing from Bellpac towards interests or costs;
 - (iv) LMIM commenced proceedings against Gujarat with the objective to force Gujarat into a position where it would purchase the Property for a reasonable price.
22. The seventh defendant admits the allegations in paragraph 22 of the FASC.
23. As to paragraph 23 of the FASC, the seventh defendant:
- (a) admits that the Directors formed the view that LMIM as RE for the FMIF was not in a position to fund the Proceedings;
 - (b) admits the fact that LMIM as RE of the FMIF was not in a position to fund the Proceedings.
24. As to paragraph 24 of the FASC, the seventh defendant:
- (a) admits that it funded the Proceedings to the extent of \$1,380,431.51;
 - (b) says that the funding began shortly after LMIM was involved in the Proceedings because redemptions from the FMIF were frozen which resulted in no new funds flowing in from investors and an obligation to remit borrower's payments to LMIM's former funder (the Commonwealth Bank) and LMIM as RE for the FMIF was unable therefore to provide funding for the Proceedings;
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- (c) denies that it advanced no more than \$1,380,431.51 because by 6 December 2010, it had contributed the amount set out in below in respect of the three Proceedings and related litigation and other associated costs including receiver's fees and liquidator's fees ("the other costs");
- (d) denies that such funding was provided expressly as second mortgagee because the funding was provided to enable LMIM to continue to prosecute the Proceedings for the benefit of the FMIF and the MPF;
- (e) admits that the funding was drawn against the MPF Bellpac loan;
- (f) says that the funding was provided in the following circumstances:
- (i) as set out in paragraphs 21 to 23 above;
 - (ii) the Proceedings were highly complex and prospects were uncertain;
 - (iii) from shortly after the commencement of the Bellpac proceedings by LMIM, FMIF was in the position of being unable to provide funding, with the burden of funding the litigation falling solely on LMIM as trustee of the MPF and it being 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 Proceedings;
 - (iv) funding commenced in July 2009;
 - (v) the seventh defendant considered, as at 1 June 2010 and as recorded in a "conflict record" dated that date, the potential conflict between the position of LMIM as RE for the FMIF and LMIM as trustee for the MPF arising by reason of LMIM as trustee for the MPF providing the funding for the benefit of LMIM as RE for the FMIF and resolved to approve the ongoing litigation and strategies so as to maximize the best return;
 - (vi) the seventh defendant considered, as at October 2010 and as recorded in a further "conflict record", the potential conflict between the position of LMIM as RE for the FMIF and
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LMIM as trustee for the MPF arising by reason of LMIM as trustee for the MPF providing the funding for the benefit of LMIM as RE for the FMIF and resolved to approve the ongoing funding;

(vii) as the outcome of the litigation was so uncertain, and the possible methods of resolving the litigation so varied, LMIM did not consider it appropriate to enter into any formal agreement to split the proceeds at that time;

(viii) as at 6 December, 2010, the funding provided by FMIF and MPF was as follows:

MPF had contributed \$1,638,438.00 (91%)

FMIF had contributed \$ 161,471.00 (9%)

Total contributions \$1,799,909.00

(ix) on 9 November 2010, the parties entered the Mediation Heads of Agreement, which was non-binding, on terms that LMIM considered at that stage to be very highly advantageous;

(x) in circumstances where the Mediation Heads of Agreement was not binding and negotiations for any purchase of the Property by Gujarat needed to continue in order to achieve a binding agreement, there was a prospect of a significant financial benefit to both LMIM as RE of the FMIF and LMIM as trustee of the MPF if LMIM as trustee of the MPF continued to fund the costs of the ongoing negotiations.

25. The seventh defendant admits the allegations in paragraph 25 of the FASC.

26. The seventh defendant admits the allegations in paragraph 26 of the FASC, and on the assumption that the reference in paragraph 26(a) to the "liquidator of LMIM" is a typographical error and should be a reference to "liquidator of Bellpac".

27. The seventh defendant admits the allegations in paragraph 27 of the FASC and says further that one aspect of the negotiation included the reduction in the amount to be paid by Gujarat to PTAL as Custodian of LMIM as RE for FMIF from \$65M to \$45.5M, which figure was still significantly in excess of the sum of \$7M which Gujarat had proposed prior to the Bellpac proceedings

being commenced and being an amount which would not have been received by LMIM as RE for FMIF in the absence of the Proceedings.

28. The seventh defendant admits the allegations in paragraph 28 of the FASC.
29. The seventh defendant admits the allegations in paragraph 29 of the FASC.
30. The seventh defendant admits the allegations in paragraph 30 of the FASC.
- 30A. The seventh defendant admits the allegations in paragraph 30A of the FASC.
- 30B. The seventh defendant admits the allegations in paragraph 30B of the FASC.
- 30C. As to paragraph 30C of the FASC, the seventh defendant:
- (a) admits the allegation in subparagraph (a) and says further that the three documents therein referred to did not exist as at 14 or 17 March 2011;
 - (b) denies as untrue the allegations in subparagraph (b) because:
 - (i) the instructions, provided to WMS and Allens did refer to documents which were to be executed and which would encompass the matters referred to in that subparagraph, by inclusion of the 6 December 2010 email and accompanying documents referred to in paragraph 30A of the FASC; and
 - (ii) Allens in fact had copies of all relevant transactional and security documents the subject of the disputes in the Proceedings, as Allens was then the solicitors for the seventh defendant in documenting the resolution of the Proceedings;
 - (c) as to the allegations in subparagraph (c), it:
 - (i) does not admit the allegations for the reason that despite reasonable enquiry and in the circumstances of the Liquidators' position, the seventh defendant remains uncertain as to the truth or otherwise of the allegation; and
 - (ii) says that Allens and WMS had available to them all security documents, by reason of, in respect of Allens, the matters in (b) above and, in respect of WMS, the availability to WMS of all security documents through a secure website.
 - (d) as to subparagraph (d):
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- (i) denies that the instructions did not disclose that LMIM as trustee of the MPF did not fund the proceedings, because the instructions did state that fact;
 - (ii) denies that the instructions did not state that LMIM as trustee of the MPF was the second mortgagee, because they did disclose that fact;
 - (iii) admits that the instructions did not identify the precise loan account to which the funds advanced for the litigation were debited to;
 - (iv) denies that LMIM as trustee of the MPF funded the Proceedings as second mortgagee because such allegation is untrue as the funding was not provided "as second mortgagee", but as if it were a litigation funder in the circumstances set out in paragraphs 21 to 24 above.

30D. The seventh defendant admits the allegations in paragraph 30D of the FASC.

30E. The seventh defendant admits the allegations in paragraph 30E of the FASC.

31. The seventh defendant admits the allegations in paragraph 31 of the FASC.

31A. The seventh defendant does not admit the allegations in paragraph 31A of the FASC, because whether the first to sixth defendants knew or ought to have known of those matters is not within the knowledge of the seventh defendant in the circumstances of the Liquidators' position and pending the delivery of defences on behalf of the first to sixth defendants, the seventh defendant is unable to admit the allegation.

32. The seventh defendant admits the allegations in paragraph 32 of the FASC.

33. As to paragraph 33 of the FASC, the seventh defendant:

- (a) does not admit the existence of any agreement by LMIM as trustee of the MPF to fund the proceedings as alleged, because that is not a matter within its own knowledge and in the circumstances of the Liquidators' position, and the seventh defendant says further that pending provision of particulars of the alleged agreement, the seventh defendant is unable to respond further to the allegation;
- (b) otherwise denies the allegations because, from the time that LMIM as trustee for the MPF commenced to fund the litigation, as alleged

above, it was always 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.

34. As to paragraph 34 of the FASC, the seventh defendant:
- (a) does not admit the state of knowledge of the first to sixth defendants despite having made reasonable inquiries and in the circumstances of the Liquidators' position;
 - (b) denies that the first to sixth defendants failed to have regard to all relevant matters for their consideration before reaching the conclusions and decisions stated in the Deed Poll for the reasons that the Directors did have regard to all relevant matters, as is recited and stated in the Deed Poll.
 - (c) denies that the first to sixth defendants failed to have regard to such of the facts alleged in sub-paragraphs (a), (b) and (c) as were relevant, because they did have regard to such of those facts as were relevant, namely, the facts that:
 - (i) LMIM as trustee of the MPF was a second registered mortgagee;
 - (ii) LMIM as trustee of the MPF could have prevented the sale to Gujarat and the settlement at any time by ceasing to fund the Proceedings and the other costs; and
 - (iii) it was in the interest of LMIM as RE for the FMIF and LMIM as trustee of the MPF that the sale and settlement proceed in, or similar to, the form agreed to in the Mediation Heads of Agreement;
 - (d) says that to the extent that the plaintiff alleges that the first to sixth defendants failed to have regard to the matters set out in paragraphs 34(b), 34(c)(ii), 34(c)(iv) and 34(c)(v), the seventh defendant denies that those are matters to which the first to sixth defendants were required to have regard, because they were either irrelevant, or of only limited relevance, to the conclusion and decision stated in the Deed Poll;
 - (e) says that to the extent that the plaintiff alleges that the first to sixth defendants failed to have regard to the matters set out in paragraph

34(c)(iii), the seventh defendant denies that that is a matter to which the first to sixth defendants were required to have regard, because LMIM as trustee for the MPF was not funding the Proceedings as second mortgagee;

- (f) denies as untrue that Allens and WMS were not properly instructed about all relevant matters concerning the transactions affecting the MPF and FMIF as set out above, because WMS and Allens were fully instructed with all relevant matters as set out in the email from Mr Monaghan to Allens dated 6 December 2010, and the emails dated 14 March 2011 and 17 March, 2011 including attachments referred to in paragraphs 30A and 30B of the FASC;
- (g) denies that the Allens Advice and the WMS Report were premised upon matters other than correct facts, because those advices were premised upon all matters that were relevant, including, as alleged in paragraph 34(c) above;
- (h) denies that the Directors failed to have regard to the different interests of LMIM as RE of the FMIF and as trustee of the MPF, because of the matters alleged in paragraphs 21 and 24 above.

35. As to paragraph 35 of the FASC, the seventh defendant:

- (a) denies the allegations as untrue because the true facts are as alleged in subparagraphs (b) and (c) below;
- (b) says that the Gujarat contract, Deed of Release and the Deed of Settlement and Release were all executed on 21 June 2011 with simultaneous effect and with immediate completion on that date ("**Completion**");
- (c) says that the Gujarat contract, Deed of Release and the Deed of Settlement and Release all completed on 21 June 2011 ("**Settlement date**");
- (d) says that at Completion, PTAL as custodian for LMIM as RE of the FMIF was entitled to receive:
 - (i) \$35.5M pursuant to clause 7 of the Deed of Release; and
 - (ii) \$10M pursuant to clause 16.7 of the Gujarat contracttogether the "**Gujarat settlement payment**".

(e) says that of the Gujarat settlement payment, LMIM as RE for the FMIF, by its lawyers Allens in their letter dated 21 June 2011 to Gujarat, directed Gujarat to pay the Gujarat settlement payment to seven different payees, by drawing nine separate bank cheques, totalling \$50,111,300.88 (being the amount of the Gujarat settlement payment plus GST and conveyancing adjustments, less \$5.5M which was to be held as controlled monies and payable on the extended settlement date), including the cheque set out in paragraph (f)(i) below;

(f) says that LMIM as trustee of the MPF received a sum of money upon and after Completion:

(i) by its receipt of a bank cheque dated 17 June 2011 in the sum of \$13,606,093.32; and

(ii) on the extended settlement date LMIM as trustee of the MPF received a further bank cheque dated 8 September 2011 in the sum of \$1,944,600.47,

both cheques amounting to a total sum of \$15,550,693.79¹
("Litigation funding fee");

(g) says that on the extended settlement date, LMIM as RE for the FMIF received \$3,611,405.51 being the balance of the monies payable from the Gujarat settlement payment plus GST and adjustments; and

(h) in the premises, says that the Litigation funding fee was paid to it out of the proceeds of the amounts payable to PTAL as custodian of LMIM as RE for the FMIF pursuant to the terms of the Gujarat Contract and the Deed of Release.

36. As to paragraph 36 of the FASC, the seventh defendant admits the allegation save that the reference to a "Settlement payment" is a reference to the Litigation funding fee as set out in paragraph 35 above.

37. As to paragraph 37 of the FASC, the seventh defendant:

(a) denies the allegations because of the matters alleged in paragraph 35 and sub-paragraphs (b) to (d) below;

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- (b) says that LMIM as RE for the FMIF had a legal entitlement at Completion to the entire Gujarat settlement payment;
- (c) says that the entire Gujarat settlement payment less adjustments was recorded in the accounts of LMIM as RE for the FMIF as:
- (i) \$42,930,417.25 on 22 June, 2011; and
- (ii) \$5,566,005.98 on 8 September, 2011;
- (d) says that LMIM as RE for the FMIF directed, as it was entitled to do, part of the Gujarat settlement payment, to LMIM as trustee for the MPF, as it similarly directed other parts of the Gujarat settlement sum to another six parties.
- 37A. The seventh defendant denies the allegations in paragraph 37A of the FASC because:
- (a) the first to sixth defendants did give proper regard and adequate consideration to all matters that were relevant to the conclusions and decisions stated in the Deed Poll, as is recorded in the Deed Poll;
- (b) having given proper regard and given adequate consideration to all facts and matters that were relevant, as set out in paragraphs 21 to 29, 30A to 31, 34 to 37 above, LMIM as RE of the FMIF properly determined that LMIM as trustee of the MPF was entitled to the Litigation funding fee;
- (c) the payment of the Litigation funding fee was in the interests of the members of the FMIF;
- (d) as regards sub-paragraph (c), the payment of the Litigation funding fee fairly reflected the value to the members of the FMIF of the funding provided by the LMIM as trustee of the MPF, for the reasons set out in paragraphs 35 to 37 above.
- 37B. As to paragraph 37B of the FASC, the seventh defendant:
- (a) admits that it, as trustee of the MPF, received the sum of \$15,550,693.79, being the Litigation funding fee, by two bank cheques as directed by LMIM as RE for the FMIF;
- (b) says that the receipt of the Litigation funding fee was in the circumstances of the matters alleged in paragraphs 35 to 37A above.
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38. As to paragraph 38 of the FASC, the seventh defendant:
- (a) admits that the first to sixth defendants owed duties to LMIM in its own capacity under s.180 and s.182 of the Act;
 - (b) denies that the first to sixth defendants owed duties to LMIM as responsible entity of the FMIF, because s.180 and s.182 are of no application to the officers of a responsible entity of a registered scheme, in circumstances where the statutory obligations under the Act on the officers of the responsible entity of a registered scheme are provided by s.601FD of the Act.
39. The seventh defendant denies the allegations in paragraph 39 of the FASC because:
- (a) there were no such duties owed by the first to sixth defendants to LMIM as RE of the FMIF for the reasons alleged in paragraph 38 above; and
 - (b) the first to sixth defendants did nothing to breach their duties, for the reasons set out in paragraphs 35 to 37A above.
- 39A. As to paragraph 39A of the FASC, the seventh defendant:
- (a) denies the allegations because of the matters alleged in paragraphs 38 and 39 above;
 - (b) otherwise denies the allegations, because the true facts are as alleged in paragraphs 35 to 37A above.
- 39B. The seventh defendant denies the allegations in paragraph 39B of the FASC because of the matters alleged in paragraph 39A above.
40. The seventh defendant denies the allegations in paragraph 40 of the FASC because the first to sixth defendants are not liable to pay to the plaintiff any compensation or damages for alleged contravention of s.180 and s.182 of the Act for the reasons set out in paragraphs 38 to 39B above.
41. As to paragraph 41 of the FASC, the seventh defendant:
- (a) admits that it knew of the matters pleaded in paragraphs 1(b), 1(c), 2 (subject to the qualifications set out in paragraph 2 above), 5-13 (subject to the qualifications in paragraphs 5 to 13 above), 17 to 31
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(subject to the qualifications in paragraphs 17 to 31 above), of the FASC;

(b) denies that it knew of any wrongdoing on the part of the seventh defendants because it did not know of any such wrongdoing or breach of any duty, for the reasons set out in paragraphs 31 to 37 above.

42. The seventh defendant denies the allegations in paragraph 42 of the FASC because of the matters alleged in paragraphs 38 to 41 above.

42A. The seventh defendant denies the allegations in paragraph 42A of the FASC because of the matters alleged in paragraphs 38 to 42 above.

42B. The seventh defendant denies the allegations in paragraph 42B of the FASC because of the matters alleged in paragraphs 38 to 42A above.

43. As to paragraph 43 of the FASC, the seventh defendant:

(a) denies that the seventh defendant is liable to pay to the plaintiff compensation under s.1317H of the Act, as alleged, because of the matters alleged in paragraphs 35 to 37A and 38-42B above;

(b) says that the seventh defendant acted honestly in respect of all of the matters alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above; and

(c) in the circumstances of the matters alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above and in the event of a Court finding that the seventh defendant has or may have contravened a civil penalty provision or been in default, the seventh defendant is entitled to relief under s.1317S and/or s.1318 of the Act.

44. As to paragraph 44 of the FASC, the seventh defendant:

(a) admits the allegations in respect of the periods during which each of the first to sixth defendants were officers of LMIM as RE of the FMIF, as alleged in paragraph 2 above;

(b) otherwise denies the allegations, because no duties were owed by the first to sixth defendants for any period during which any of them was not an officer.

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45. The seventh defendant denies the allegations in paragraph 45 of the FASC because of the matters alleged in paragraphs 35 to 37A above.
- 45A. As to paragraph 45A of the FASC, the seventh defendant denies the allegation, because the first to sixth defendants did nothing to breach their duties, because of the matters alleged in paragraphs 35 to 37A above.
- 45B. The seventh defendant denies the allegations in paragraph 45B of the FASC because of the matters alleged in paragraphs 45 and 45A above.
46. As to paragraph 46 of the FASC, the seventh defendant:
- (a) denies that the first to sixth defendants are liable to pay to the plaintiff compensation under s.1317H of the Act or damages of general law as alleged, because of the matters alleged in paragraphs 35 through 37A and 45-45B above;
 - (b) says that the first to sixth defendants acted honestly in respect of all of the matters alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above;
 - (c) in the circumstances of the matters alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above and in the event of a Court finding that any or all of the first to sixth defendants have or may have contravened a civil penalty provision or have been negligent, in default or in breach of trust or breach of duty, then the first to sixth defendants are entitled to relief under s.1317S and/or s.1318 of the Act.
47. As to paragraph 47 of the FASC, the seventh defendant:
- (a) admits that it knew of the matters pleaded in paragraphs 1(b), 1(c), 2 (subject to the qualifications set out in paragraph 2 above), 5-13 (subject to the qualifications in paragraphs 5 to 13 of this defence), 17 to 32 except 31A (subject to the qualifications in paragraphs 17 to 32 above), of the FASC;
 - (b) denies that it knew of any wrongdoing, because it did not know of any such wrongdoing or breach of any duty as set out in paragraphs 33 to 37B above.
48. The seventh defendant denies the allegations in paragraph 48 of the FASC for the matters alleged in paragraphs 45 to 47 above.
-

48A. As to paragraph 48A of the FASC, the seventh defendant denies the allegation because:

- (a) the first to sixth defendants did nothing to breach their duties, for the reasons set out in paragraphs 45 through 47A above;
- (b) the assets of the LMIM as RE for the FMIF were not depleted, but rather, were augmented from being practically worthless in the circumstances of an unsaleable mortgage given Gujarat's claim with respect to the Property and hence Gujarat being the only real potential purchaser of the Property to being approximately \$30M by the conduct of the seventh defendant as alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above.

48B. The seventh defendant denies the allegations in paragraph 48B of the FASC for the reasons set out in paragraphs 48 and 48A above.

49. As to paragraph 49 of the FASC, the seventh defendant:

- (a) denies as untrue that the seventh defendant is liable to pay to the plaintiff compensation under s.1317H of the Act, as alleged, because of the matters alleged in paragraph 35 to 37A and 47-48B above;
- (b) says that the seventh defendant acted honestly in respect of all of the matters alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above; and
- (c) in the circumstances of the matters alleged in paragraphs 21 to 29, 30A to 31, 34 to 37A above and in the event of a Court finding that the seventh defendant has or may have contravened a civil penalty provision or been in default, the seventh defendant is entitled to relief under s.1317S and/or s.1318 of the Act.

50. As to paragraph 50 of the FASC the seventh defendant:

- (a) denies that it has any liability in these proceedings because of the matters alleged above;
- (b) says, to the extent that it is found to have any liability in these proceedings, it admits that it has a right of indemnity out of the assets of the MPF.

51. The seventh defendant admits the allegations in paragraph 51 of the FASC.

-
52. The seventh defendant admits the allegations in paragraph 52 of the FASC.
53. The seventh defendant admits the allegations in paragraph 53 of the FASC.
54. As to paragraph 54 of the FASC, the seventh defendant:
- (a) denies that it has any liability to the plaintiff in these proceedings, because of the matters alleged above; and
 - (b) says to the extent that it is held to have any liability, then any such liability is liable to be enforced directly against the eighth defendant as current trustee of the MPF.

Signed: *Russells Russells*

Description: Russells Law
Solicitors for the Seventh Defendant

Dated: 1 July 2015

This pleading was settled by Graham Gibson QC and John Peden of Counsel.

NOTICE AS TO REPLY

You have 14 days within which to file and serve a reply to this defence. If you do not do so, you may be prevented from adducing evidence in relation to allegations of fact made in this defence.

Cor. Jackson J
leave to file and read
together with exhibits
any hereto
21 JUL 2015
ST.

SUPREME COURT OF QUEENSLAND

FILED
BRISBANE

REGISTRY: Brisbane
NUMBER: 12317/14

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

SUBMISSIONS OF THE APPLICANT PLAINTIFF

Summary

1. By this application the plaintiff seeks a direction, pursuant to section 59 of the *Trusts Act 1973* (Qld), that:
 - (a) the interests of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 in its capacity as responsible entity of the LM First Mortgage Income Fund as plaintiff have been and continue to be represented in these proceedings by David Whyte, as court appointed receiver of the property of the LM First Mortgage Income Fund and person responsible for ensuring it is wound up pursuant to its constitution, pursuant to the order of Dalton J in proceedings numbered 3383/2013 and dated 21 August 2013; and

- (b) the interests of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 in its own capacity and in its capacity as former trustee of the LM Managed Performance Fund as seventh defendant have been and continue to be represented in these proceedings by the liquidators of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461, Mr John Park and Ms Ginette Muller.
2. LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 is on both sides of the record in these proceedings. It is suing and being sued in different capacities.
 3. Section 59 appears to be a procedural provision (discussed further below) which enables a trustee acting in different capacities to be on both sides of the record in a proceeding provided directions are sought from the Court as to representation of the parties.
 4. The orders made by Dalton J on 21 August 2013 appointing Mr Whyte as Receiver of the property of the LM First Mortgage Income Fund and as the person responsible for ensuring it is wound up pursuant to its constitution have effectively resolved the question of representation in these proceedings in that:
 - (a) Mr Whyte represents the interests of the plaintiff in its capacity as Responsible Entity of the LM First Mortgage Income Fund; and
 - (b) the Liquidators of LM Investment Management Limited remain appointed and represent the interests of that entity as seventh defendant,

such that no direction beyond confirmation and maintenance of the status quo is sought or necessary.
 5. The Liquidators of the seventh defendant do not seek any alteration to the current representative parties for the plaintiff and seventh defendant.
 6. Additionally, Mr Whyte also seeks a direction that it is appropriate that he prosecute the claim in the proceedings arising out of s 182 of the *Corporations Act 2001* (Cth) under the authorization of the order of Dalton J.
 7. This direction is sought in response to paragraph 3 (c) of the seventh defendant's defence (**Defence**)¹ which pleads that:

"to the extent that these proceedings include relief claimed against the seventh Defendant arising from allegations concerning s 182 of the Act, it denies that Mr Whyte has any authority to bring such proceedings because a claim pursuant to s 182 of the Act is available to a corporation in respect of its assets and not in respect of any property of a managed investment scheme".

¹ CFI-53

8. Given that the Defence raises a question of whether the proceedings fall within the terms of the order of Dalton J, Mr Whyte seeks a direction from the Court that it is appropriate for him to prosecute the proceedings which include the claim for compensation pursuant to s 1317H.
9. Leave to proceed was sought from the Court in relation to the proceedings against the seventh defendant and was granted by order of Mullins J of 21 February 2015. The Liquidators:
 - (a) consented to the plaintiff being granted leave to commence these proceedings against the seventh defendant (at the time they were represented by Clayton Utz);
 - (b) have not sought to revoke such leave (pursuant to the liberty to apply provision contained in the order for leave); and
 - (c) have to date represented the company in these proceedings.

Background

LMIM, the Liquidators & the Receiver

10. LM Investment Management Limited (Receivers and Managers Appointed) (in Liquidation) (LMIM), the Responsible Entity (RE) of the LM First Mortgage Income Fund (FMIF), was placed into liquidation on 1 August 2013.²
11. Mr David Whyte was appointed, by order of Dalton J made on 21 August 2013 (**Appointment Order**) pursuant to s 601NF(1) of the *Corporations Act 2001* (Cth) (**Corps Act**), to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution.³
12. Mr Whyte was also appointed pursuant to s 601NF(2) of the Corps Act as receiver of the property of the FMIF.
13. Pursuant to paragraph 7(b) of the Appointment Order (and without derogating from the powers he was given under that order as Receiver pursuant to s 420 of the Corps Act), Mr Whyte is authorised to, inter alia:

“bring, defend or maintain any proceedings on behalf of FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.”
14. It is clear that this paragraph of the Appointment Order was intended to address the fact that the FMIF is not a legal entity and it is LMIM as RE (and trustee) which would hold the title or legal rights to property and thus be the relevant party for the purpose of bringing proceedings.

² Affidavit of Mr Whyte exhibit DW-3

³ Affidavit of Mr Whyte exhibit DW-1

The claim against the directors & seventh defendant in these proceedings

15. LMIM is on both sides of the record. It is suing and being sued in different capacities; that is, as plaintiff it sues in its capacity as RE of the FMIF and as seventh defendant it is sued in its capacity as LMIM as former trustee of the MPF.
16. In the proceedings the plaintiff sues each of the directors of LMIM for compensation pursuant to s 1317H of the Corps Act in respect of damage suffered by LMIM as RE of the FMIF as a consequence of a breach by the directors of, inter alia:
 - (a) Section 601FD(1)(e) of the Corps Act (the duty of an officer of a responsible entity not to make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or any other person or to cause detriment to the members of the scheme); and
 - (b) Section 182(1) of the Corps Act (the duty of a director of a corporation not to improperly use their position to gain an advantage for themselves or someone else or to cause detriment to the corporation).
17. Both sections 601FD(1)(e) and 182(1) are civil penalty provisions.⁴
18. As against the seventh defendant, LMIM, the claim made in the proceeding is for compensation pursuant to s 1317H of the Corps Act by reason of the fact that LMIM as trustee of the MPF was involved in the contravention by the directors of ss 601FD(1)(e) and 182(1). Section 601FD(3) provides that a person who is involved in a contravention of s 601FD(1) contravenes the section. Similarly, s 182(2) provides that a person who is involved in a contravention of s 182(1) contravenes the sub-section.
19. The conduct of the directors complained of involves the paying away of trust monies of the FMIF by LMIM as RE of the FMIF (being the proceeds of a settlement of litigation and the sale of property over which FMIF held a first registered mortgage) to LMIM as trustee of the MPF as part of an alleged arrangement for litigation funding provided by the MPF. It is alleged that LMIM as trustee of the MPF received and accepted the payment with certain knowledge, including knowledge that the payment was scheme property which ought to have been held by LMIM as RE of the FMIF for the benefit of members of the FMIF.⁵
20. In exercise of the power in paragraph 7(b) of the Appointment Order, this proceeding was commenced by claim filed on 19 December 2014.⁶
21. Consistent with the terms of paragraph 7(b) of the Appointment Order the plaintiff is named as:

⁴ See s 1317E

⁵ See para [37] and paras [41] and [47]

⁶ Claim & Statement of Claim CFI-1

"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".

22. The plaintiff also claims declarations that the seventh defendant is entitled to be indemnified out of the assets of the MPF (of which LMIM was formerly trustee) in respect of its liability to the plaintiff and that the seventh defendant has a lien or charge over the assets and undertakings of the MPF in respect of its liability to the plaintiff.

Section 59 of the Trusts Act

Relevance of the section

23. The proposition is stated in *Neale v Turton* (1827) 130 ER 725:

"There is no principle by which a man can be at the same time plaintiff and defendant."

24. Section 59 of the *Trusts Act 1973 (Qld)* (**Trusts Act**) creates an exception to this general proposition.⁷

Judicial and other consideration of s 59

25. The following extract appears in the Queensland Law Reform Commission discussion paper entitled "*A Review of the Trusts Act 1973 (Qld)*" December 2012 (footnotes omitted).⁸

"9.289 The provision is procedural only it provides an exception to the general rule that a person may not be both plaintiff and defendant in the same action. The Commission explained in its 1971 Report that:

'It is a slowly vanishing rule of practice that in legal proceedings a party may not appear on both sides of the record, i.e. may not appear both as plaintiff and defendant in the same action. This sometimes creates difficulties e.g. where a person, who is an (or the only) executor or trustee of an estate, is also a beneficiary and wishes in that character to enforce a claim against the estate: cf Rubin v McNamara [1969] QWN 18. Clause 59 will enable such proceedings to be instituted, provided, however, that the trustee takes directions as to the manner in which differing interests are to be represented.'

26. Similar commentary appears in the Queensland Law Reform Commission Report entitled "*A Review of the Trust Act 1983*" Report No. 71 in December 2013.⁹
27. Commentary in Ford & Lee *The Law of Trusts* appears to accept that s 59 recognizes that whilst the trust is not an entity there are differing interests/separate obligations that an entity can owe when it acts as trustee.¹⁰

⁷ Note that a very similar provision also appears in the *Public Trustee Act 1978 (Qld)*

⁸ Queensland Law Reform Commission "*A Review of the Trusts Act 1973 (Qld)*" Discussion Paper WP No. 70 December 2012

⁹ At paragraphs 5.161 to 5.163

¹⁰ H.A.J. Ford & W.A. Lee *et al* Thomson Reuters, *The Law of Trusts* (at 15 May 2012) [1.6410]

28. Provisions similar to s 59 exist in Western Australia and New Zealand.¹¹ Also, *the Public Trustee Act 1978* (Qld) contains a similar provision in s 137 which allows the Public Trustee to sue itself in different capacities and similar provisions exist in the Public Trustee and Public Guardian legislation in other Australian states and New Zealand.¹²
29. There is little in the way of case authority on the section (or the equivalents noted above) and that which exists does not contain any substantive analysis of the section nor any consideration of an application for directions under the section.¹³

The nature of the claim against the seventh defendant – trustee recouping trust assets

30. The action is being brought by LMIM as trustee of a fund against the same entity but in a different capacity.
31. In so far as the plaintiff, LMIM as RE, is seeking to recover compensation for the scheme it does so as trustee.
32. On the basis of the terms of s 1317H(4) of the Corps Act it is contended that it is the RE that is entitled to “*recover the compensation on behalf of the scheme*” where a “*scheme*” has suffered damage as a consequence of a breach of a civil penalty provision (such as s 182).¹⁴
33. A claim for compensation under s 1317H of the Corps Act would be payable to the Plaintiff by reason of the fact that the alleged conduct involves the paying away of trust property in breach of, inter alia, duties owed by directors pursuant to s 601 FD, in which it is alleged that the Seventh Defendant was involved.
34. Section 1317H is in the following terms:

“1317H Compensation orders--corporation/scheme civil penalty provisions

Compensation for damage suffered

- (1) *A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:*
- (a) *the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and*
 - (b) *the damage resulted from the contravention.*

The order must specify the amount of the compensation.

¹¹ See s 57 of the *Trustees Act 1962* (Western Australia); s 33A of the *Trustee Act 1956* (New Zealand)

¹² See s 21 *NSW Trustee and Guardian Act 2009* (New South Wales); s 52 *Public Trustee Act* (Northern Territory); s 26 *Public Trustee Act 1985* (Australian Capital Territory); s 120 *Public Trust Act 2001* (New Zealand)

¹³ See schedule A to these submissions which sets out some of the decisions

¹⁴ See s 1317E of the Corps Act

Damage includes profits

- (2) *In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.*

Damage includes diminution of value of scheme property

- (3) *In determining the damage suffered by the scheme for the purposes of making a compensation order, include any diminution in the value of the property of the scheme.*
- (4) *If the responsible entity for a registered scheme is ordered to compensate the scheme, the responsible entity must transfer the amount of the compensation to scheme property. If anyone else is ordered to compensate the scheme, the responsible entity may recover the compensation on behalf of the scheme.*

Recovery of damage

- (5) *A compensation order may be enforced as if it were a judgment of the Court.”*

35. In *Agricultural*¹⁵ Edelman also had this to say about s 1317H:

“[436] The infelicitous expression “compensate ... a registered scheme” appears to be shorthand for the concept of compensating the corporation which, as responsible entity, owes duties in relation to the assets it holds on trust. The separate treatment of compensation to a “corporation” and a “corporation as responsible entity” is required by the statutory language as I explain below in s 19.3. But conceptually, and from the point of view of the person owing duties to the corporation, it makes no difference whether the corporation itself holds its assets as scheme property.”

36. Additionally, at paragraph [454] his Honour further noted that s 1317H draws a distinction between the corporation in each of its different capacities for the purpose of ensuring that where a scheme is registered then compensation for breach of registered scheme provisions becomes scheme property and is held for the benefit of the registered scheme.
37. It should also be noted that, the definition of “*scheme property*” in s 9 of the Corps Act includes “*money that forms part of the scheme property under provisions of this Act or the ASIC Act*”. That appears to be a reference to s 1317H(4) which provides that where an RE is ordered to compensate a scheme then the RE must transfer the compensation to scheme property.
38. Finally, s 1317J of the Corps Act provides that a corporation or the RE for the registered scheme may apply for a compensation order. Given an RE must, under the Corps Act,¹⁶ be a public company the reference to the RE appears to be a reference to the company acting as RE for the registered scheme.

¹⁵ (2014) 48 WAR 1 at [436]

¹⁶ See s 601FA of the Corps Act

No reason for other directions as to representation

39. The Liquidators of the seventh defendant are content to represent its interests in these proceedings. As set out above, they have previously consented to the plaintiff having leave to commence these proceedings against the seventh defendant¹⁷ and have to date been prepared to and have in fact represented the company in these proceedings.
40. There is no suggestion that the parties currently representing the plaintiff and the seventh defendant cannot properly protect the respective interests of those parties or are not the appropriate parties to do so; this much is evident from the appointment of Mr Whyte pursuant to the Appointment Order and the fact that the Liquidators remain the liquidators of LMIM.

Direction regarding s 182 claim

41. As stated above the Liquidators contend (by the Defence of the seventh defendant filed in these proceedings) that to the extent that any relief claimed against the seventh defendant arises from any allegations concerning s 182 of the Corps Act Mr Whyte does not have “authority to bring such proceedings”.¹⁸
42. The reason expressed for this contention is that a claim pursuant to s 182 is available to a corporation and not in respect of any property of a managed investment scheme. The seventh defendant otherwise admits that Mr Whyte is entitled to bring the proceedings in the name of the Plaintiff.
43. The notion that s 182 is a cause of action available only to LMIM accords with traditionally held views. However on the basis of comments of Justice Edelman in *Agricultural Land Management Ltd v Jackson (No 2)*¹⁹ a cause of action for breach of s 182 arguably lies for the benefit of the scheme, given the alleged breaches by directors in which it is alleged the seventh defendant was knowingly involved related to the payment of monies received in settlement of an action in relation to a property over which, inter alia, the plaintiff held a first mortgage. As such it is contended that the cause of action is one which can properly be pursued within the terms of paragraph 7(b) of her Honour’s order.
44. In *Agricultural Land Management Ltd v Jackson (No 2)*²⁰ Edelman J said (footnotes omitted):

“[331] In reaching this conclusion I am not to be taken as endorsing the proposition that an action, such as that in Young, [a reference to Young v Murphy [1996] 1 VR 279] for breach of a duty of skill and care will always be independent of any trust property so that the claim will not pass to a new trustee, or a beneficiary will not be able to compel an action. If actions could have been brought by Agricultural against its directors alleging unauthorised dissipation of trust property then the claim by

¹⁷ Affidavit of Mr Whyte paras [21]-[23] & exhibit DW-5

¹⁸ Para [3(c)] of the defence of the seventh defence CFI-53

¹⁹ (2014) 48 WAR 1 at [331]

²⁰ (2014) 48 WAR 1 at [331]

Agricultural against its directors for dissipating trust property would be held on trust. In this respect, the appropriate analogy might be with the breaches of duty in Young involving claims by the former trustee company against its auditors. In relation to those claims the Court of Appeal held that the former trustee "was clearly acting in the administration of the trusts and for the purposes of the trusts. It follows then that the benefit of the contract was itself trust property, with the result that any right of action arising thereunder was trust property too"."

45. Pursuant to the terms of s 1317H(4) of the Corps Act that it is the RE that is entitled to "recover the compensation on behalf of the scheme" where a "scheme" has suffered damage as a consequence of a breach of a civil penalty provision (such as s 182).²¹
46. The provisions of s 182(1) of the Corps Act are mirrored in s 601FD(1)(e) of the Corps Act. These proceedings also include a claim for breach of the duty in s 601FD(1)(e) of the Corps Act. The factual matrix underpins the claim under each of ss 182 and 601FD(1)(e).
47. The Court retains an inherent power to give directions to persons appointed by the Court as receiver of property (including a receiver appointed to property of a managed investment scheme) with respect to the discharge of the functions for which the appointment was made.²² In particular, where a receiver is appointed under statutory provisions, it is appropriate for the Court to give directions in order to provide guidance to the receiver, not only on matters of law but also on the propriety or reasonableness of the contemplated exercise of discretion.²³ The courts powers in relation to court appointed receivers are broad.²⁴
48. Mr Whyte is bringing these proceedings in the name of a trustee and for the benefit of the FMIF (and ultimately its members). Given the defence of the seventh defendant contends that the proceedings are unauthorized in so far as they include a cause of action against LMIM arising out of s 182 of the Corps Act Mr Whyte seeks a direction that it is appropriate that he continue to prosecute the proceedings which include a cause of action pursuant to or arising from s 182 of the Corps Act in these proceedings continue to be prosecuted by him, as court appointed receiver of the property of the LM First Mortgage Income Fund in the name of the Plaintiff pursuant to paragraph 7(b) of the Appointment Order.
49. This is on the basis that:
- (a) It is arguable that a breach of s 182 and any compensation that may be found payable pursuant to s 1317H of the Corporations Act is trust property that would be held for the benefit of the scheme and is therefore within the terms of the Order of Dalton J;

²¹ See s 1317E of the Corps Act

²² See for example *Mariconti v Batiste* (2000) 48 NSWLR 724 at [75] per Austin J; *Re Cape Tribulation Reef Experiences Pty Ltd* [2007] QSC 115 at [29] per Margaret Wilson J; *Australian Securities & Investments Commission v Letten (No. 7)* (2010) 80 ACSR 401 at [270] per Gordon J

²³ *Mariconti v Batiste* (2000) 48 NSWLR 724 at [76] per Austin J; *Australian Securities & Investments Commission v Letten (No. 7)* (2010) 80 ACSR 401 at [270] (6)

²⁴ *Australian Securities & Investments Commission v Letten (No. 7)* (2010) 80 ACSR 401 at [271]

- (b) The inclusion of s 182 does not expand the scope of the factual issues in the proceedings and therefore should not result in any significant additional cost in its prosecution;
- (c) The direction will not preclude the seventh defendant from continuing with its pleaded defence at trial.

SE Brown QC
MJ Luchich
Counsel for the applicant

21 July 2015

Schedule A

Case Authority considering s 59 of the Trusts Act 1973

Re Cavill Hotels Pty Ltd [1996] 1 Qd R 396

50. In this case the court was asked to rule upon the proper construction of an original Deed of Trust and, in consequence of that construction, to rule upon whether the clause in a subsequent Deed of Variation was *ultra vires* the original Trust Deed. Alternatively if the clause in the Deed of Variation was not *ultra vires* the court was asked to determine whether, on the facts, there was a breach of fiduciary duty by the trustee so that the Deed of Variation was invalid. All the beneficiaries including potential beneficiaries and all distinct interests were said by Williams J to be "*sufficiently represented before the court*".²⁵
51. His Honour also noted:²⁶

"..... *the first applicant is Cavill Hotels Pty Ltd in its capacity as trustee of the Greg Cavill Family Trust, and that that company is also the first respondent. Section 59 of the Trusts Act 1973 recognises that a trustee can sue itself in its personal capacity; that is the position here.*"

David Christie as Trustee for the Moreton Bay Trading Company v The Commissioner of Taxation [2004] AATA 1396

52. In this case, the section was also considered very briefly, but not found to assist, by Senior Member McCabe who said at [44]:

"I was referred to s 59 of the Trusts Act 1973 (Qld). Section 59 permits the trustee to sue himself or herself (or itself in the case of an incorporated trustee), in certain circumstances. That has occurred in a handful of cases: See, for example, *Re Cavill Hotels Pty Ltd* [1998] 1 Qd R 396. In *Ford & Lee, Principles of the Law of Trusts, Loose-leaf, Law Book Co., Sydney, 2004, [1590]* the learned author suggests s 59 is a procedural provision that allows the trustee to overcome the usual rule that the same person may not be both plaintiff and defendant. *Ford & Lee* suggests (at [1580]) that might be useful where legislation recognises a person might convey property to himself: see, for example, s.14 of the Property Law Act 1974 (Qld). Professor Ong suggests the provision might also be useful where a trustee is a beneficiary under the trust: *Trust Law in Australia, 2nd ed. Federation Press, Sydney, 2003 at p. 272. I do not think s. 59 assists in the analysis of this case.*"

Everest Capital Ltd as trustee of the EBI Income Fund v Trust Company Limited (2010) 77 ACSR 371

53. The fact that a corporate trustee can represent different interests in carrying out different functions has been acknowledged: see *Everest Capital Ltd as trustee of the EBI Income Fund v Trust Company Limited* [2010] NSWSC 231 at [12] where White J said:

"I take the following description of events between the inception of the trust deed and 31 July 2009 from the submissions of Mr F Gleeson SC of counsel who appeared for ECL in its capacity as responsible entity of EDIF. (I might observe that pursuant to orders made by Brereton J on 1 March 2010, ECL appeared at the hearing separately represented in its capacity as trustee of the Fund and as responsible entity of EDIF.)"²⁷

²⁵ At page

²⁶ At page 397

²⁷ Reasons for the orders made by Brereton J referred to have not been able to be located

AMP Capital Investors Ltd v Parsons Brinckerhoff Australia Pty Ltd [2013] NSWSC 1633

54. The order in *Everest Capital* was referred to in *AMP Capital Investors Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2013] NSWSC 1633. In that decision, Pembroke J was considering an application for stay of certain proceedings. There was an allegation that a conflict of interest existed as a result of AMPCI and AMPIS being represented by the same solicitors. Each of AMPCI and AMPIS acted as trustee in their roles as members of the financing consortium for the Lane Cove Tunnel project. The practical object of the proceedings was to recoup the losses which the beneficiaries of those trusts were alleged to have suffered and to restore the value of the trust funds (because of alleged negligence by engineers).
55. The defendants contended, inter alia, that AMPCI could not continue to act as the first plaintiff while it remained trustee of another trust. It was alleged by the defendants that in making its investment decision AMPCI (in its capacity of the relevant infrastructure trust) relied on advice recommendations and instructions of AMPCI in its capacity as manager of another trust. Pembroke J said:

"[15] I should add that although AMPCI may have had several roles in the investment decision relating to the Lane Cove Tunnel Project it does not have a split legal personality, as some of the submissions appeared to assume. AMPCI (as trustee) is not, in a legally material sense, different from AMPCI (as investment manager). The claims against AMPCI by some of the defendants and cross-claimants, such as Parsons Brinckerhoff and Booz defendants, are made against the single entity AMPCI. Whether AMPCI has a conflict of interest is primarily a matter for it, not for those who claim against it in the AMP proceedings. If AMPCI has adopted a position that resolves the conflict, it is no concern of the parties who claim against it.

*[16] It is true that the question of whether a person or entity acts as trustee or in some other capacity is relevant to the internal question, as between trustee and beneficiary, as to whether the trustee has a right of recoupment from the trust fund for any liability it may incur. But that is not an issue in which third parties usually have any legitimate involvement. As it is a mistake, oft repeated, to describe a single legal entity by adding the surplusage 'in its capacity as ...'. Those words tend to add nothing except obscurity. That is the reason why, in *Provident Capital Ltd v Zone Developments Pty Ltd* [2001] NSWSC 843 at [49], Young CJ in Eq criticised the use of the expression 'Cab Investments Pty Ltd as trustee of the Zivanovic Family Trust' in connection with dealings relating to an assignment of a lease. It is also the reason why, in *Australian Securities & Investments Commission v Perpetual Trustee Co (Canberra) Ltd* (1999) 41 ATR 401, Lehane J said at [21]:*

It is, we think, to cloud the issue to speak of the capacity in which Perpetual acted when it obtained the benefit of the promise ...

*[17] To similar effect are the recent statements of Pullin JA at [259] and Murphy JA at [409]–[411] in *Yara Australia Pty Ltd v Oswal (No 2)* [2013] WASCA 187.*

*[18] It does happen of course, that parties to litigation, who act in a representative capacity, sometimes have competing and inconsistent allegiances which cannot be reconciled. In such cases, separate representation, lightly controlled, may be allowed. In *Everest Capital Ltd v Trust Co Ltd* [2010] NSWSC 231, an order was made that Everest Capital Limited be permitted to appear separately represented in its role as trustee of the relevant fund (the EBI Income Fund) and as the responsible entity for EAIT Direct Investment Fund (a unit holder in the fund). But this is the exception rather than the rule. In most cases, it should not be necessary and will not be appropriate. In the AMP proceedings, for the reasons that I have explained, AMPCI does not in fact have competing and irreconcilable allegiances."*

29 JUL 2015

FILED
BRISBANE

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

Plaintiff: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE
ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 089 343 288**

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

Seventh Defendant: **LM INVESTMENT MANAGEMENT LIMITED
(RECEIVERS & MANAGERS APPOINTED) (IN
LIQUIDATION) ACN 077 208 461**

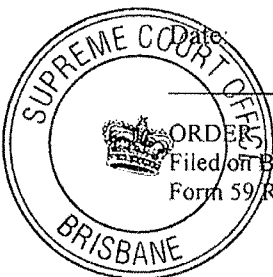
AND

Eighth Defendant: **KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS
CAPACITY AS TRUSTEE OF THE LM MANAGED
PERFORMANCE FUND**

ORDER

Before: Jackson J

Date: 21 July 2015



ORDER
Filed on Behalf of the Plaintiff
Form 59/Rule 661

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
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Initiating document: Interlocutory application filed 14 July 2015

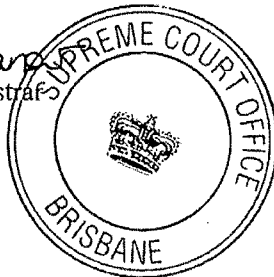
THE COURT DIRECTS THAT:

1. Pursuant to section 59 of the *Trusts Act 1973* (Qld),
 - (a) the interests of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 in its capacity as responsible entity of the LM First Mortgage Income Fund as plaintiff have been and continue to be represented in these proceedings by David Whyte, as court appointed receiver of the property of the LM First Mortgage Income Fund and person responsible for ensuring it is wound up pursuant to its constitution, pursuant to the order of Dalton J in proceedings numbered 3383/2013 and dated 21 August 2013;
 - (b) the interests of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 in its own capacity and in its capacity as former trustee of the LM Managed Performance Fund as seventh defendant have been and continue to be represented in these proceedings by the liquidators of LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461, Mr John Park and Ms Ginette Muller.
2. David Whyte, as court appointed receiver of the property of the LM First Mortgage Income Fund, has properly included in proceeding 12317 of 2014 the alternative claim for compensation under section 1317H of the *Corporations Act 2001* (Cth) for damage suffered by the Plaintiff for contravention of section 182 of the *Corporations Act 2001* (Cth) as against the seventh defendant as a person who has contravened section 182 and whose contravention resulted in the damage for the purposes of paragraph 7(b) of the order of Dalton J in proceedings numbered 3383/2013 and dated 21 August 2013.

THE ORDER OF THE COURT IS THAT:

3. The parties' costs of and incidental to this application, each on the indemnity basis, be paid from the assets of the LM First Mortgage Income Fund.

Signed: 
Deputy Registrar



SUPREME COURT OF QUEENSLAND

CITATION: *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte* [2015] QSC 287

PARTIES: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461**
(plaintiff)

v

LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461
(seventh defendant)

AND

KORDAMENTHA PTY LTD ACN 100 169 391 IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND
(eighth defendant)

FILE NO/S: BS12317/14

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 29 October 2015

DELIVERED AT: Brisbane

HEARING DATE: 5 August 2015

JUDGE: Jackson J

ORDER: **The order of the court is that:**

- 1. The application is dismissed.**
- 2. The applicant pay the respondent's costs of the application.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – INDEMNITY, LIEN AND REIMBURSEMENT – RELEVANT PRINCIPLES – where the applicant is a former trustee – where the applicant was removed and the respondent was appointed as trustee by the court – where the applicant was also the responsible entity of a registered scheme – where the applicant was directed by the court to wind up the registered scheme – where a receiver was appointed by the court to the scheme property including any claims against the applicant – where the receiver made a

claim against the applicant as a person involved in its former directors' breaches of duties – where the applicant applied for orders to be indemnified from the property of the trust fund for its costs in defending the proceeding started by the receiver

Law of Property Amendment Act 1859 (Imp), s 30

Trusts Act 1973 (Qld), ss 59, 96, 97

Alphena Pty Ltd (in liq) v PS Securities Pty Ltd [2013] NSWSC 26, cited

Alsop Wilkinson (a firm) v Neary [1996] 1 WLR 1220, referred to

Armitage v Nurse [1998] Ch 241, referred to

Belar Pty Ltd (in liq) v Mahaffey [2000] 1 Qd R 477, cited
Bennet v Wyndham (1862) 4 De GF & J 259; 45 E.R. 1183, considered

Coates v McInerney (1992) 6 ACSR 748; (1992) 7 WAR 537, referred to

Davis v Heuber (1923) 31 CLR 583; [1923] HCA 10, cited
Dimos v Dikeakos (1996) 68 FCR 39; (1996) 149 ALR 1, cited

Evans v Evans [1982] 1 WLR 756, cited

Frost v Bovaird (2012) 203 FCR 95; [2012] FCAFC 60, considered

Gatsios Holdings v Kritharas Holdings Pty Ltd (in liq) [2002] NSWCA 29, considered

Kemtron Industries Pty Ltd v Commissioner of Stamp Duties [1984] 1 Qd R 576, cited

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; [2008] HCA 42, considered

McLean v Discount & Finance Ltd (1939) 64 CLR 312; [1939] HCA 38, considered

National Roads and Motorists' Association v Whitlam (2007) 25 ACLC 688; [2007] NSWCA 81, cited

National Trustees Executors Agency Co of Australasia Ltd v Barnes (1941) 64 CLR 268; [1941] HCA 3, cited

Nolan v Collie (2003) 7 VR 287; [2003] VSCA 39, considered

Re Beddoe; Downes v Cottam [1893] 1 Ch 547, cited

Re Dallaway (dec'd) [1982] 1 WLR 756, referred to
Re Exhall Coal (1866) 35 Beav 449, cited

Rickus v Motor Trades Association of Australia

Superannuation Fund Pty Ltd (2010) 265 ALR 112; [2010] FCAFC 16, cited

Robsyn Pty Ltd (in liq) v O'Brien [2012] QSC 285, cited

Stephens v Chee [2015] QSC 138, referred to

Talbot v NRMA (2000) 50 NSWLR 300; [2000] NSWSC 887, cited

Vacuum Oil Co Pty Ltd v Wiltshire (1945) 72 CLR 219; [1945] HCA 47, cited
Walters v Woodbridge (1878) 7 Ch D 504, referred to
Warton v Yeo [2015] NSWCA 115, considered
Wolmerhausen v Gullick [1893] 2 Ch 514, referred to
Worrall v Harford (1802) 8 Ves 4; 32 E.R. 250, referred to
Yorke v Lucas (1985) 158 CLR 661; [1985] HCA 65, referred to
to

COUNSEL: J Peden for the applicant
A Crowe QC and E Goodwin for the respondent

SOLICITORS: Russell & Co for the applicant
Minter Ellison for the respondent

- [1] **JACKSON J:** This is an unusual application in an unusually constituted proceeding.

The application

- [2] The parties to the application are the applicant/seventh defendant and the respondent/eighth defendant.
- [3] On 12 April 2013, under an order of the Court, the applicant was removed as the trustee of a trust scheme known as “the LM Managed Performance Fund” (“MPF”). On the same day, the respondent was appointed as the trustee.
- [4] As former trustee, the applicant applies for orders that would indemnify the applicant for its costs of defending the plaintiff’s claim from the property of the MPF, to be paid from time to time as the proceeding continues and those costs are incurred. I will refer to that aspect of the application as “the application for indemnity for costs”. The applicant also applies for a particular order that the indemnity extend to the applicant’s liquidators professional fees, (which are not legal costs) for their time and actions while engaged in the defence of the proceeding.
- [5] The application raises questions of some complexity. For the reasons that follow, in my view, it must be dismissed.

The proceeding

- [6] The applicant is the responsible entity and trustee of a managed investment scheme that is a registered scheme known as “the LM First Mortgage Income Fund” (“FMIF”).
- [7] On 21 August 2013, the Court made an order under s 601ND(1) of the *Corporations Act 2001* (Cth) (“CA”) directing the applicant to wind up the FMIF. By another order made at the same time Mr Whyte was appointed under s 601NF(1) as a person to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders made under s 601NF(2) of the CA. He was also appointed receiver of the property of the FMIF under s 601NF(2).

- [8] As the appointed person and receiver, and under the powers given to him by the Court's order, Mr Whyte started the originating proceeding in the name of the applicant against the applicant's former directors, the applicant and the respondent. In doing so, he represents the interests of the members of the FMIF. The proceeding is thus brought by him as plaintiff in the applicant's name against the applicant, among others, as a defendant. For convenience, it may be described as a proceeding brought against the applicant in its personal capacity. An order has been made under s 59 of the *Trusts Act 1973* (Qld) authorising the receiver to continue the proceeding so constituted in the applicant's name. For simplicity, I will describe the plaintiff as "the receiver".
- [9] The receiver also brings the proceeding against the respondent as a defendant, as the current trustee of the MPF. Broadly speaking, that claim is based on the rights of a creditor of a former trustee (the applicant) to be subrogated to the right of indemnity of the former trustee from trust property and to pursue the trust property through a claim against the current trustee (the respondent).
- [10] The explanation for the application for indemnity for costs lies in the nature of the claim brought by the receiver against the applicant. It stems from transactions that were made by the applicant with third parties when it was both the responsible entity of the FMIF and trustee of the MPF. Simplifying, the applicant had lent moneys from the property it held as trustee of the FMIF and from the property it held as trustee of the MPF to the third parties. It sought to recover the loans. It started litigation against some of the third parties.
- [11] A compromise of the litigation between the applicant and the third parties was reached ("the settlement transaction"). So far as the third parties were concerned, a single settlement sum was paid to the applicant. So far as the applicant was concerned, the settlement sum had to be divided between or allocated to the interests of the FMIF and MPF respectively.
- [12] The relevant legal relationship of the FMIF and the MPF prior to the settlement transaction was that the applicant held a first ranking security or securities from some of the third parties for the funds advanced from the property of the FMIF. It held a second ranking security or securities for the funds advanced from the property of the MPF.
- [13] The receiver alleges, in effect, that the directors of the applicant were in a position of conflict in making the allocation of the settlement sum as between the FMIF and MPF and that the MPF was treated more favourably than it would have been treated as second ranking secured creditor upon a realisation of the secured property.
- [14] The applicant responds, in effect, that the proceeding started against the third parties resulted in the successful settlement transaction that was, overall, favourable to both the FMIF and MPF. Nearly all of the funds used to start the proceeding and put at risk thereby had come from the MPF in circumstances where the FMIF had been unable to fund the litigation. It was appropriate that the allocation reflect that, as if the MPF were a litigation funder.
- [15] Specifically, the receiver alleges that in allocating the proportions of the settlement sum as between the FMIF and the MPF, the applicant's directors breached their duties as officers of the applicant as a corporation and as responsible entity of the

FMIF under relevant provisions of the CA and that the applicant breached its duties as responsible entity of the FMIF, or was a person involved in those contraventions by the directors, with the consequences that the former directors and the applicant are liable to compensate the scheme or the receiver (who would hold the recovery on trust for the members as beneficiaries of the FMIF).

- [16] Although it is not necessary to identify all of the receiver's causes of action, it is critical to identify that they are not all brought against the applicant as acting in the same capacity. The distinction to be made turns on the facts that at the time of the settlement transaction the applicant was both responsible entity of the FMIF and trustee of the MPF. Some of the causes of action alleged by the receiver against the applicant are for compensation or damages for breach of its duties as responsible entity of the FMIF. On those causes of action the applicant is alleged to be liable to the scheme members. No question is raised on those causes of action that the applicant has any right of indemnity against the scheme property of the FMIF. Nor could there be. The receiver's claim upon those causes of action is not based on the applicant's liability as trustee of the MPF.
- [17] On the other hand, some of the causes of action alleged by the receiver are brought against the applicant for its role in the transaction as trustee of the MPF.
- [18] First, par 41 of the further amended statement of claim ("FASOC") alleges knowledge by the applicant "as trustee of the MPF" of the facts relating to the transaction, with the consequences alleged in par 42 that the applicant "as trustee of the MPF" was involved in its directors' alleged contraventions of s 182(1) of the CA and thereby itself contravened s 182(2) of the CA and in par 43 that the applicant "as trustee of the MPF" is liable to pay to the plaintiff the alleged amount of the loss to the FMIF under s 1317H of the CA.
- [19] Second, par 47 of the FASOC alleges knowledge of similar facts relating to knowledge by the applicant of the transaction "as trustee of the MPF", with the consequences alleged in par 48 that the applicant was involved in its directors' alleged contraventions of s 601FD(1) of the CA and in par 49 that the applicant "as trustee of the MPF" is liable to pay to the plaintiff the alleged amount of the loss to the FMIF under s 1317H of the CA.
- [20] It is important to note that under s 1317H of the CA, the Court's power to order compensation only arises: "if the person has contravened a corporation/scheme civil penalty provision". Liability under s 1317H does not attach to "a person involved in a contravention", as such.
- [21] In the case of s 182 of the CA, s 182(1) provides that directors (inter alia) must not improperly use their position and s 182(2) expressly provides that a person involved in a contravention of s 182(1) is a contravenor. Accordingly, the definition of "corporation/scheme civil penalty provision" in s 1317DA of the CA refers to s 182(1) and s 182(2).
- [22] In the case of s 601FD of the CA, s 601FD(3) of the CA provides both that a person who contravenes and a person involved in a contravention of s 601FD(1) are contravenors. Accordingly, the definition of "corporation/scheme civil penalty provision" in s 1317DA of the CA only refers to s 601FD(3).

- [23] Thus, the liabilities of the applicant alleged in paras 43 and 49 of the FASOC depend upon the applicant being a “person involved in a contravention” by the directors of the applicant of either s 182(1) or s 601FD(1).
- [24] Section 79 of the CA defines when “a person is involved in a contravention”. The definition is framed in the same language as was s 75B of the *Trade Practice Act* 1974 (Cth). That section was considered by the High Court in *Yorke v Lucas*.¹ The plurality judgment included the following:

“Turning first to par (a), the appellants immediately encounter the difficulty that the words used, ‘aided, abetted, counselled or procured’, are taken from the criminal law where they are used to designate participation in a crime as a principal in the second degree or as an accessory before the fact. Both in the case of felonies where the principal offender and the secondary participant commit separate offences, and in the case of misdemeanours where no distinction is drawn between the two, a person will be guilty of the offences of aiding and abetting or counselling and procuring the commission of an offence only if he intentionally participates in it. To form the requisite intent he must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime.

...In our view, the proper construction of par (c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.”²

- [25] The point for present purposes is that the applicant’s liabilities to the receiver’s causes of action as alleged in paras 43 and 49 require a finding or findings of knowledge of the essential matters or elements that go to make up the relevant contravention. The liabilities postulated are not, by way of contrast, the vicarious liability of a person otherwise not at fault.
- [26] I will call these causes of action “the liabilities as former trustee of the MPF”. It should be recognised, however, that this is only a convenient label. There is in law and equity no such thing as a liability as a former trustee.
- [27] The applicant defends the receiver’s claim against it, including the liabilities as former trustee of the MPF, on the bases that the decision it made as to the allocation of the settlement amount was not a breach of any obligation or that it should be excused for any breach.³

Provisions of the trust deed

- [28] The MPF is constituted as a trust by deed. Until it was removed, the applicant was trustee under the deed. In effect, the deed provides, in part:

¹ (1985) 158 CLR 661.

² (1985) 158 CLR 661, 667, 670.

³ However, it does not specifically plead reliance upon the *Trusts Act* 1973 (Qld), s 76.

- (a) by clause 17.6 that the trustee (described as the manager) shall be indemnified out of the scheme property for liabilities or expenses incurred in relation to the performance of its duties, including legal fees and outgoings, barristers, Queens Counsel or legal counsel's fees, all costs arising from the proper performance of its duties in connection with the scheme performed by the trustee or by any agent appointed and costs and disbursements incurred in the conduct and settlement of any court proceedings;
- (b) by clause 17.8 that in the event regarding the payment of expenses the trustee shall be paid such expenses until the dispute is fully determined. Any overpayment shall be repaid forthwith upon the identification of the overpayment;
- (c) by clause 18.1(c) that in addition to any indemnity under any Law the trustee has a right of indemnity out of the scheme property on a full indemnity basis in respect of a matter unless, in respect of that matter, the trustee has acted negligently, fraudulently or in breach of trust.

[29] The applicant did not identify whether its reliance on these provisions of the trust deed was a claim of contractual rights as a party to the deed or based on some other equitable jurisdiction. A proceeding based upon a contractual right of indemnity would ordinarily be brought by claim, whereas this application is brought in the proceeding brought by the receiver against the applicant and others.

[30] The applicant relied on these provisions as if they applied regardless of its removal as trustee.

[31] In my view, that is unlikely to be their proper construction. To take cl 17.8 first, in its context within cl 17 as a whole, there is a clear assumption that the applicant as trustee is in possession of the scheme property. That is not the case and has not been so from the point in time when it was removed as trustee.

[32] As to cl 18.1(c), that there is a right of indemnity on a full indemnity basis in respect of a matter unless the applicant acted negligently, fraudulently or in breach of trust, in my view, there is question whether that provision extends to an indemnity for the costs of a proceeding brought against the applicant after its removal as trustee. The exclusion of the right to indemnity under the clause for a breach of trust in respect of the relevant matter assumes that the applicant is the trustee in respect of the matter. If the relevant matter is made up of the liabilities as former trustee of the MPF, the applicant was the trustee at the time when the relevant liability arose. But if the matter is the liability or expense of the applicant for the costs of the law practice acting for it in the proceeding, the applicant is not now trustee.

[33] However, it may be that cls 17.6 and 18.1(c) of the trust deed, properly construed, could operate in relation to a liability or expense incurred while trustee notwithstanding that the trustee is removed after that. The respondent did not make any detailed submissions as to the operation of these clauses after removal of the applicant as trustee.

- [34] Accordingly, it is appropriate to proceed on the footing that the applicant may be entitled to an indemnity under cls 17.6 or 18.1(c) of the trust deed for a liability for costs incurred in defending the receiver's claim to the extent of the liabilities as former trustee of the MPF, without deciding that question.
- [35] The consequence is that in the discussion that follows it must be kept in mind that under cl 17.6 any right to an indemnity might extend to legal fees and disbursements incurred in relation to the proper performance of the applicant's duties as trustee. And under cl 18.1(c) any right to indemnity might extend unless the applicant has acted negligently, fraudulently or in breach of trust.
- [36] However, the applicant did not confine the application for indemnity for costs to the contractual or other rights under the trust deed. It relied on broader principles and rights operating under the law of trusts in equity.

Some background principles and facts

- [37] In that way, the application for indemnity for costs is based on five inter-related principles of the law of trusts that were largely uncontentious between the parties and accordingly may be briefly summarised at the expense of some precision, at least to start with:
- (a) first, where a trustee incurs a liability as trustee, "properly"⁴ or "reasonably",⁵ the trustee is entitled to an indemnity from the trust property either by way of exoneration or by way of recoupment for the expenditure required to discharge the liability;
 - (b) second, a trustee who seeks indemnity for the costs of defending litigation may obtain protection against the risk that it will be found later that the costs of the litigation are not a proper or reasonable expense of office by seeking an order of the court in the form of judicial advice that the trustee is justified in defending the proceeding (and is at some risk of being denied an indemnity if it does not do so);
 - (c) third, where a trustee is sued by a third party, and is justified in defending the proceeding, the trustee's entitlement to an indemnity for the costs incurred properly or reasonably in doing so is not lost because the trustee is defending a personal liability (and the propriety of their action or omission) as well as protecting the trust property;
 - (d) fourth, where the trustee is justified in defending the proceeding, the trustee may have resort to the trust property directly by way of recoupment or exoneration for the costs incurred properly or reasonably in doing so; and
 - (e) fifth, where a trustee has an accrued right to an indemnity, removal of the trustee does not affect the right, except that a former trustee may not have possession of the trust property to exercise its right of indemnity directly from the trust property by way of exoneration or recoupment.

⁴ Although the right of indemnity dates even from before Lord Eldon's judgment in *Worrall v Harford* (1802) 8 Ves 4, the requirement of "properly paid" stems from *Re Exhall Coal* (1866) 35 Beav 449, 452-453.

⁵ See *Trusts Act 1973* (Qld), s 72.

- [38] It will be necessary to discuss the operation of some of these principles in greater detail. However, it is important at the outset to note four features of the present case that distinguish it factually from some other cases where a trustee's indemnity was in question.
- [39] First, the applicant is not now a trustee of the MPF. It is the former trustee. It must rely on the fifth principle.
- [40] Second, the applicant does not have the benefit of judicial advice that it is justified in defending the proceeding. It is not suggested that it could have applied for such advice. At this stage, it is not known whether the applicant will succeed in its defence of the receiver's claim upon the liabilities as former trustee of the MPF. It cannot be said with any certainty that the expenses of defending the claim would be classified as incurred properly or reasonably in the sense that they would be allowed as proper expenses of a trustee of a trust in protecting the trust property. However, even if the applicant is unsuccessful in defending the proceeding, it contends that it may still be entitled to an indemnity for its costs as "reasonably and properly incurred".
- [41] Third, the particular orders sought are for costs incurred to date and to be incurred in the future in the applicant's defence of the receiver's claim. As to the costs already incurred, the applicant has not sought to establish either their quantum or that they are proper expenses in the sense that the amounts were reasonably incurred. No attempt has been made to distinguish between any costs incurred in defending the liabilities as a former trustee from the balance of the receiver's claim.
- [42] Fourth, the respondent as trustee of the MPF has brought other separate claims against the applicant that it alleges will have to be set-off before the applicant's entitlement to any sum by way of indemnity would be payable.
- [43] Fifth, if the applicant is entitled to succeed on the question of an indemnity from the property of the MPF, but cannot recover on the indemnity until the end of the proceeding, there is a risk of insolvency affecting recovery. If the applicant is not able to obtain indemnity for its costs from the property of the MPF progressively, there is a risk that at the end of the day that property may not be sufficient to meet the applicant's entitlement to an indemnity, because of other competing claims against those.
- [44] Sixth, as a countervailing factor, if the applicant is able to obtain progressive payment from the property of the MPF, there is a risk of insolvency affecting any recovery by the respondent of any overpayment, if it is ultimately determined that the applicant is not entitled to the indemnity it claims. The applicant is a company being wound up in insolvency.
- [45] I also note that if the applicant is successful in defending the receiver's claim, it will also have a right to apply for an order that the receiver pay its costs of the proceeding to be funded from the property of the FMIF.

The nature of the application for the indemnity sought

- [46] A starting point for discussion of the application for indemnity for costs is that the respondent submits that it is brought prematurely.

- [47] The right of indemnity, called a right of exoneration or a right of recoupment,⁶ is one that a trustee has against the trust property for a liability or expense properly incurred as trustee. It is a personal right that is supported by a proprietary right in the form of lien or charge over the trust property to the extent of the right of indemnity.⁷
- [48] Oftentimes, when a trustee is sued in relation to a trust, it is appropriate for the trustee to apply for judicial advice as to whether the trustee is justified to defend the proceeding, so as to obtain the protection of the court's order against any subsequent question as to whether the trustee has discharged the trustee's duty.⁸ The High Court has said of a provision equivalent to s 96 of the *Trust Act 1973* (Qld) ("TA") that:
- "A necessary consequence of the provisions ... is that a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings. In deciding that question a judge must determine whether, on the material then available, it would be proper for the trustee to defend the proceedings."⁹
- [49] The respondent has obtained such an order for its defence of the receiver's claim.
- [50] But this application by the applicant is not brought for judicial advice. The applicant is not the trustee of the MPF. That is the respondent. The applicant does not seek the Court's advice as to whether to defend the proceeding on behalf of the MPF. It is doing so irrespective of the Court's view.
- [51] Instead, the application is brought to establish the claimed right to indemnity for the applicant's costs payable to the law practice acting for it to defend the receiver's claim. The applicant is not the trustee defending the trust property, as such. The respondent is defendant to the receiver's claim as the current trustee of the MPF.
- [52] The application is for *quia timet* relief, to a significant extent. It is brought on the footing that both the costs incurred to date and the costs to be incurred in the future are costs for which the applicant is entitled to indemnity before the proceeding is resolved.
- [53] Neither of the parties came to grips with this point fully in the context of an application by a former trustee.
- [54] The applicant relied on cases that support the fifth principle stated above that the right of indemnity that arises when a liability is properly incurred as trustee while holding the office is not lost because the trustee ceases to hold the office.¹⁰ The respondent, likewise, relied on cases referring to the effect of loss of office upon an

⁶ *Chief Commissioner of Stamp Duties v Buckle* (1998) 192 CLR 226, 245-247 [47]-[51].

⁷ *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346, 358 [43].

⁸ *Trusts Act 1973* (Qld), ss 96 and 97.

⁹ *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, 94 [74].

¹⁰ *Coates v McInerney* (1992) 6 ACSR 748, 749; *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, *Dimos v Dikeakos* (1996) 68 FCR 39, 43.

accrued liability for which there is a right of indemnity.¹¹ However, in each of the cases referred to, the right to indemnity had arisen while the trustee held office.

- [55] It assists analysis to first consider whether as a former trustee the applicant's costs would be recoverable after the event on the assumption that the applicant is successful in its defence of the proceeding? If there is such a right of indemnity, the second question is whether a former trustee is entitled to the right of indemnity before the claim in the proceeding is decided?

Indemnity of a former trustee

- [56] The applicant relied upon s 72 of the TA. It provides that:

“A trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers.”

- [57] Section 72 is derived from s 31 of the *Law of Property Trustees Relief Amendment Act 1859 (Imp)*.

- [58] However, the applicant is no longer a trustee and was not a trustee when any of the expenses of the costs of defending the proceeding were incurred.¹² The definition of “trustee” in s 5 of the TA is inclusive, but does not provide or indicate that a former trustee is a trustee within the meaning of that Act. That construction is supported by the context that s 80(3) of the TA specifically refers to a “former... trustee” and more generally that, in some provisions of the Act, it would be inappropriate for the term “trustee” to include a former trustee.

- [59] In the particular context of s 72, in my view, the word “trustee” should not be construed to include a former trustee. Section 72 assumes that the trustee is in possession of the trust property. It permits and protects the trustee in reimbursing himself or herself or in paying or discharging out of the trust property. The applicant is not seeking a declaration that it is entitled to reimburse itself out of the trust property or to make a payment out of the trust property or make a discharge out of the trust property. It is seeking an order that the respondent as trustee indemnify the applicant out of the trust property.

- [60] Apart from s 72, in equity, a trustee's right of indemnification from trust property “against all his proper costs charges and expenses incident to the execution of the trust... includes costs, charges and expenses properly incurred in litigation relating to the trust estate.”¹³

- [61] Historically, discussion of that right often begins with *Worrall v Harford*,¹⁴ where Lord Eldon said:

¹¹ *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477, 487 [20]; *Alphena Pty Ltd (in liq) v PS Securities Pty Ltd* [2013] NSWSC 26, [50].

¹² *Compare Robsyn Pty Ltd (in liq) v O'Brien* [2012] QSC 285, [31].

¹³ *National Trustees Executors Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268, 277. And see *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 219, 335.

¹⁴ (1802) 8 Ves 4.

“It is in the nature of the office of a trustee, whether expressed in the instrument, or not, that the trust property shall reimburse him all charges and expenses incurred in the execution of the trust.”¹⁵

[62] But the question here, so far as the applicant is concerned, is whether a former trustee who is sued personally by a third party for their liability in connection with a transaction effected when the former trustee was acting as trustee on behalf of the trust estate, is entitled to an indemnity from the trust property, in particular for their costs of defending the suit.

[63] The right to indemnity by way of reimbursement stated by Lord Eldon and considered and restated on so many occasions in subsequent cases is one implied or imposed by equity. The parties did not make any detailed submissions as to the principles that inform its availability in the case of a former trustee, beyond reference to the cases previously noted.

[64] The leading statement in this Court relied upon was that made in *Belar Pty Ltd (in liq) v Mahaffey*,¹⁶ that:

“The trustee’s right of indemnity out of the trust assets is in the nature of a charge or lien in favour of the trustee and as such takes preference or priority over claims by the cestuis que trust. But of course when the assets have passed out of a trustee’s possession the necessary claim for a trustee’s indemnity should be made against the new trustee. An unco-operative new trustee who declined to exercise the powers to recover trust property in the hands of the beneficiaries could be made a defendant, and orders could be made which would in effect permit the former trustee to exercise such powers by subrogation.”¹⁷

[65] An important consideration is that a trustee’s right to an indemnity can extend to the liability of a trustee to pay damages to a third party. In *Bennet v Wyndham*,¹⁸ trustees were liable to pay damages and costs to a third party for what might be recognised now as the vicarious liability of an employer for the negligence of an employee. Although the employee had acted negligently, the trustees had acted without any personal fault. The trustees were held to be entitled to an indemnity from the trust property for the liability to the third party and their costs of the proceeding.

[66] It is trite that the vicarious liability of a principal or employer for the tort of an agent or employee accrues when the third party is injured or suffers loss or damage. If the principal or employer is a trustee, the relevant trustee is the trustee at that time. In principle, a trustee’s vicarious liability at law to a third party for damages in tort, incurred without fault on the part of the trustee, is supported from that time by the trustee’s right of indemnity from the trust estate.

¹⁵ (1802) 8 Ves 4, 8

¹⁶ [2000] 1 Qd R 477.

¹⁷ [2000] 1 Qd R 477, 587, [20].

¹⁸ (1862) 4 De GF & J 259.

- [67] Where a third party brings a claim for damages in tort against a trustee (before removal), at least from the time of Lord St Leonard's Act,¹⁹ in the ordinary course, the trustee would seek judicial advice as to whether it would be justified in defending the proceeding and, with the benefit of that advice exercise the right to an indemnity against the trust property for its costs, either under a statutory equivalent of s 72 of the TA or in equity.²⁰ It must be remembered that the right of exoneration or recoupment so exercised is to discharge an existing liability for costs as an expense incurred or paid properly as trustee in defending the trust property.
- [68] Still, if that analysis is right, the principle that the right to indemnity is not lost by the removal of the trustee should lead to the result that it is immaterial that the trustee is a former trustee when the relevant proceeding is started against it. The former trustee's liability to a third party upon a cause of action in tort is not transferred to a new trustee. The former trustee remains liable to the third party at law. In principle, the implied right to an indemnity should still support the former trustee's liability to the third party.
- [69] On that basis, the trustee is entitled to an indemnity against that liability either from the time when the liability accrues or at least the time when judgment is given against them. In *Coates v McInerney*,²¹ Anderson J put it thus:
- “Any right of indemnity would arise upon the liability arising and the question is whether that right of indemnity, arising at that time, that is to say, during the holding of the office by the trustee at the time when the liability was incurred, is then lost by subsequent loss of office.”²²
- [70] A trustee's liability for costs of defending a proceeding is treated differently from the liability for damages to the third party for some purposes. But none of the cases suggests that a former trustee entitled to an indemnity against the third party's claim as a liability arising during the office of trustee is not entitled, as well, to an indemnity for the costs of reasonably defending the third party's claim, simply because the liability for costs arises after the time of loss of the office.
- [71] In other words, in principle, the extent of the right of indemnity should not depend on whether the trustee at the time when the third party's cause of action accrues is still the trustee when the third party brings a claim against it for damages in tort.
- [72] Of course, in the present case the receiver's claim against the applicant upon the liabilities as former trustee of the MPF is not based on an alleged liability of a former trustee for damages in tort. It is for an order for compensation made under s 1317H of the CA. Each of the alleged causes of action against the applicant for a liability incurred “as trustee of the MPF” is for the “damage” suffered “by” the corporation or scheme. Each of them arose when the damage was “suffered”. In my view, the analogy between a trustee's right of indemnity for any liability under s 1317H and a trustee's right of indemnity for a liability for damages in tort is strong.

¹⁹ *Law of Property Amendment Act 1859 (Imp)*, s 30.

²⁰ See *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.

²¹ (1992) 6 ACSR 748.

²² (1992) 6 ACSR 748, 749.

- [73] That conclusion is supported by the judgment of the Court of Appeal of NSW in *Gatsios Holdings v Kritharas Holdings Pty Ltd (in liq)*.²³ It was held in that case that the liability of a trustee to a third party for damages for misleading or deceptive conduct in contravention of s 52 of the *Trade Practices Act 1974* (Cth) was analogous to a liability in tort.²⁴
- [74] In my view, that reasoning leads to the conclusion that if the applicant had remained as trustee of the MPF and if the applicant as trustee would have had a right to an indemnity for the costs of defending the receiver's claim based on the alleged liabilities as former trustee of the MPF, that right to indemnity was not lost upon the applicant being removed as trustee and the respondent being appointed as trustee in its place.

Power to order indemnity before the proceeding is decided

- [75] The next question is whether there is power to order that the respondent as trustee of the MPF indemnify the applicant upon its claim for an indemnity for the costs of the receiver's claim before the issues in the proceeding are decided.
- [76] The applicant relied upon *Frost v Bovaird*.²⁵ Simplifying somewhat, in one of the proceedings dealt with in that case, the executors of a will successfully defended a family provision claim against the estate of the testator but were unsuccessful in defending other proceedings brought against the estate by creditors. The claimants appealed in each case. Because of the result of the proceeding brought by the creditors, the estate became insolvent. A trustee in bankruptcy was appointed. In advance of the hearing of the appeals, the executors sought an indemnity from the trustee in bankruptcy for their costs of responding to the appeals. The trustee in bankruptcy sought judicial advice as to whether he was justified in paying the executors' costs of defending the appeals as proper expenses. On appeal, it was held that it was proper to give the trustee in bankruptcy judicial advice that he was justified in paying the executors' costs of the appeals.
- [77] *Frost v Bovaird* does not answer the question posed by the present case. The respondent has not applied for judicial advice that it would be justified in paying the applicant's costs. In fact, the respondent denies the receiver's allegation that the applicant is entitled to an indemnity from the trust property of the MPF for the applicant's liability on the receiver's claim for conduct "as trustee of the MPF". The issue is not raised as between the applicant and the respondent on the pleadings, but the respondent opposes any indemnity.
- [78] Nevertheless, one obvious assumption underlying *Frost v Bovaird* is that it may be appropriate for a trustee to obtain an indemnity for costs of defending the trust property against a claim by a third party, notwithstanding that the trustee may be unsuccessful, as were the executors in that case on the creditors' claims.
- [79] That assumption is confirmed by other cases. Lightman J summarised the position of a trustee facing a claim by a third party in *Alsop Wilkinson (a firm) v Neary*.²⁶ Philip McMurdo J referred to Lightman J's analysis recently in *Stephens v Chee*.²⁷

²³ [2002] NSWCA 29.

²⁴ [2002] NSWCA 29, [36] and [46].

²⁵ (2012) 203 FCR 95.

²⁶ [1996] 1 WLR 1220,

“The third [category], which [Lightman J] described as a “third party dispute“, is a dispute with persons, other than in the capacity of beneficiaries, in respect of rights and liabilities assumed by the trustees as such in the course of administration of the trust. In that third category, Lightman J said, trustees are entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust.”²⁸

[80] The basis for that statement was explained by Lightman J thus:

“Trustees have a duty to protect and preserve the trust estate for the benefit of the beneficiaries and accordingly to represent the trust in a third party dispute.”²⁹

[81] That must mean that the costs of defending to protect the trust estate may be expenses incurred properly by a trustee even though the expenditure is ultimately wasted, if the defence was reasonably made and the expenses were, therefore, incurred properly. Not only that, the trustee may have a right of indemnity for such costs as expenses incurred properly even though the trustee is also defending its personal liability, and even on a question whether the trustee’s actions the subject of the proceeding were proper.³⁰

[82] But there is no absolute right to an indemnity. In my view, it is sufficient for this case to recognise that where the indemnity is sought to reimburse the costs of defence, in particular, the expenses will not be expenses incurred properly or reasonably where the defence is not reasonable. Although there may be debate about the threshold of what is reasonable and the onus of proof when a trustee defends a proceeding without the benefit of first obtaining judicial advice in the nature of a *Beddoe*³¹ order, there is no question that a trustee’s right to indemnity for the costs of defending a proceeding is not absolute.

[83] As a tool for analysis, let it be assumed that the applicant was still the trustee of the MPF and that it sought judicial advice as to whether it would be justified to indemnify itself from the property of the MPF for its costs of defending the receiver’s claim. The decided cases clearly show that whether there should be an indemnity before the issues raised against the trustee are resolved, depends on the nature of the case that is made against the trustee.

[84] So, in *Armitage v Nurse*,³² it was held that where a beneficiary alleged fraud against a trustee, the right of the trustee to recoup themselves out of the trust fund should await until the action against them was discontinued or dismissed.³³ Similarly, in *Walters v Woodbridge*,³⁴ where a beneficiary alleged that a trustee had acted in fraud of the beneficiaries in obtaining the Court’s approval of a compromise by the

²⁷ [2015] QSC 138.

²⁸ [2015] QSC 138, [28].

²⁹ [1996] 1 WLR 1220, 1224.

³⁰ *National Trustees Executors and Agency Co of Australia Ltd v Barnes* (1941) 64 CLR 268, 278-279, referring to *Walters v Woodbridge* (1878) 7 Ch D 504.

³¹ *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547.

³² [1998] Ch 241.

³³ *Armitage v Nurse* [1998] Ch 241, 263.

³⁴ (1878) 7 Ch D 504.

trustees, it was held that, because of the allegation of misconduct, no order could be made as to the costs of the trustee until the result of the proceeding was known.³⁵

- [85] In this context, it must be remembered that the informing principle is that the scope of the indemnity is for “charges and expenses are properly incurred by the trustee as an incident of [the] administration of the [trust] estate.”³⁶
- [86] In *Frost v Bovaird*,³⁷ the Full Court of the Federal Court of Australia referred to the mechanism of judicial advice under the equivalent of s 96 of the TA as a “means whereby a trustee against whom misconduct is alleged may be able to have resort to the trust funds, pending the determination of that claim”, because where advice is given that the trustee would be justified in paying the costs as a properly incurred expense they would be protected later from being found liable for breach of trust.³⁸ Provided it is remembered that the protective effect of the judicial advice taken depends upon and is limited by the statement of facts on which it is based and that it does not bind a person who is not a party to the application, that may be accepted. But, in any event, that mechanism is not available in this case. The applicant is not a trustee applying for judicial advice.
- [87] For that reason, it is of no direct assistance to analyse *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*³⁹ for the purposes of this case. It too was concerned with an application for judicial advice as to whether a trustee should be able to have resort to the trust funds pending determination of the case.
- [88] Notwithstanding the difficulties previously identified, I consider that the better view is that in some circumstances it may be possible for the Court to order an indemnity from the trust property before a proceeding to which the former trustee is a defendant is decided.
- [89] In my view, an analogous order that shows the width of the court’s power is an “advance costs order”. In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*, it was argued that the order of Megarry V-C in *Re Dallaway (dec’d)*⁴⁰ was an “advance costs order”.⁴¹ There can be a distinction between the usual form of a *Beddoe* order as to judicial advice and an order specifically authorising a trustee defendant to have resort to the trust property to discharge its costs of litigation from time to time.
- [90] In *Re Dallaway (dec’d)* the Vice-Chancellor analysed the nature of a *Beddoe* order for the costs of a trustee in defending a claim made by a third party to all of the trust property.⁴² An example is a claim to set aside a settlement. If the claim succeeds, there will be no trust property out of which the trustees could take their costs. The

³⁵ *Walters v Woodbridge* (1878) 7 Ch D 504, 509-510.

³⁶ *National Trustees Executors Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268, 279.

³⁷ (2012) 203 FCR 95.

³⁸ (2012) 203 FCR 95, 107.

³⁹ (2008) 237 CLR 66.

⁴⁰ [1982] 1 WLR 756.

⁴¹ (2008) 237 CLR 66, 97 [86].

⁴² [1982] 1 WLR 756, 760.

court nevertheless has a discretion to take the costs out of the fund before handing it over to the successful litigants.⁴³ See also *Evans v Evans*,⁴⁴ and *Alsop Wilkinson (a firm) v Neary*.⁴⁵

- [91] The analogy in the present case is that because there are questions of solvency of both the applicant and the respondent, an advance costs order would operate to permit the applicant to take its costs out of the fund, irrespective that it might subsequently be found that they are not expenses incurred properly or reasonably.
- [92] But given that the applicant is no longer the trustee of the MPF, there is no basis I can see by which the order sought by the applicant can be treated as some interlocutory order that may be reversed or treated as one made on account pending some further order. In any event, even where an “advance costs order” is made, the cases recognise a revocation of the order by further order might operate from the time of the further order for future costs not so as to retroactively invalidate the advance costs order.⁴⁶
- [93] As previously stated, the applicant, as a former trustee, cannot be seen to be seeking to preserve the property of the MPF as trustee in its defence of the receiver’s claim. It may be of assistance to consider the nature of the equitable right to an indemnity more broadly by reference to cognate principles in other legal contexts.
- [94] For example, it is not just a trustee who has an equitable right to an indemnity for expenses properly incurred. An agent has a similar right,⁴⁷ as does an office holder of a corporation,⁴⁸ including in some circumstances the expenses of running litigation.⁴⁹ The scope of the equitable principle is subject in the agency context to the contractual obligation and rights as agreed.⁵⁰ Even so, there is no suggestion of a *quia timet* right, arising before some of the relevant expenses are paid.
- [95] There is a recognised *quia timet* right in the context of the equitable doctrine of contribution as between co-sureties. A co-surety who discharges more than their share of the obligation to the creditor may obtain an indemnity from a co-surety who has not done so. The right to indemnity may include a share of the costs of successfully defending a proceeding brought by the creditor against the joint obligees.
- [96] In that context, at common law, a joint debtor and surety is obliged to discharge more than their proportion of the joint debt before they can bring a claim for

⁴³ [1982] 1 WLR 756, 760.

⁴⁴ [1982] 1 WLR 756

⁴⁵ [1985] 1 WLR 101.

⁴⁶ *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, 97-99 [89]-[96].

⁴⁷ *Davis v Heuber* (1923) 31 CLR 583, 588.

⁴⁸ *Talbot v NRMA* (2000) 50 NSWLR 300, [20]-[22].

⁴⁹ *National Roads and Motorists’ Association v Whittlam* (2007) 25 ACLC 688, [90].

⁵⁰ *National Roads and Motorists’ Association v Whittlam* (2007) 25 ACLC 688, [95]-[96]; *Rickus v Motor Trades Association of Australia Superannuation Fund Pty Ltd* (2010) 265 ALR 112, 131 [90], where a common law implied term analysis failed at the hurdle that an implied term was not necessary to give business efficacy.

contribution. Equity is more flexible, as was said by Starke J in *McLean v Discount & Finance Ltd*:⁵¹

“At common law, no doubt, a surety could not maintain an action for contribution or money paid until he had actually paid more than his just proportion of the principal debt. But the authorities support the view that in equity the right to contribution can be declared before actual payment is made or loss sustained provided that such payment or loss is imminent. A judgment against a surety for the whole amount of the principal debt justifies such a declaration, as does the allowance of a claim by the principal creditor against the estate of a deceased surety. The apprehended loss or over-payment thus appears sufficiently imminent, and the court acts *quia timet...*” (citations omitted)⁵²

- [97] The form of order so made is derived from *Wolmerhausen v Gullick*.⁵³ It was expressed in the following passage from the reasons in that case:

“I therefore declare the plaintiff’s right to contribution, and direct that, upon the plaintiff paying her own share, the defendant ... is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor or otherwise, to exonerate the Plaintiff from liability beyond the extent of her own share.”

- [98] This equity of exoneration obliges the defendant to discharge the plaintiff’s liability to the creditor either by indemnity to her or payment to the creditor.
- [99] But in such a case, the decision as to the plaintiff’s right to an indemnity is finally made. The declaration is based upon the facts as finally determined as between the plaintiff and the defendant as to the defendant’s obligation to exonerate the plaintiff. The only fact preventing judgment for a money sum is that the plaintiff has not yet paid more than her share.
- [100] In the present case, there has been no final determination of the applicant’s right to an indemnity from the property of the MPF as against the respondent as trustee representing the beneficiaries of the MPF. The question is only raised by this application.

Unresolved questions about expenses properly incurred

- [101] The respondent as trustee of the MPF disputes (as against the receiver) the entitlement of the applicant to any indemnity against the receiver’s claim. However, the parties did not seek to argue or to have found as a fact whether or not there was disentitling conduct by the applicant that might repel any right to indemnity.

⁵¹ (1939) 64 CLR 312.

⁵² (1939) 64 CLR 312, 341.

⁵³ [1893] 2 Ch 514.

- [102] Perhaps that is as well, because there may be some difficulty associated with establishing the legal requirements for a final determination of that question. The questions are illustrated by reference to two cases.
- [103] Up to this point, I have used the conventional expression that in equity a trustee is entitled to indemnity for legal costs in defence of a claim brought against the trustee where they are expenses incurred properly or reasonably. Where there is a *Beddoe* application and judicial advice is given that the trustee would be justified in defending the proceeding, the costs in a reasonable amount will be treated as paid incurred properly or reasonably, assuming the factual basis of the advice holds good.
- [104] But the related question whether there is an indemnity for the liability for tortious conduct as expenses incurred properly is not so easily answered. The question becomes what is the meaning of incurred “properly” or “reasonably”?
- [105] It will be recalled that in *Gatsios* the liability was for damages for misleading or deceptive conduct by the trustee and the costs of the proceeding brought against it by a third party. The Court of Appeal was unable to agree upon what was an expense incurred properly in this context. Two of the three Judges rejected that the requirement necessarily excluded a liability for misleading or deceptive conduct, and rejected the requirement that the liability must have been “properly incurred” as a test of exclusion of the right to indemnity. Spigelman CJ said:

“The only question, therefore, is whether the executors’ conduct in this case has been such as to amount to a violation or culpable neglect of their duty.’

I find this general approach more helpful than the use of conclusory terminology of whether or not conduct was ‘proper’ or ‘reasonable’ as if it were a test.”⁵⁴

- [106] Meagher JA said:

“Presumably if the activity which generated the liability in question were a breach of trust, the right to an indemnity under the general law would no longer exist; similarly if it were criminal in nature, but no criminal offences were charged against NKH, its associates or officers. Again, one must in principle incline to the view that if the activity in question had been fraudulent the law would withhold the right to indemnification; but in the present case Tamberlin J expressly negated fraud. I find it difficult to formulate any other limitations.”⁵⁵

- [107] However, in *Gatsios*, the question was decided after the conclusion of the litigation brought against the trustee and upon the trustee’s right to an indemnity under the terms of the trust deed.
- [108] In the present case, that approach would require the determination of the application of and scope of cls 17.6 and 18.1(c) of the trust deed.

⁵⁴ [2002] NSWCA 29, [16]-[17].

⁵⁵ [2002] NSWCA 29, [47].

- [109] On the other hand, in *Nolan v Collie*,⁵⁶ the Court of Appeal in Victoria virtually rejected the approach in *Gatsios*, in favour of the traditional formulation that indemnity extends to expenses “properly incurred”. Ormiston JA, with whom the other members of the Court agreed, said:

“With the greatest of respect, it is by no means clear why a majority of their Honours in *Gatsios Holdings* seemed to sanction so significant a departure from accepted principle as to leave the trustee’s right largely unconstrained. It is possible that their views were prompted by the fact that the claim there in question resulted from a judgment obtained in an action in tort, which has always posed problems in relation to questions of indemnification. The form of their Honours’ discussion tends to make it unlikely that their intention was so limited, nor does it seem that the case depended, as it might have, on the terms of the trust deed, which appear to have been expressed benevolently towards the trustees. Again with respect, the majority’s views would appear to leave this important area of trust law rudderless and in a state where mischievous trustees might seize upon an almost unfettered right to indemnity as justifying improper deprivations of trust funds, contrary to their obligation not to abuse their position by making it “a means of profit or benefit” to themselves.”⁵⁷ (footnotes omitted)

- [110] This difference of opinion was referred to by the High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*,⁵⁸ but was not resolved then. Nor has it been resolved since.
- [111] The parties made no submissions either recognising or as to the resolution of this uncertainty. The applicant submitted that whether it was entitled to an indemnity upon the application for indemnity for costs turns on whether its defence of the proceeding is expenditure that is reasonably as well as honestly incurred. The applicant also referred to the recent statement by Basten J in *Warton v Yeo*,⁵⁹ referring to a passage from Ipp JA’s reasons in *Macedonian Orthodox Church*:

“Ipp JA... accepted that the general discretion should be subject to the approach adopted by Bowen LJ in *In re Beddoe: Downes v Cottam* that ‘trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness.’ Ipp JA noted that a similar approach had been adopted by the Full Court of the Federal Court in *Adsett v Berlouis*, identifying as the critical question ‘whether or not the conduct which gave rise to the burden of costs - whether costs ordered to be paid or costs incurred by the trustee in prosecution of the litigation - was proper in the sense explained in *Beddoe*; that is, whether the expenditure was reasonably, as well as honestly, incurred.’”⁶⁰

⁵⁶ (2003) 7 VR 287.

⁵⁷ (2003) 7 VR 287, 304 [45].

⁵⁸ (2008) 237 CLR 66, 114 fn (164).

⁵⁹ [2015] NSWCA 115.

⁶⁰ [2015] NSWCA 115, [12].

- [112] But these statements all relate to a defence or proceeding by a trustee still charged with the responsibility of protecting the trust property. They were not about the extent of the right of indemnity of a former trustee defending a claim in the nature of tortious liability involving a fault element. In my view, it is unrealistic in the context of the present case to suggest that the question of any indemnity for costs can be separated from the indemnity for the underlying liability.
- [113] It seems to me that whatever be the correct approach, the resolution of the entitlement to the indemnity on the application for indemnity for costs in the present case requires a finding of fact on a final basis as to any conduct that might disqualify the applicant from an entitlement to that indemnity.
- [114] The applicant seeks to address this by submitting that the receiver does not allege fraud, negligence or breach of trust against the applicant. But, as against the receiver's claim to subrogation to the applicant's right of indemnity from the trust property, the respondent alleges that the applicant is not entitled to indemnity because if the applicant was a person involved in the contraventions by the directors, as alleged by the receiver:
- (a) the expenses (the liabilities alleged) were not reasonably incurred;
 - (b) the applicant was not acting properly;
 - (c) the applicant's conduct was negligent or fraudulent.
- [115] The application for indemnity for costs is made on the basis that the applicant should be entitled to an order for indemnity without these questions being resolved. In my view, the application for indemnity for costs should not be decided in that way. The question of disentitling conduct affects both the applicant's right to any indemnity for the receiver's claim and the applicant's right to an indemnity for costs.

Where an impugned act benefits the trust

- [116] I also observe that in *Gatsios* and *Nolan* reference is made to an alternative basis for a trustee's right of indemnity to a finding that the relevant expense had been incurred not improperly or that otherwise there is no disentitling conduct, namely because the impugned act benefited the trust estate in any event.⁶¹ Curiously, the respondent (not the applicant) relied on the reference to that principle in *Nolan*. I will call it "the benefit principle".
- [117] It is necessary to distinguish between the application for indemnity for costs and any indemnity for the liabilities as former trustee for the MPF. Within the meaning of the benefit principle, a claim by the applicant for indemnity against a liability for damages on the receiver's claim might raise a question whether the impugned acts leading to that liability benefited the trust estate in any event. However, the applicant does not apply for an indemnity against that liability by the present application.
- [118] The applicant submitted that a reason why it should be granted the indemnity for costs is that it advances an additional defence or defences against the receiver's claim for liabilities as former trustee for the MPF to that that raised by the

⁶¹ *Gatsios Holdings v Kritharas Holdings Pty Ltd (in liq)* [2002] NSWCA 29, [33]; *Nolan v Collie* (2003) 7 VR 287, 310 [58].

respondent. My provisional view is that whether or not the applicant's additional ground or grounds of defence are well taken does not make the act of raising those grounds an impugned act which has benefited the trust estate for the purposes of the benefit principle. However, since the contrary was not expressly argued, I will not consider it further.

Other grounds of opposition

- [119] It is strictly unnecessary to decide other questions raised by the respondent in opposition to the application in order to decide it. Having regard to the essentially interlocutory stage of the principal proceeding at which the application has been brought, it is not appropriate to consider them further.

Conclusion

- [120] In my view, for those reasons, and having regard to the nature of the receiver's claim against the applicant for the liabilities as former trustee for the MPF, as previously discussed, the present case is not one in which an order of the kind sought by the applicant should be made, even if in other circumstances such an order could be made in favour of a former trustee.
- [121] Because of that conclusion, in my view, the application should be dismissed.

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: BS3508 of 2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461

First Applicant: JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001

APPLICATION

Definitions

Where the following terms appear in this Application, they have the following meaning:

Act means *Corporations Act 2001* (Cth)

Conclusion means the date not before the conclusion of all Proceedings and after the Receiver and the Liquidator file an affidavit in these proceedings stating that there is no impediment to the distribution of funds to members of all Funds, with such affidavit to include an estimate of the

APPLICATION
Filed on behalf of the Applicants
Form 9, Version 1
Uniform Civil Procedure Rules 1999
Rule 31

Russells
Level 18, 300 Queen Street
Brisbane, Qld, 4000
Tel: 07 3004 8888
Fax: 07 3004 8899
Ref: JTW:20180543

amount to be distributed pending the making of orders in the Final remuneration and expenses determination.

Budget(s) means the estimates of the Liquidator and the Receiver respectively for their remuneration and expenses up to the Conclusion.

Feeder funds means CPAIF and ICPAIF.

Final Distribution means making a final distribution to members of FMIF at the Conclusion in the event that they were responsible for winding up the affairs of the FMIF

Final remuneration and expenses determination means any application for remuneration and expenses to be brought by either the Receiver or the Liquidator at the Conclusion

Funds means, together:

1. LM First Mortgage Income Fund ARSN 089 343 288 (“**FMIF**”);
2. LM Cash Performance Fund ARSN 087 304 032 (“**CPF**”);
3. LM Currency Protected Australian Income Fund ARSN 110 247 875 (“**CPAIF**”);
4. LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (“**ICPAIF**”);
5. LM Australian Income Fund ARSN 133 497 917 (“**AIF**”); and
6. LM Australian Structured Products Fund ARSN 149 875 669 (“**ASPF**”).

Insolvency Schedule means schedule 2 to the *Corporations Act 2001* (Cth).

Interim Distribution means an interim distribution to members of the FMIF, in the event that they were responsible for winding up the affairs of the FMIF

Liquidator means the First Applicant, Mr John Park

LMIM means LM Investment Management Limited (in liquidation) (receivers and managers appointed) ACN 077 208 461

Old Act of the *Corporations Act 2001* (Cth) as in force immediately before 1 March 2017.

Proceedings means, together:

1. Supreme Court of Queensland Proceeding number 11560 of 2016 (“**the Clear Accounts Proceeding**”);
2. Supreme Court Proceedings BS 2166/2015 (“**Ernst & Young Proceedings**”);
3. Supreme Court of Queensland Proceeding number 13534 of 2016 (“**the Feeder Fund Proceedings**”)

Receiver means the Respondent, Mr David Whyte

21 August 2013 Order means the Order of Dalton J dated 21 August 2013 in Supreme Court Proceedings BS3383/13

TAKE NOTICE that the Applicants are applying to the Court for the following orders:

At the directions hearing on 19 November 2018:

1. Directions pursuant to section 511(1) of the Old Act and section 601NF (2) of the Act or, alternatively section 90-15(1) of the Insolvency Schedule and section 601NF(2) of the Act:
 - (a) that subject to the payment pursuant to paragraphs 2(i) and (j) of this application being made, the Liquidator be directed to act as contradictor in respect of:
 - (i) the Clear Accounts Proceeding; and
 - (ii) the Feeder Fund Proceeding;
 - (b) That by no later than 27 November 2018 the Liquidator and the Receiver file affidavits setting out a Budget up to and including the payment of the final distribution to the creditors of LMIM and final distribution to the members of each of the Funds;
 - (c) The Budget set out in the affidavits to be filed in accordance with paragraph 1(b) are to include:
 - (i) estimates of the monthly remuneration of the Liquidator and the Receiver respectively up to and including the Conclusion;
 - (ii) an estimate of the monthly expenses of the Liquidator and the Receiver up to the Conclusion;
 - (iii) an estimate by each of the Liquidator and the Receiver of the remuneration and expenses they would charge for making the Interim Distribution;
 - (iv) an estimate by each of the Liquidators and the Receivers of the remuneration and expenses they would charge for making the Final Distribution;
 - (v) an estimate of the total remuneration and expenses up to the Conclusion in the event that they were responsible for winding up the affairs of the FMIF (other than conduct of the Proceedings);
 - (vi) a description of the work to be carried out by the Liquidator and the Receiver in respect of their estimated remuneration (other than conduct of

the Proceedings) in the event that they were responsible for winding up the affairs of the FMIF;

- (vii) an estimate as to the expenses to be incurred by the Liquidator and the Receiver up to the Conclusion in the event that they were responsible for winding up the affairs of the FMIF (other than conduct of the Proceedings);
- (viii) a description of the expenses to be incurred by the Liquidator and the Receiver up to the Conclusion (other than conduct of the Proceedings) in the event that they were responsible for winding up the affairs of the FMIF;
- (ix) for any Proceeding of which either the Liquidator or Receiver has conduct of, a breakdown by each proceeding of the estimated costs of solicitors, experts and counsel to the conclusion of each proceeding (including any appeal to an intermediate Court of Appeal);
- (x) for any Proceeding of which either the Liquidator or Receiver has conduct of, an estimate of any costs exposure to each counterparty to such proceeding in the event of the proceeding being unsuccessful.

On the further return of the Application, set down provisionally for 10 December 2018

2. Directions pursuant to section 511(1) of the Old Act and section 601NF(2) of the Act or, alternatively section 90-15(1) of the Insolvency Schedule and section 601NF(2) of the Act that:
 - (a) The Receiver's appointment pursuant to the 21 August 2013 Order to act as the person appointed to supervise the winding up of the FMIF is to continue only in respect of the conduct on behalf of the FMIF of:
 - (i) the Clear Accounts Proceeding;
 - (ii) the Feeder Fund Proceeding; and
 - (iii) the EY Proceeding;
 - (b) From the date of this Order, the Liquidator is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution, together with such ancillary Orders as may be appropriate to give effect to this appointment;
 - (c) the Liquidator, or the Receiver in the event of Order in paragraph 2(b) of this application is not made, will:

- (i) within three months of this order, file an affidavit describing any impediment that might exist to his knowledge as to why an interim distribution cannot be forthwith made to members of the FMIF; and
 - (ii) in the event of that the affidavit does not describe an impediment, make the Interim Distribution within a further three months;
- (d) approving the Budgets, in the amounts sought or as varied by the Court, as being reasonable estimates of the remuneration and expenses that may be incurred in the winding up of LMIM and the Funds;
- (e) the remuneration of the Liquidator for the period from the date of this order to the Conclusion:
- (i) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Liquidator for that period, with the Liquidator reserving the right to seek a fixing or determination of the other 50% of the Budget and all other additional remuneration at the Final remuneration and expenses determination; or alternatively
 - (ii) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Liquidator for that period with such amount being on account of an amount to be fixed determined at the Final remuneration and expenses determination at which the initial fixing or determination of 50% of the amount stated in the Budget for the Liquidator can be reduced, increased or stay the same;
- (f) the remuneration of the Receiver for the period from the date of this order to the Conclusion:
- (i) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Receiver for that period, with the Receiver reserving the right to seek a fixing or determination of the other 50% of the Budget and all other additional remuneration at the Final remuneration and expenses determination; or alternatively
 - (ii) be fixed or determined in the amount of 50% of the amount stated in the Budget for the Liquidator for that period with such amount being on account of an amount to be fixed or determined at the Final remuneration and expenses determination at which the initial fixing or determination of 50% of the amount stated in the Budget for the Liquidator can be reduced, increased or stay the same

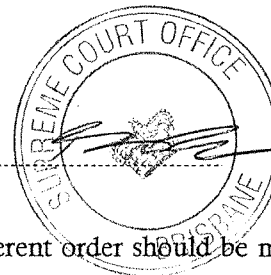
- (g) All of the remuneration of the Liquidator as fixed, or alternatively determined, pursuant to paragraph 2(e) be paid within 30 days from the date of this order from the respective scheme property of FMIF, AIF and ASPF in such proportions as may be just;
- (h) All of the remuneration of the Receiver fixed, or alternatively determined, pursuant to 2(f) be paid within 7 days after the payments in paragraph 2(g) above from the scheme property of FMIF.
- (i) The expenses of the Liquidator to the Conclusion be paid on an indemnity basis from the scheme property of the FMIF, AIF and ASPF in such proportions as may be just on the following basis:
 - (i) in an amount equal to 50% of the expenses stated in the Budget of the Liquidator be paid within 7 days after the end of each calendar month as set out in the Budget with the Liquidator reserving the right to seek an order for payment of the other 50% of the Budget and all other additional expenses as ordered to be paid at the Final remuneration and expenses determination; or alternatively
 - (ii) in an amount equal to 50% of the expenses stated in the Budget of the Liquidator be paid within 7 days after the end of each calendar month as set out in the Budget with such amount being on account of an amount to be paid at the Final remuneration and expenses determination at which the initial payment of 50% of the amount stated in the Budget for the Liquidator can be reduced, increased or stay the same;
- (j) The expenses of the Receiver to the Conclusion be paid on an indemnity basis from the scheme property of the FMIF on the following basis:
 - (i) in an amount equal to 50% of the expenses stated in the Budget of the Receiver be paid within 7 days after the payments in paragraph 2(i)(i) above with the Receiver reserving the right to seek an order for payment of the other 50% of the Budget and all other additional expenses at the Final remuneration and expenses determination; or alternatively
 - (ii) in an amount equal to 50% of the expenses stated in the Budget of the Receiver be paid within 7 days after the payments in paragraph 2(i)(ii) above with such amount being on account of an amount to be order to be paid at the Final remuneration and expenses determination at which time the initial payment of 50% of the amount stated in the Budget for the Receiver can be reduced, increased or stay the same

3. Costs of this Application be payable, and paid, on the indemnity basis from the respective scheme property of the FMIF, AIF and ASPF in such proportions as may be just.
4. Such further or other Order as the Court deems meet.

This application will be heard by the Court at QEII Courts of Law Complex, 415 George Street, Brisbane, Qld, 4000 on 19 November 2018 and provisionally for 10 December 2018.

Filed in the Brisbane Registry on 10 October 2018:

Registrar:



If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you.

On the review hearing of the Application the Applicants intend to rely on the following affidavits:

1. Affidavit of Kelly-Anne Lavina Trenfield to be sworn;
2. Affidavit of Renee Lobb to be sworn;

On the further hearing of the Application the Applicants intend to rely on the following affidavits:

3. Affidavit of John Richard Park to be sworn; and
4. Affidavit of Kelly-Anne Lavina Trenfield to be sworn.

THE APPLICANTS ESTIMATE THE FIRST HEARING SHOULD BE ALLOCATED TWO HOURS

Signed:

Description: Julian Walsh, Solicitor for the Applicants

Dated: 10 October 2018

This application is to be served on:

Respondent Name:

DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001

Address:

of BDO, Level 10, 12 Creek Street, Brisbane, Queensland, 4000, C/- Tucker & Cowen, Level 15, 15 Adelaide Street, Brisbane, Queensland, 4000

Notice fo this application is to be given in accordance with the 3 October 2018 Order of the Honourable Justice Jackson on:

Third Party Name:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Address:

Level 20, 240 Queen Street, Brisbane Queensland, 4000

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited & Anor v Whyte* [2019]
QSC 233

PARTIES: **JOHN RICHARD PARK AND GINETTE DAWN
MULLER AS LIQUIDATORS OF LM INVESTMENT
MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS APPOINTED) ACN 077 208 461 THE
RESPONSIBLE ENTITY OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288**
(First Applicant)

AND

**LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS APPOINTED) ACN 077
208 461 THE RESPONSIBLE ENTITY OF THE LM
FIRST MORTGAGE INCOME FUND ARSN 089 343 288**
(Second Applicant)

v

**DAVID WHYTE AS THE PERSON APPOINTED TO
SUPERVISE THE WINDING UP OF THE LM FIRST
MORTGAGE INCOME FUND ARSN 089 343 288
PURSUANT TO SECTION 601NF OF THE
CORPORATIONS ACT 2001**
(First Respondent)

AND

**SAID JAHANI IN HIS CAPACITY AS RECEIVER AND
MANAGER OF THE ASSETS, UNDERTAKINGS,
RIGHTS AND INTERESTS OF LM INVESTMENT
MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED) ACN
077 208 461 AS THE RESPONSIBLE ENTITY OF THE
LM CURRENCY PROTECTED AUSTRALIAN
INCOME FUND ARSN 110 247 875 AND THE LM
INSTITUTIONAL CURRENCY PROTECTED
AUSTRALIAN INCOME FUND ARSN 122 052 868**
(Second Respondent)

FILE NO/S: BS No 3508 of 2015

DIVISION: Trial Division

PROCEEDING: Application filed 10 October 2018 and an application filed 1 February 2019

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 October 2019

DELIVERED AT: Brisbane

HEARING DATE: For the application filed 10 October 2018 – 10 December 2018
For the application filed 1 February 2019 – 13 March 2019

JUDGE: Jackson J

ORDER: **On the application filed 10 October 2018 the order of the court is that:**

- 1. The application is dismissed.**
- 2. The parties exchange and file written submissions as to costs by 8 October 2019.**

On the application filed 1 February 2019 the order of the court is that:

- 1. The first respondent is authorised and empowered to make an interim distribution from the property of the LM First Mortgage Investment Income Fund (“FMIF”) among the members of the FMIF of up to \$40 million.**
- 2. It is declared that each member holding “Class C” Units in the FMIF is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member’s units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australian dollar prevailing at the date of the commencement of the winding up of the FMIF.**
- 3. The first respondent’s costs of the application be costs in the winding up of the FMIF to be assessed on the indemnity basis and paid to the first respondent from the property of the FMIF.**
- 4. Trilogy exchange and file with any opposite party submissions as to costs by 8 October 2019.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the second applicant is the responsible entity of a registered managed investment scheme – Where the first applicant is the liquidator of the second applicant – Where the first respondent was appointed to take responsibility for ensuring the scheme is wound up in accordance with its

constitution – where the first applicant applied to the court for directions that the first applicant take responsibility for ensuring the scheme was wound up in accordance with its constitution – Where the court held that the winding up of the scheme should not be transferred from the first respondent to the first applicant

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the first respondent was appointed to ensure a registered managed investment scheme is wound up in accordance with its constitution – Where the first respondent applied for orders that he be authorised to make an interim distribution to the members of the scheme in a sum of up to \$40 million

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the first respondent was appointed to ensure a registered managed investment scheme is wound up in accordance with its constitution – Where the first respondent sought a declaration that Class C unit holders were entitled to be paid amounts in the winding up of the scheme – Where the court held that Class C members could receive distributions on the footing their entitlements were ascertained by reference to the appropriate calculation of units in AUD as at the dates of the winding up

ASIC v Atlantic 3-Financial (Aust) Pty Ltd [2004] 1 Qd R 591, cited

ASIC v Letten (No. 7) (2010) 190 FCR 59, cited

ASIC v Letten [2010] FCA 140, cited

Bruce v LM Investment Management Limited (in liquidation) & Ors [2019] QSC 126, cited

Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276, cited

Frost v Bovaird (2012) 203 FCR 95, cited

Hung v Warner; re Bellpac Pty Ltd (receivers and managers appointed) (in liquidation) [2013] FCAFC 48, cited

Ide v Ide (2004) 184 FLR 44, cited

LM Investment Management Ltd (in liq) v Bruce and others (2014) 102 ACSR 481, cited

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, cited

Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund) [2015] QSC 283, cited

Park v Whyte (No. 2) [2018] 2 Qd R 413, cited

Park v Whyte (No. 3) [2018] 2 Qd R 475, cited

Re Bruce & Anor v LM Investment Management Limited & Ors [2013] QSC 192, cited
Re Stacks Managed Investments Ltd (2005) 54 ACSR 466, cited

Corporations Act 2001 (Cth), ss 420, 473, 563B, 601NF, 1581,
Insolvency Law Reform Act 2016 (Cth)
Trusts Act 1973 (Qld), s 59

COUNSEL: For the application filed on 10 October 2018 (“first application”):
 J Peden QC and S Russell for the applicant liquidator
 J McKenna QC and D Ananian-Cooper for the respondent
 David Whyte
 D Turner for Said Jahani

For the application on 1 February 2019 (“second application”):
 J McKenna QC and D Ananian-Cooper for the applicant
 David Whyte

SOLICITORS: For the application on 10 December 2018:
 Russells for the applicant liquidator
 Tucker & Cowen for the respondent David Whyte
 HWL Ebsworth for Said Jahani

For the application on 13 March 2019:
 Tucker & Cowen for the respondent David Whyte
 HWL Ebsworth for Said Jahani

JACKSON J:

- [1] These two applications are related and, accordingly, may be dealt with together in these reasons. They are also related to a separate set of applications that proceeded after these applications were heard.¹
- [2] The first application was heard on 10 December 2018. By it, the liquidator of LM Investment Management Limited (in liquidation) (receivers appointed) (“LMIM”) applied for directions as to how the registered managed investment scheme named the LM First Mortgage Investment Fund (“FMIF”) is to be wound up consequent upon earlier orders resolving an earlier directions application court made on 8 and 21 August 2013,²

¹ *Bruce v LM Investment Management Limited (in liquidation) & Ors* [2019] QSC 126.

² *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

and 17 December 2015 as varied,³ that I will term the “First Directions Application”,⁴ and other relevant decisions as to the liquidator’s remuneration and expenses.⁵ Although mostly directed to the winding up of the FMIF, the first application sought some orders in relation to two other registered managed investment schemes, the LM Australian Income Fund (“AIF”) and the LM Australian Structured Products Fund (“ASPF”). LMIM is the responsible entity of all three schemes. The first respondent, David Whyte is a person appointed⁶ to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders made under s 601NF(2) of the *Corporations Act 2001 (Cth)* (“CA”).⁷ He was also appointed as the receiver of the scheme property of the FMIF, with powers to start and defend proceedings on behalf of LMIM as responsible entity of the FMIF.⁸

- [3] The orders applied for in the first application, in substance, would see the management of how the FMIF is to be wound up transferred to the liquidator, subject to the continuation of existing legal proceedings by Mr Whyte as receiver of LMIM as responsible entity of the FMIF. It is necessary to deal with the facts and grounds of the application in some detail. Nevertheless, it is relevant to observe that as long ago as July 2013 the liquidator opposed any order that Mr Whyte be appointed as a person to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution⁹ and, since that order was made, the liquidator has sought to overturn or reduce Mr Whyte’s role on two previous occasions, by an appeal from the orders made on 8 and 21 August 2013,¹⁰ and by the First Application for Directions.¹¹ Accordingly, this is not the first occasion on which the liquidator has sought to resist or reduce Mr Whyte’s appointed role.
- [4] The second application was heard on 13 March 2019, and then adjourned for consideration until after the third related but separate set of applications were heard and decided. The order applied for in the second application would see Mr Whyte authorised to make an interim distribution to the members of the FMIF in a sum of up to \$40 million. It is necessary for him to seek such an order because an existing direction as to how the FMIF is to be wound up is that he not make a distribution without an order of the court.¹² Again, it will be necessary to consider the facts and grounds advanced on the second application in some detail, but an appropriate initial observation is that Mr Whyte’s application is founded on the winding up of the FMIF coming to an end, subject to two

³ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283. See also the order made 17 December 2015 and the order made on 18 July 2018 (CFI 138).

⁴ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

⁵ *Park v Whyte (No. 2)* [2018] 2 Qd R 413; *Park v Whyte (No. 3)* [2018] 2 Qd R 475. As well, there have been a number of decisions relevant to David Whyte’s remuneration as receiver and person appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the court’s orders.

⁶ *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

⁷ *Corporations Act 2001 (Cth)*, s 601NF(1).

⁸ *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

⁹ *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

¹⁰ *LM Investment Management Ltd (in liq) v Bruce and others* (2014) 102 ACSR 481.

¹¹ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

¹² *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283, [106].

or three important pieces of litigation and other lesser matters, so that it is clear that the proposed interim distribution to members is possible and, accordingly, should be made.

- [5] The third related but separate set of applications (“Feeder Funds Proceeding judicial advice applications”) were for orders that the trustees and responsible entities that are parties to proceeding BS 13534 of 2016, known colloquially among the parties as the “Feeder Funds Proceeding” were justified in entering into a deed of settlement and release compromising the proceeding. LMIM as responsible entity of the FMIF, by Mr Whyte, is the plaintiff in the Feeder Funds Proceeding. The Feeder Funds are registered managed investment schemes, namely the LM Currency Protected Australian Income Fund (“CPAIF”), the LM Institutional Currency Protected Australian Income Fund (“ICPAIF”) and the LM Wholesale First Mortgage Income Fund (“WFMIF”). They are the defendants to the Feeder Funds Proceeding, together with LMIM in its own right. Each of the Feeder Funds holds units in the FMIF.
- [6] Orders that the responsible entities were justified in entering into the deed of settlement and release compromising the proceeding were conditions precedent to the performance of the deed of settlement and release, and were made on 22 May 2019.¹³ Because those conditions have now been satisfied, it is possible for the second application for interim distribution to proceed without jeopardising the compromise and settlement of the Feeder Funds Proceeding. Because the first application for directions by the liquidator included an order that he be appointed or authorised to act as a contradictor in respect of the Feeder Funds Proceeding, it was not appropriate to resolve either the first or the second applications before the result of the applications for judicial advice or directions as to whether the responsible entities were justified in entering into and implementing the deed of settlement and release was known.
- [7] For the reasons that follow, the conclusions I have reached are that the first application should be dismissed and an order should be made on the second application authorising Mr Whyte to make the proposed interim distribution.

First application – directions in the winding up of the FMIF and other schemes

- [8] By the first application, the liquidator applies for orders that may be grouped into categories. Summarising, the orders sought are that:
- (a) Mr Whyte’s appointment continue only in respect of his conduct on behalf of LMIM as responsible entity of the FMIF of proceeding BS 11560 of 2016, colloquially known among the parties as the “Clear Accounts Proceeding”, the Feeder Funds Proceeding and proceeding BS 2166 of 2015, colloquially known among the parties as the “EY Proceeding”;¹⁴
- (b) the liquidator henceforth take responsibility for ensuring that the FMIF is wound up in accordance with its constitution together with such ancillary orders as may be appropriate;

¹³ *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

¹⁴ Surprisingly, the liquidator did not include proceeding BS 12317 of 2014, colloquially known among the parties as the “Bellpac Proceeding”, in those Mr Whyte would continue. I assume this to have been an oversight, as the Bellpac Proceeding was ready for trial at the time of hearing of the first application and it would have made no sense to transfer it from Mr Whyte’s control to the liquidator’s control. Kellie-Anne Trenfield said the most efficient structure moving forward was for Mr Whyte to maintain control of all litigation.

- (c) the liquidator or Mr Whyte, in the event that the last order is not made, file an affidavit describing any impediment that might exist to an interim distribution being made forthwith to members of the FMIF;
- (d) the liquidator and Mr Whyte file affidavits setting out budgets of remuneration and expenses for the period up to and including the payment of the final distribution to creditors and members of the FMIF (and in the liquidator's case, the AIF and ASPF);
- (e) the court approve the budgets for remuneration and expenses to be incurred as reasonable estimates in the winding up of LMIM, the FMIF, the AIF and the ASPF;
- (f) the remuneration of the liquidator be paid forthwith in the amount of 50 percent of the amount of the approved budget, with the liquidator to receive the other 50 percent and all other additional remuneration as might be ordered by the court at the final remuneration and expenses determination, or that the initial 50 percent be treated as being "on account" of the final determination;
- (g) the remuneration of Mr Whyte henceforth be dealt with in the same way;
- (h) 50 percent of the remuneration of the liquidator, in accordance with the approved budget, be paid within 30 days of the order for directions from the respective scheme property of the FMIF, AIF and ASPF, in such proportions as may be just;
- (i) 50 percent of the remuneration of Mr Whyte, in accordance with the approved budget, be paid within seven days after payments are made to the liquidator from the scheme property of the FMIF;
- (j) the expenses of the liquidator to the conclusion of the winding up of the FMIF, AIF and ASPF be paid from the scheme property of the FMIF, AIF and ASPF, in such proportions as may be just, by payment of 50 percent of the expenses in the approved budget within seven days after the end of each calendar month, with the other 50 percent of the approved budget and all other additional expenses as might be ordered to be paid at the final remuneration and expenses determination, or that the initial 50 percent be treated as being "on account" of the final determination;
- (k) the expenses of Mr Whyte henceforth be dealt with on the same basis.

[9] On any view, these proposed directions are unusual. They are opposed by Mr Whyte as to the FMIF. The liquidator's submissions in support of the orders are framed by reference to the grounds of Mr Whyte's opposition. However, at a high level, the liquidator's application is informed by three or four considerations. The most important of them is that the liquidator is unfunded for remuneration and expenses in respect of the FMIF, unless the liquidator is entitled to an indemnity from the scheme property of the FMIF. Second, the liquidator submits that the delay, costs and expenses of the winding up of the FMIF are excessive. Third, the liquidator submits that the proposed budgeting, approval and 50 percent pre-payment mechanism would introduce transparency in relation to remuneration and expenses being charged to the FMIF.

[10] Mr Whyte's opposition to the proposed orders is made only in relation to the FMIF; he has no concern or role in the administration of any other fund.

Progress of winding up the FMIF

- [11] At this point, Mr Whyte (and another receiver appointed by a secured creditor of the FMIF), have realised all of the real property assets of the FMIF, resulting in a substantial cash balance of over \$60 million that is available to meet further expenses in collecting any remaining assets in legal proceedings and for distribution to members. At the time of the hearing of the first application, the cash assets were held in the name of the custodian of the FMIF and were under the control of the secured creditor's receiver, but that receiver has now retired and Mr Whyte has control of the relevant accounts. Accordingly, the steps to finalising the winding up of the FMIF may be summarised as:
- (a) finalising the creditors or claimants who are entitled to indemnity from the FMIF. That is a process provided for by previous orders. That has been partly completed, but not finished, possibly because the liquidator ceased to do the necessary work because he was unfunded;
 - (b) making an interim distribution to the members of the FMIF;
 - (c) completing the remaining litigation matters brought by or against LMIM as responsible entity of the FMIF (by Mr Whyte) and any claims against it or him that need to be completed; and
 - (d) making any final distribution, a final audit and deregistration of the scheme.

Liquidator identifying claims for indemnity

- [12] The order made on 17 December 2015 upon the First Directions Application¹⁵ provided that Mr Whyte was authorised to determine whether and to what extent LMIM is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against LMIM acting as responsible entity of the FMIF. The order provided for a mechanism directing the liquidators to ascertain the debts payable by and the claims against LMIM, to adjudicate upon those debts and claims in accordance with the provisions of the *Corporations Act 2001 (Cth)* ("CA"), to identify whether LMIM has a claim for indemnity from the property of the FMIF, and to make those claims to Mr Whyte for consideration in accordance with the order. If Mr Whyte rejected a claim for indemnity, provision was made for it to be resolved by the court, if necessary.
- [13] Regrettably, that process did not occur as envisaged, or in a timely way. In the event, on 18 July 2018 the court ordered that any further claim by the liquidator for an indemnity and payment from the property of the FMIF be submitted to the court for approval. The process envisaged by that order for the liquidator to make any further claims apparently has not been completed by the liquidators still, although the picture is somewhat crystallised by the evidence that was adduced in support of the second application for an interim distribution that is made by Mr Whyte.

¹⁵ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

Appointment of liquidator as contradictor

- [14] At the hearing, the liquidator did not make any detailed oral submissions in support of the application for orders that the liquidator be appointed as a contradictor in either the Feeder Funds Proceeding or the Clear Accounts Proceeding. Nevertheless, it is necessary to deal with those questions as the application for those orders was not withdrawn.

Feeder Funds Proceeding

- [15] LMIM as responsible entity of the FMIF claims relief as plaintiff in the Feeder Funds Proceeding as to whether the Feeder Funds were disentitled from receiving distributions in the winding up of the FMIF by reason of benefits or payments previously provided to and received by them, and allegedly made by LMIM as responsible entity of the FMIF in breach of trust, including whether a number of income distributions and deemed reinvestments by the Feeder Funds in units in the FMIF were void.
- [16] On 13 June 2018, the court made an order under s 59 of the *Trusts Act 1973 (Qld)* that the interests of LMIM as responsible entity of the CPAIF and the ICPAIF as defendants to the Feeder Funds Proceedings be represented by Said Jahani, a receiver appointed to the assets of those funds by a secured creditor. The WFMIF was represented by Trilogy Funds Management Ltd (“Trilogy”) as its responsible entity.
- [17] Before the hearing of the first application, the Feeder Funds Proceeding was settled at mediation and the deed of settlement and release was executed by the relevant parties through their representatives. There are, however, a number of conditions precedent to the performance of the deed, including that:
- (a) various parties to the deed, including Mr Whyte, obtain such judicial advice as they considered necessary to confirm that they were justified in entering into the deed; and
 - (b) Mr Whyte is authorised to make an interim distribution to the members of the FMIF of at least \$30 million.
- [18] Mr Whyte submitted that any order for the liquidator to be a “contradictor” in the Feeder Funds Proceeding to represent the interests of LMIM in its personal capacity was unnecessary. I agree. Alternatively, Mr Whyte and Mr Jahani submitted that if the liquidator sought to be appointed as a contradictor to represent the interests of the members of the CPAIF and ICPAIF that too was unnecessary. Mr Jahani, as receiver of the property of the CPAIF and ICPAIF has the power to conduct the defences of LMIM as responsible entity of those schemes in the Feeder Funds Proceeding, in the interests of the secured creditor and, in effect, on behalf of the members of those schemes.¹⁶ Further, on 13 June 2018, the court ordered that he represent LMIM as responsible entity for the CPAIF and ICPAIF in the Feeder Funds Proceeding. There was no evidence that any member of the CPAIF or the ICPAIF had any concern about Mr Jahani representing LMIM as responsible entity of those schemes, or that Mr Jahani had failed or was failing to defend the proceeding properly. Of course, Trilogy is a defendant to the Feeder Funds Proceeding as the responsible entity for the WFMIF and it is the appropriate party and representative as trustee of the members of that scheme.

¹⁶ *Corporations Act 2001 (Cth)*, 420(2)(k).

- [19] The liquidator's submissions seemed to be premised on the fact that because the liquidator has not seen the deed of settlement and release he could not assess the possibility that Mr Jahani may not have acted in the best interests of the members of the CPAIF and the ICPAIF. That is not a reason to order that the liquidator be a contradictor in the Feeder Funds Proceeding. There was no warrant in the circumstances as disclosed on the application for an order appointing the liquidator to act as a contradictor for any party to the Feeder Funds Proceeding. Mr Jahani, as the receiver of the scheme property of the CPAIF and the ICPAIF was the proper representative of LMIM as the responsible entity of the CPAIF and the ICPAIF. Under the terms of the deed of release and settlement, it was a condition precedent that Mr Jahani make a successful application to the court in the Feeder Funds Proceeding judicial advice applications that he was justified in entering into the deed of settlement and release. That has now occurred.¹⁷
- [20] Accordingly, I decline to make an order that the liquidator be directed to act as a contradictor in respect of the Feeder Funds Proceeding.

Clear Accounts Proceeding

- [21] The Clear Accounts Proceeding is a proceeding by which LMIM as responsible entity of the FMIF, by Mr Whyte, claims relief against LMIM in its own right, by the liquidator, for alleged breaches of trust by LMIM. On 25 July 2018, the court directed that the liquidator represent the interests of LMIM in its own right in the Clear Accounts Proceeding and ordered that the proceeding be stayed pending completion of the proof of debt process.
- [22] The relevant interests being represented in the Clear Accounts Proceeding must be kept in mind. Mr Whyte claims relief to vindicate alleged rights of the unit holders of the FMIF as beneficiaries of the trust of the scheme property of the FMIF to have LMIM as trustee restore trust assets of the FMIF. Accordingly, no question of the liquidator representing the interests of the unit holders of the FMIF as beneficiaries arises. There is no basis for LMIM to seek appointment as contradictor in the interest of the unit holders.
- [23] The basis of the liquidator applying to be appointed as a contradictor in the Clear Accounts Proceeding seems to be a suggestion that by doing so he may be entitled to receive payment of remuneration and legal expenses to oppose the proceeding from the scheme property of the FMIF. However, orders to that effect are not sought explicitly.
- [24] There are some circumstances where a defendant, including a trustee who has title to or possession of property to which an adverse proprietary claim is made by a plaintiff, may be authorised to utilise some of that property to defend the claim, either by an application for directions under trust legislation,¹⁸ or more generally.¹⁹ But the primary or usual rule is that a trustee who defends a claim for breach of trust brought by or on behalf of the beneficiaries is not entitled to indemnity for their costs when incurred, although if the trustee is successful the trustee's costs would ordinarily be ordered to be paid by the opposite party personally or from the trust estate.²⁰

¹⁷ *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

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, 94 – 97 [74]-[88].

¹⁹ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 283-285.

²⁰ *Frost v Bovaird* (2012) 203 FCR 95, 106-109 [69]-[79].

- [25] Thus, if LMIM in its own right, by the liquidator, successfully defends the Clear Accounts Proceeding, it and he might be entitled to an indemnity from the property of the FMIF for any costs and expenses reasonably incurred that are not compensated by an order for costs that might be made in its favour. But that does not, per se, justify making an order in advance to fund the alleged defaulting trustee's costs from the assets of the trust fund and does not justify an order for appointment of the liquidator as a contradictor so as to fund those costs from the trust estate of the scheme property of the FMIF.
- [26] In my view, no appointment of the liquidator as a contradictor for the Clear Accounts Proceeding should be made.

Liquidator's proposed remuneration and expenses regimes

- [27] The liquidator submits that the winding up of the FMIF has been a lengthy and expensive task. In particular, the remuneration of Mr Whyte up to the time of making the first application has exceeded \$14 million, to which must be added the remuneration of the liquidator (including whilst appointed voluntary administrator) and the external receivers.
- [28] The liquidator submits that since all the assets of the FMIF have been realised, apart from any that may be collected in the remaining litigation, any course which lessens the cost burden on the members of the FMIF is desirable and necessary.

Remuneration

- [29] To that end, the liquidator proposes²¹ that if he were appointed to continue the winding up of the FMIF, he would cap his remuneration for the work necessary to wind it up at \$180,000 per annum plus \$200,000 for identified one-off tasks that would need to be completed (both exclusive of GST).
- [30] The liquidator submits that the continued appointment of Mr Whyte apart from continuing the Feeder Funds Proceeding, the Clear Accounts Proceeding and the EY Proceeding (and I infer the Bellpac Proceeding) is unnecessary. As previously mentioned, there is a substantial issue between Mr Whyte as receiver of the FMIF and LMIM in its own right, by the liquidator, as to whether LMIM in its own right is entitled to recover costs or expenses by an indemnity of exoneration from the scheme property of the FMIF, which is the subject of the Clear Accounts Proceeding.
- [31] Notwithstanding this difficulty, the liquidator made submissions as to the differences between his proposals in relation to a number of different subject matters that would remain in the winding up of the FMIF, as matters that will attract remuneration for the insolvency practitioner carrying them out, on the basis that the comparison demonstrates that the liquidator would be more cost effective than Mr Whyte. Perhaps he would be on those matters, but it does not seem to me that is a strong factor in the circumstances viewed overall, because they are relatively minor matters of remuneration and expense in comparison to resolving the remaining litigation.
- [32] Another point that assumed some significance in oral argument was Mr Whyte's concern that if responsibility for the winding up of the FMIF were transferred to the liquidator, except for Mr Whyte's conduct of the remaining litigation matters, the cash funds that are presently under Mr Whyte's control would pass to the liquidator. Mr Whyte's

²¹ By an affidavit of Kelly-Anne Trenfield.

submissions expressed concern about both the practical need he would then have to involve the liquidator in seeking payment of sums on account of the remaining litigation and also that the liquidator has conflicts between LMIM's own interests and LMIM's duties as responsible entity of the other registered schemes on the one hand and the interests of the members of the FMIF. However, before reaching those matters there are a number of other points.

- [33] First, the fundamental purpose of the liquidator's proposal for orders for budgeting, approval and pre-payment of 50 percent of future remuneration is that the liquidator will receive a substantial sum by way of pre-payment of that remuneration from the scheme property of the FMIF for the responsibility of carrying out the remaining work of winding up the FMIF as a registered scheme.
- [34] I have previously decided that because the provisions of the CA require the liquidator of LMIM to call for and adjudicate on proofs of debt of LMIM in LMIM's winding up, and that some of the proofs will be in respect of debts which LMIM incurred as responsible entity and trustee of the FMIF for which LMIM might be entitled to an indemnity by way of exoneration from the property of the FMIF, for expenses properly incurred, the liquidator should call for relevant proofs, adjudicate upon them and notify them to Mr Whyte. That was the subject of the order made on 17 December 2015 and varied on 18 July 2018. Those orders specifically made provision for the liquidator to be reimbursed for his remuneration and expenses of any proofs that should be accepted as debts properly incurred on behalf of the FMIF, although not in advance.
- [35] However, by the Clear Accounts Proceeding, Mr Whyte alleges that the members of the FMIF are entitled to set up claims that they have against LMIM in its own right to restore the trust funds of the FMIF as scheme property, as a defaulting trustee, against any claim by LMIM for an indemnity from the scheme property of the FMIF for expenses properly incurred on behalf of the FMIF. Accordingly, Mr Whyte submits that to make the order for pre-payment of remuneration sought by the liquidator would be to require the members of the FMIF to fund the claims of the creditors, beyond the scope of the existing orders. In making submissions in support of the pre-payment of remuneration order, the liquidator did not deal with this difficulty.
- [36] Second, because the liquidator proposes that Mr Whyte continue to conduct both the Clear Accounts Proceeding on behalf of the unit holders of the FMIF against LMIM in its own right by the liquidator, as well as the Feeder Funds Proceeding and the EY Proceeding (and I infer the Bellpac Proceeding), it will be necessary for Mr Whyte to have access to the cash funds of the FMIF for that purpose and to report to unit holders as to the progress of those proceedings.
- [37] Given these points, there does not seem to be any logical reason why the functions of managing registry issues or general administration otherwise warrant an order generally handing over the conduct of the winding up of the FMIF, including its substantial cash funds, otherwise, to the liquidator. The point is illustrated by Kellie-Anne Trenfield's affidavit that proposes on the liquidator's behalf that for the ongoing litigation the most efficient structure would be for Mr Whyte to have conduct of the Feeder Funds Proceeding, the Clear Accounts Proceeding, the Bellpac Proceeding and the EY Proceeding and,²² on the basis that Mr Whyte should estimate his remuneration and

²² Supreme Court of Queensland, BSC 12317/14.

expenses through to the conclusion of the proceedings and if approved by the court retain the “sum” (50 percent of the approved budget) without having recourse to the remaining funds of the FMIF and on the basis that the liquidator would maintain a liaison with Mr Whyte. That proposal does not seem to me to be practical. I note that after that affidavit was sworn the Bellpac Proceeding went to a full trial in April 2019, but the EY Proceeding has not significantly progressed.

- [38] Even if those reasons were not enough, there are other potential difficulties associated with the liquidator’s proposed regime for budgeting, approving and pre-paying 50 percent of the approved amount of remuneration and expenses.
- [39] The court’s power in respect of the liquidator’s remuneration is that provided for by s 473(3) of the CA that a liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined under that section.²³ Under s 473, there is no provision for a maximum amount of remuneration where an external administrator is entitled to receive remuneration worked out on a time cost basis.²⁴ As well, in the body of cases developed as to the practices that relate to a liquidator’s remuneration, no case identified in submissions, or of which I am aware, supports an order for a budgeting process that would determine, in effect, that an amount of remuneration is approved by court order but is also subject to a right on the part of the liquidator to apply for further remuneration together with a right of pre-payment of 50 percent (or some other percentage) of the relevant amount, in aid of cash flow. It will be observed that the orders applied for do not propose to cap finally the amount of the liquidator’s remuneration in a way that transfers the risk of the amount proving to be too low to the liquidator, although on the hearing of the application it was proposed that there be a cap on some items of work.
- [40] The driving feature of the liquidator’s proposal in relation to his future remuneration is that he receive pre-payment of remuneration to the extent of 50 percent (or some other percentage) from the scheme property of the FMIF. In my view, for the reasons already mentioned, that is not an appropriate order in this case, assuming there is power to make it in the first place. There is little point in incurring the costs of budgeting and approval only to wait until the final determination of the appropriate remuneration which was not truly fixed.
- [41] As to the schemes other than the FMIF, namely the AIF and ASPF, there is some untidiness as to the precise orders sought by the liquidator. This was introduced by the liquidator apparently applying for an order that he prepare a single budget for more than one scheme. The liquidator’s submissions continued the difficulty by describing the schemes collectively as the “LMIM Estate”, a concept devoid of legal meaning. However, some of the orders applied for can only relate to the FMIF. So far as Mr Whyte is concerned, that is the only scheme in which he was interested. Some orders sought specifically referred to the winding up of the affairs of the FMIF. Yet others did not, yet they would have affected the FMIF. For example, the provision for Mr Whyte’s remuneration to be paid as to 50 percent until the “Conclusion”, a term defined to mean a date not before an affidavit by the liquidator that there is no impediment to the

²³ Although s 473 of the *Corporations Act* 2001 (Cth) was repealed by the *Insolvency Law Reform Act* 2016 (Cth), and the introduction under that Act of the Insolvency Practice Schedule (Corporations), s 1581 of the CA provides that despite the repeal of s 473, the old Act continues to apply in relation to the remuneration of a liquidator of a company appointed before 1 March 2017.

²⁴ Compare s 60-10(4) of the *Insolvency Practice Schedule (Corporations)*.

distribution of funds to members of all schemes, would have had Mr Whyte's remuneration entitlement turn on the progress of the winding up of the AIF and ASPF.

- [42] However, it is unnecessary to separately consider the position of the schemes other than the FMIF, with a view to whether any separate order should be made concerning them. No particular or separate reason to warrant the budgeting, approval and pre-payment orders sought in relation to those schemes was relied upon by the liquidator. In any event, the liquidator submitted on the hearing of the first application that the AIF, ASPF and CPF were within weeks of completion of winding up (in December 2018) and the only property of the ACPAIF and CPAIF were cash and units in the FMIF.

Mr Whyte's remuneration

- [43] As to the liquidator's application for similar orders in relation to Mr Whyte's remuneration, in my view, the driving feature appears to be to make Mr Whyte take the risk of estimating his remuneration for the remaining litigation and to limit his cash flow to 50 percent of that estimate until the final determination of his remuneration.
- [44] The court's power, if any, to order that Mr Whyte's remuneration be determined and paid from the scheme property of the FMIF begins with s 601NF(1) of the CA, by which the court may, by order, appoint a person to take responsibility for ensuring that a registered scheme is wound up in accordance with its constitution and the power under s 601NF(2) to give directions about how the registered scheme is to be wound up. In addition, as in this case, it has been held that in making such an order or orders, the court may appoint the person as receiver of the scheme property of a registered scheme, including orders that confer on the person the powers of a receiver in relation to the property and the scheme, *mutatis mutandis*, to those provided for by s 420(1) and (2) of the CA in relation to a receiver of a company's property. In that context, the court has power, by order, to determine the amount to be paid by way of remuneration to a receiver, as it does in relation to court appointed receivers generally.²⁵
- [45] Accordingly, when Mr Whyte was appointed as a person to ensure that the FMIF was wound up in accordance with its constitution and any orders made under s 601NF(2) of the CA, and he was appointed receiver of the scheme property, an order was made that he be entitled to claim remuneration in respect of the time spent by him and by employees of his firm who performed work in carrying out the appointment at rates and in the sums, from time to time, approved by the court and he be indemnified out of the assets of the FMIF in respect of such remuneration. It is in accordance with that order that Mr Whyte's remuneration has been approved by the court from time to time, and he has indemnified himself from the scheme property of the FMIF.
- [46] Mr Whyte opposes the liquidator's proposed budgeting, approval and 50 percent pre-payment of remuneration regime to the extent that it might apply to him. He consented to appointment on the basis of the existing provisions in the court's order as to his remuneration. Having consulted with the other members of his firm, he does not consent to an arrangement whereby his remuneration is determined in advance by an estimate and paid only as to 50 percent from time to time until a final determination hearing at the completion of the winding up of the FMIF and the other schemes.

²⁵ *ASIC v Letten (No. 7)* (2010) 190 FCR 59, [118]-[119], [270]-[271]; *ASIC v Letten* [2010] FCA 140, [47]; *Ide v Ide* (2004) 184 FLR 44, 49-50; *ASIC v Atlantic 3-Financial (Aust) Pty Ltd* [2004] 1 Qd R 591, 597-598, [27]-[32].

- [47] That is not surprising, for a number of reasons. First, the liquidator's proposal would make Mr Whyte and his firm funders of 50 percent of his remuneration for the balance of the period of the winding up of the FMIF. Second, whereas the liquidator's remuneration for other remaining functions in respect of the FMIF would be relatively simple (leaving to one side any defence of the Clear Accounts Proceeding), Mr Whyte's remaining functions include the conduct of complex commercial litigation, including the EY Proceeding.
- [48] Third, the liquidator's proposal assumes that Mr Whyte's remaining work and remuneration is capable of being accurately estimated and budgeted in advance. That is an unlikely scenario in terms of the remuneration for the remaining litigation. The amount of that remuneration may be greater or lesser to a very significant degree depending on whether (and when) the litigation is compromised or whether it must be or should be fought to the end.
- [49] In support of this part of the application, the liquidator referred in submissions to the estimated remuneration to be incurred by Mr Whyte to 30 June 2019, being in the range between \$690,000 and \$925,000. The point appeared to be that the amount of the liquidator's proposed budget for remuneration was, in comparison, much less. However, the comparison was not of like with like. The remuneration incurred and to be incurred by Mr Whyte may not have included work of gathering other assets of the FMIF, but they included very substantial work of conducting the legal proceedings on foot during that year, including the Feeder Funds Proceeding, the Clear Accounts Proceeding, the Bellpac Proceeding and the EY Proceeding. These are not items covered by the liquidator's proposal for his remuneration.
- [50] Although the liquidator referred to the cost and delay of the winding up of the FMIF to date, Mr Whyte pointed out, first, that the remuneration he has sought and received has been approved by the court in ten successive six monthly applications without reduction, and that his ongoing remuneration is the subject of approval applications made to the same judge.
- [51] Second, as to delay, Mr Whyte pointed out that although delay is raised in the liquidator's written submissions, no example or instance of delay on Mr Whyte's part was referred to by the liquidator in written or oral argument.
- [52] ASIC has supported Mr Whyte's position by correspondence. It stated that it was concerned that the liquidator's motivation for filing the application might be to prevent Mr Whyte from seeking remuneration as might properly be incurred by him in his capacity as the person charged with the responsibility of winding up the FMIF and that having reviewed the application and the material filed in support of Mr Whyte's then most recent application for remuneration, ASIC did not seek to be heard on the application, consistent with ASIC's position in respect of each of the previous applications for remuneration made by Mr Whyte.
- [53] Neither Mr Jahani nor Trilogy support the liquidator's application on the proposed budget, approval and 50 percent pre-payment of remuneration proposal.
- [54] In my view, nearly all of the relevant circumstances point against the proposed orders for budgeting, approval and pre-payment of the future remuneration of Mr Whyte's remuneration and no order to that effect should be made in the circumstances of this case.

Liquidator's expenses

- [55] In substance, the liquidator's proposal for his expenses is that, like remuneration, they be budgeted and pre-approved and then approved amounts be paid monthly in advance to meet expenses. In my view, in substance, this too, is a pre-payment regime based on forecasts of expenses, driven by the liquidator's lack of funds in the winding up of LMIM generally and in respect of the FMIF, and other insolvent schemes or funds, in particular.
- [56] Although the point is not as clear in relation to expenses other than legal expenses of conducting outstanding legal proceedings, in my view, there is no real justification for the budgeting, approval and pre-payment of the liquidator's expenses either, in the circumstances of this case. The amounts involved are relatively less than the expenses by way of legal expenses of the relevant proceedings, which the liquidator does not propose to conduct. Overall, it is difficult to see the attraction in the liquidator's proposal, in relation to the FMIF in particular.

Mr Whyte's expenses

- [57] In support of this part of the application, the liquidator referred to the financial statements for the FMIF for the year ended 30 June 2018, that show Mr Whyte's fees and outlays, for investigations, litigation and non-operating costs as \$1,0007,573 and operating costs of the FMIF as \$1,231,477. However, there was no evidence as to whether any of those amounts is excessive, or unjustified, or what was included in them beyond those descriptions.
- [58] Mr Whyte relied on the fact that his expenses were approved for payment by the secured creditor's receiver up to the point in time after the hearing of the application when they retired and they are subject to approval by the custodian of the FMIF.
- [59] I have previously summarised the source of the court's powers and the orders under which he was appointed in relation to Mr Whyte's remuneration. Similar points apply to his expenses.
- [60] Mr Whyte's expenses will be of a different order and complexity to those proposed by the liquidator, because he retains responsibility for the expenses associated with the remaining litigation that will be significant, in particular because of the likely amounts of legal fees.
- [61] Mr Whyte also estimated his expenses for the period to 30 June 2019. However, there is no point in setting the amounts out in these reasons, because they were estimated on the basis of assumptions as to settlement of the EY Proceeding at mediation during that six month period. That possibility did not come about. The EY Proceeding remains in the interlocutory stages of disputes about the pleadings. Inevitably, Mr Whyte will have incurred further expenses than those estimated at December 2018. The example illustrates the lack of utility in attempting to budget, approve and pre-pay 50 percent of the approved budgeted expenses on the footing that until the final determination for the winding up of the FMIF, Mr Whyte should be limited to the budgeted and approved amount.
- [62] In my view, the liquidator's proposed budgeting, approval and pre-payment of 50 percent mechanism should not be adopted in relation to Mr Whyte's expenses.

Members registry

- [63] Part of the orders sought by the liquidator would see control of and responsibility for the members' registry for the FMIF returned to the liquidator. Mr Whyte presently manages those functions for the FMIF and keeps unit holders informed of the progress of the winding up of the FMIF in regular reports. That he does so is a condition of the relief that ASIC has granted from the reporting requirements that would otherwise apply to the FMIF under Chapter 2M of the CA. To transfer the registry function to the liquidator would involve a transactional cost, although the amount may not be great (Ms Trenfield suggests \$10,000). It is suggested on the evidence that the liquidator would obtain ongoing registry services for a lower cost than Mr Whyte does, but the greatest expenses associated with this function are the costs of reports to unit holders from time to time. If Mr Whyte continues to manage the remaining litigation, he or his staff would have to provide reports to the liquidator or his staff who would then have to consider the content of the relevant reports before communicating them to unit holders. In my view, this is unlikely to lead to cost savings to the unit holders of the FMIF.

Audit of the FMIF

- [64] Although ASIC has, in effect, relieved the liquidator and Mr Whyte from any obligation to carry out ongoing periodical audits of the FMIF under Chapter 2M of the CA, at the end of the winding up of the FMIF it will be necessary for there to be a final audit. Ms Trenfield estimates the cost of doing so to be in the region of \$10,000 to \$20,000, so it is not a major cost. At present, Mr Whyte is not appointed to carry out that task. However, assuming it is to be carried out by one of the protagonists to this proceeding, it is not a major prospective saving of expense for the liquidator to carry out the function.
- [65] In substance, the point about the liquidator's expenses of winding up the FMIF (that do not include the expenses associated with the remaining litigation) is that those expenses are not likely to be significant in the overall scale of things and, so viewed, they are not a reason to adopt the liquidator's proposed budgeting, approval and pre-payment of 50 percent mechanism.

Limiting Mr Whyte's appointment

- [66] Leaving aside the liquidator's proposal for budgeting, approval and pre-payment of 50 percent of both his remuneration and expenses and Mr Whyte's remuneration and expenses, a shift in a number of the functions and responsibilities for some of the proposals previously discussed would follow from an order that limits the future functions of Mr Whyte to continuing and completion of the remaining litigation.
- [67] First, Mr Whyte apprehends that he would be required to transfer the cash balance in the accounts under his control to the liquidator. Second, Mr Whyte points out that the liquidator has a position of conflict in relation to LMIM's claims for indemnity from the scheme property of the FMIF arising out of the Clear Accounts Proceeding, as well as in respect of the apportionment or allocation as between the other registered schemes of which LMIM is the responsible entity and the FMIF for common items of remuneration and expenses. Third, in particular, Mr Whyte would no longer have the function to consider and, if he thinks appropriate on behalf of members of the FMIF, to oppose orders sought by the liquidator in respect of claims for indemnity from the scheme property of the FMIF for his remuneration or expenses.

- [68] In my view, these reasons remain as reasons why Mr Whyte's appointment to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the orders of the court made under s 601NF(2) of the CA should not be limited to continuing and completion of the remaining litigation. Subject to one consideration, the reasons why Mr Whyte was appointed in the first place continue and would suggest that he should take the winding up of the FMIF towards completion, to the extent that he can do so.
- [69] The exception is that, as I have previously decided, Mr Whyte cannot complete the process of the winding up to the extent that it remains the statutory function of the liquidator to call for proofs of debt, to consider whether LMIM has an entitlement to indemnity from the funds of the FMIF for debts admitted to proof and to apply for an order for indemnity in respect of those amounts in accordance with paragraphs 2 and 3 of the court's order made on 18 July 2018.
- [70] However, those functions are not, in my view, a reason why Mr Whyte's appointment should be limited.
- [71] Mr Jahani opposes any order that would limit Mr Whyte's functions or powers under the existing orders as endangering the performance of the terms of the settlement of the Feeder Funds Proceeding, which contemplate Mr Whyte making an interim distribution in accordance with the second application for an interim distribution order.
- [72] In the result, in my view, the liquidator's application should be dismissed in relation to the scope of Mr Whyte's appointment and functions in relation to the FMIF.

Second application - interim distribution

- [73] Mr Whyte makes the second application, for an interim distribution to members of the FMIF, under s 601NF(2) of the CA. First, he seeks an order that he is authorised to make an interim distribution from the property of the FMIF of up to \$40 million among the members of the FMIF pursuant to cl 16.7 of the constitution of the FMIF. Alternatively, if any of the conditions precedent to the deed of settlement and release of the Feeder Funds Proceeding have not been satisfied or will not be satisfied by making the interim distribution, Mr Whyte applies for an order that he is authorised to withhold payment of the interim distribution to the responsible entities or the custodians of the Feeder Funds.
- [74] Second, Mr Whyte seeks a declaration that each member holding Class C units in the FMIF, having invested in one of the non-Australian dollar currency hedged fixed term investment options for investment, is entitled to be paid amounts in the winding up of the FMIF calculated by reference to that member's unit balance recorded in the investor master register as adjusted for the foreign exchange spot rate between the investment currency recorded in the investor master register and the Australian dollar prevailing as at the time of each distribution or an alternative date.
- [75] On the hearing of the application, Mr Whyte and Trilogy appeared, both in support of the application. LMIM as responsible entity of the CPAIF and the ICPAIF by Mr Jahani did not appear but provided a letter from his solicitors supporting the application. No contradictor appeared.

- [76] Trilogy's position was that although it supported the application, no order should be made on it until after the Feeder Funds Proceeding judicial advice applications had been decided. That was also the position of Mr Jahani, in effect. On Mr Whyte's part, there was no opposition to the court hearing the application for an interim distribution, but deferring any decision until after the outcome of the Feeder Funds Proceeding judicial advice applications was known. Accordingly, I proceeded to hear the application and at the conclusion of the hearing adjourned it to a date to be fixed. Since the hearing and decision of the other applications no party or person has sought a further hearing.
- [77] Mr Whyte identified five issues which may have affected the orders to be made on the second application. First, he referred to the liquidator's application for directions, including to narrow the scope of Mr Whyte's functions which had then been heard but not determined. Mr Whyte's position was that the second application should be heard and determined at the same time as the liquidator's application. In making this decision, I have done so.
- [78] Second, Mr Whyte proposed to make one of the applications that formed the Feeder Funds Proceeding judicial advice applications. That concern was met by adjourning the determination of this application until the outcome of those applications was known, as it now is.²⁶
- [79] Third, Mr Whyte was concerned as to the timing of the decisions upon the second application and the Feeder Funds Proceeding judicial advice applications because of the time for performance of conditions precedent under the deed of settlement and release, but as previously discussed, that concern is met by this application being decided after the Feeder Funds Proceeding judicial advice applications.
- [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.
- [81] Fifth, in the event that an interim distribution is authorised by order, Mr Whyte points to a degree of uncertainty as to the entitlement of the Class C unit holders who made investments in the FMIF in foreign currencies. I deal with that question later in these reasons.
- [82] In *Park v Whyte*,²⁷ I found that LMIM's power as responsible entity to make distributions in the winding up of the FMIF under cl 16.7(c) of the constitution of the FMIF was

²⁶ *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

²⁷ [2015] QSC 283, [100] – [106].

suspended because as a result of the orders appointing Mr Whyte, LMIM was not in possession of the scheme property. I held further that Mr Whyte was under no obligation to return the property of the FMIF to the liquidator once he had completed collecting and realising the assets of the FMIF, without an order of the court, and that the orders previously made appointing him receiver did not authorise him to make distributions to the members of the FMIF, without an order of the court. By the order made on 17 December 2015, I directed that LMIM shall not be responsible for and was not required to discharge the functions, duties and responsibilities set out in cl 16.7(c) and that Mr Whyte was directed not to make any distribution to the members of the FMIF without the authority or further order of the court. By this second application, Mr Whyte seeks that authority.

- [83] The summary of the circumstances under which he does so is that the cash balance under his control exceeds the amount required to satisfy any of the actual and possible contingent liabilities of the FMIF, as estimated by Mr Whyte, by up to \$40 million. The amount of cash in bank was approximately \$65 million against which the actual liabilities were \$2,213,000, approximately, and possible contingent liabilities estimated on a realistic worst case scenario might amount to \$21,773,000, approximately. In addition to that assessment of liabilities, there is a further possible contingent liability in respect of a proof of debt lodged by Ernst & Young (“EY”) with the liquidator dated 20 December 2018. It will be necessary to explain how that possible alleged liability arises later. But the short of it is that Mr Whyte considers that it does not substantially affect whether the proposed interim distribution should be made because the amount of any liability in respect of that proof will be no more than the amount of a corresponding asset that will be payable by EY to LMIM by Mr Whyte as a judgment sum on LMIM’s claim against EY as auditors in the EY Proceeding. That is, Mr Whyte assesses the amount of the contingent liability to be a zero sum game when taken together with the corresponding possibility of an increase in the property of the FMIF by litigation recovery from EY.
- [84] There is a difficulty that was faced by Mr Whyte in the extent of the evidence that was filed in support of the second application. It is that the precise amount which Mr Whyte may be justified in distributing depends upon matters which are confidential and could not be placed before the court in open court where they may come to the attention of a possible trial judge of the Feeder Funds Proceeding or the other remaining litigation. Accordingly, those matters were dealt with by disclosure in Mr Whyte’s application made in the Feeder Funds Proceeding judicial advice applications before Mullins J.
- [85] As to the potential difficulty in making appropriate payments to the Class C unit holders under the proposed interim distribution, Mr Whyte identified two points. First, the rights of Class C unit holders are not defined in the constitution of the FMIF and they do not appear to have been defined in any deed or similar document executed by LMIM as the responsible entity. The only relevant documents appears to be a product disclosure statement dated 10 April 2008, as supplemented. Second, the product disclosure statement describes the rights of Class C unit holders in a manner that admits of more than one possible construction. It is clear enough, however, that Class C units were issued with the intention of protecting those unit holders from foreign exchange fluctuations as against the Australian dollar, as at the time of relevant distributions.

[87] It is appropriate to begin a more detailed exposition with the legal framework for making a distribution in the winding up of the FMIF. The winding up is governed by the constitution of the scheme and any directions made by the Court under s 601NF(2).²⁸ Clause 16.7 of the constitution of the FMIF is as follows:

“Subject to the provisions of this clause 16 upon winding up the scheme the RE must:

- (a) realise the assets of the scheme property;
- (b) pay all liabilities of the RE in its capacity as trustee of the scheme including, but not limited to, liabilities owed to any member who is a creditor of the scheme except where such liability is a unit holder liability;
- (c) subject to any special rights or restrictions attached to any unit, distribute the net proceeds of realisation among the members in the same proportion specified in cl 12.4;
- (d) the members must pay the costs and expenses of a distribution of assets under cl 16.7(c) in the same proportion;
- (e) the RE may postpone the realisation of the scheme property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement;
- (f) the RE may retain for as long as it thinks fit any part of the scheme property which in its opinion may be required to meet any actual or contingent liability of the scheme;
- (g) the RE must distribute among the members in accordance with cl 16.7 anything retained under cl 16.7(f) which is subsequently not required.”

²⁸ *Re Stacks Managed Investments Ltd* (2005) 54 ACSR 466, [45] – [46].

- [89] In February and March 2019, the FMIF had cash at bank of approximately \$65 million. As at that time, there were actual and contingent liabilities. Mr Whyte's estimate of the actual and contingent liabilities²⁹ in March 2019 were as follows:

Description	\$ Amount
Actual liabilities	\$2,213,000.00
<u>Contingent Liabilities</u>	
Creditor indemnity claims	\$949,497.72
Exit entitlements relating to former retirement village assets (approximately)	\$5,000,000.00
Potential claims by the liquidator of LMIM	\$2,043,889.89
Non-litigation expenses and remuneration of Mr Whyte	\$1,800,000.00
The Feeder Funds Proceeding	\$1,100,000.00
EY Proceeding	\$2,450,000.00
Bellpac Proceeding	\$8,200,000.00
Lamb Bankruptcy Proceedings	\$230,000.00
Total:	\$23,986,387.61

- [90] Mr Whyte opined that these amounts are not his best estimate of the extent of the liabilities but are an assessment of a realistic worst case scenario in respect of those liabilities. Taking them into account, Mr Whyte opined that it is possible to distribute a sum of up to \$40 million to the unit holders of the FMIF, subject to his assessment of the appropriateness of the amount of contingent liabilities under his control relating to the remaining litigation to recover funds for the benefit of the FMIF. Mr Whyte provides further information as to the categories of contingent liabilities. They include the following matters.

Creditor indemnity claims

- [91] Under the 17 December 2015 order, as varied on 18 July 2018, the liquidator was directed to ascertain the debts and claims against LMIM as responsible entity for which LMIM claimed indemnity from the FMIF and to notify the same to Mr Whyte. The liquidator called for proofs of debt in early September 2018, with a due date of 2 October 2018. The liquidator subsequently advised Mr Whyte that proofs of debt had been received from EY in the amount of \$158,896.51 and Norton Rose Fulbright Australia in the sum of \$315,601.21, totalling \$474,497.72, together with provision for interest at the rate of 8 percent under s 563B of the CA for the possible relevant period of \$300,000. Mr Whyte originally allowed \$774,497.72 in respect of the actual liabilities, but increased that allowance to \$949,497.72 as at March 2019.

²⁹ Excluding some possible contingent liabilities over which he had control.

Exit entitlements relating to retirement villages

- [92] The FMIF held securities over a number of retirement villages which were realised by sale by Mr Whyte and the externally appointed receiver of the secured creditor. There were five relevant retirement villages. Under each of the agreements for sale, the incoming owner and operator of the relevant retirement village provided an indemnity to LMIM as responsible entity of the FMIF for the potential obligation to pay any exit entitlement that may be due to a resident or the resident's estate on exit from the village. Under the legislation which applies, the liability to pay exit entitlements may in some circumstances be enforced against LMIM as the responsible entity (or the custodian) as the operator of the village at the time when the resident's contract was entered into. Accordingly, there is a possibility of liability of LMIM as responsible entity, in the event that the purchaser does not honour the indemnity. The liability is not a likely one, for the reasons that the retirement villages were sold to operators who Mr Whyte believed then and still believes are financially sound and that on average the residents of retirement villages stay for a period of approximately five years and any exit entitlements are met or repaid thereafter. To date, there has been no exit liability that LMIM as responsible entity by Mr Whyte (or the custodian) has been called upon to pay.
- [93] Mr Whyte has made an estimate of what is, in his view, a realistic worst case scenario that the amount of any such liability could be up to \$5 million on the assumption that there might be a shortfall payable for up to 50 percent of the exit entitlements that were contributed by residents.

Liquidator's remuneration and expenses

- [94] On 6 September 2018 and 3 October 2018, the court heard the liquidator's second application for remuneration to be paid from the property of the FMIF in the sum of \$743,889.89. Although Mr Whyte opposed the orders sought to determine the remuneration in the amounts applied for or that they should be payable from the assets of the FMIF, he has made a full allowance of the amounts claimed as an amount of the property of the FMIF that should be retained.
- [95] Mr Whyte also anticipates the possibility of further applications by the liquidator for payment of remuneration and expenses from the property of the FMIF, including an expressed intention by the liquidator to reallocate approximately \$1.6 million in unpaid "corporate" expenses of LMIM, consisting principally of unpaid legal costs and outlays, to the various funds of which it is the responsible entity and to make a claim for a proportion of those expenses from the FMIF. Mr Whyte has estimated that 25 percent of that amount should be retained on the assumption that the amount would reflect an equal apportionment between the various funds of which LMIM is the responsible entity.
- [96] Further, Mr Whyte proposes to retain an amount against the liquidator's remuneration and expenses of the first application for directions dealt with by these reasons as another potential liability to be met from the assets of the FMIF.
- [97] Lastly, Mr Whyte has estimated the liquidator's expenses of completing the process of ascertaining creditor indemnity claims against the FMIF under the order of 17 December 2015 as varied on 18 July 2017, maintaining LMIM's Australian Financial Services Licence, carrying out a final audit of the FMIF (assuming that function is not transferred to Mr Whyte) and making a further application or applications for recovery of

remuneration and expenses from the FMIF and proposes that amounts be retained for those items.

[98] The summary of the relevant amounts is as follows:

Description	\$ Amount
Liquidator's remuneration claim heard in September 2018	\$743,889.89
Liquidator's further legal expenses notified in the remuneration application but not yet claimed	\$400,000
Liquidator's other remuneration and expenses recoverable to the conclusion of the winding up of the FMIF	\$200,000
Liquidator's remuneration and legal costs of the September 2018 remuneration application	\$200,000
Liquidator's remuneration and legal costs of the Directions Application	\$200,000
Liquidator's remuneration and legal costs of further applications for recovery of remuneration and expenses from the FMIF	\$300,000.00
Total:	\$2,043,889.89

Mr Whyte's remuneration and expenses

[99] Mr Whyte's summary of his further remuneration and expenses to the end of the winding up of the FMIF is as follows:

Description	\$ Amount
Ongoing administration	\$1 million
Completing the Proof of Debt Process	\$50,000
Responding to further claims by the Liquidator for remuneration and expenses	\$100,000
Applying for authority to make a final distribution	\$50,000
Further applications for approval of remuneration	\$500,000
Finalising the appointment	\$100,000
Total:	\$1,800,000

Feeder Funds Proceeding

- [100] Although the Feeder Funds Proceeding has been compromised, and it is proposed that the deed of settlement and release be carried into effect, Mr Whyte has estimated the costs that may be associated with the Feeder Funds Proceeding on the assumption that the compromise is not carried into effect. The amount of the potential contingent liabilities in that event were estimated by him as follows:

Description	\$ Amount
Remuneration and legal expenses of the application to court for judicial advice	\$100,000
Liability under adverse costs orders for costs of Mr Jahani and Trilogy of the litigation	\$1 million
Total:	\$1,100,000

EY Proceeding

- [101] Mr Whyte made an estimate of the contingent liability in respect of the EY Proceeding as follows:

Description	\$ Amount
Remuneration and legal expenses up to and including mediation	\$350,000
Legal expenses and remuneration of an application for judicial advice	\$100,000
Liability under adverse costs order for costs of the EY Proceeding to date	\$2 million
Total:	\$2,450,000

Bellpac Proceeding

- [102] Mr Whyte estimated the contingent liabilities for the Bellpac proceeding as follows:

Description	\$ Amount
Mr Whyte's remuneration and legal expenses up to and including trial	\$700,000
Liability under an adverse costs order, if claim is unsuccessful	\$7.5 million
Total:	\$8,200,000

Bankrupt Estate of Ross Lamb

- [103] Mr Whyte estimated the contingent liabilities with respect to Mr Lamb's bankruptcy as follows:

Description	\$ Amount
Trustee's remuneration and legal expenses in relation to public examinations	\$200,000
Mr Whyte's remuneration and expenses	\$30,000
Total:	\$230,000

- [104] In my view, the amounts estimated for these contingent liabilities are reasonable.

Class C unit holders

- [105] From 2008, 171 unit holders invested in the FMIF in a foreign currency under a product disclosure statement issued on 10 April 2008 as supplemented on a later occasion. However, throughout the relevant time, units in the FMIF were valued for other investors in the FMIF upon subscription and redemption in Australian dollars ("AUD") at \$1. The financial statements of the FMIF identify the foreign currency investors as holding "Class C" units. They represent between 2 percent and 3 percent of units in the FMIF.
- [106] When a unit holder invested in the FMIF in a foreign currency, according to the product disclosure statement, the amount accepted was converted into AUD and units at the foreign exchange rate as at the date of the investment.
- [107] However, from 2011, a unit holder who invested in a foreign currency under the product disclosure statement was recorded in the register of unit holders as a unit holder in units of the foreign currency. The investments were not recorded as converted into AUD at the spot rate of foreign exchange as at the date of the investment, or reinvestment. Instead, by choosing an "Effective Date" of 29 November 2012, an "Effective Unit Price" was set using the spot rate of foreign currency exchange in AUD on that date. I was informed that the intention was that by multiplying the "Unit Balance" recorded in the foreign currency "units" in the register by the "Effective Unit Price" as at the "Effective Date", a "Balance in Currency" of the foreign currency was recorded and a "Balance in AUD" was also recorded as the amount required in AUD to pay the investor's "Balance in Currency". I confess that, having closely examined the copies of the sample records in evidence, the methodology employed in compiling the relevant entries did not make itself clear to me.
- [108] In any event, the purported effect of the arrangements, according to the product disclosure statement, was that if an investment in units in the FMIF was made in a foreign currency, a conversion into AUD from time to time would result in a fluctuation of the unit holdings of the foreign investor according to the exchange rate. Against this outcome, LMIM as the responsible entity of the FMIF agreed with the relevant investor under the terms of the product disclosure statement to enter into a forward foreign exchange contract between the foreign currency and the AUD, thereby hedging the investment made by the foreign currency investor. However, from about the time of the order to wind up the

FMIF made in August 2015, forward foreign exchange contracts have not been maintained during the winding up.

[109] Turning to the terms of the constitution of the FMIF, cl 3.2 provides for different classes of units as follows:

“Different classes (and subclasses) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE in its complete discretion. Such rights and obligations may, but need not be, referred to in the PDS. If the RE determines in relation to particular units, the terms of issue of those units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such units. Without limitation, the RE may distribute the distributable income for any period between different classes on a basis other than proportionately, provided that the RE treats the different classes fairly.”

[110] Clause 3.4 provides:

“At any time, all the units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.”

[111] There is no evidence that LMIM as responsible entity of the FMIF recorded a determination under cl 3.2 in respect of Class C units.

[112] However, the product disclosure statement issued by LMIM as responsible entity of the FMIF on 10 April 2008 offered “non-AUD dollar currency hedged fixed term investment options” for investment in the FMIF. It stated:

- (a) “The fund currency hedges a non-Australian dollar investment through the use of foreign forward exchange contracts (“FFEC”).”
- (b) “On acceptance of investment funds and the completed application form, the relevant currency is converted at the prevailing spot market rate into Australian dollars and units in the fund issued. The fund simultaneously enters into a FFEC. The FFEC requires the fund to deliver an amount of AUD in exchange for an amount of the relevant foreign currency at a specific time in the future (the specific time is equivalent to the investment term) at a pre-determined exchange rate (forward rate). At the end of the investment period the fund converts the earnings of the investor into the relevant foreign currency at the forward foreign exchange rate”.
- (c) “Non-AUD investment terms for all currencies commence on the day the manager settles the FFEC”.
- (d) “At the end of the relevant investment term, the investor’s original investment amount and interest distribution (unless the investor elects to have the interest distribution paid direct to the account nominated on the application form), are automatically reinvested and re-hedged in the originally nominated currency for further 1 month investment terms until the investor provides the manager with longer investment term instructions or a written withdrawal notice.”
- (e) “For all non-AUD dollar investments the manager will continue to hedge (on a 1 monthly basis) the currency exposure of these investments (in the event of a delay in payment of a redemption or the suspension of redemptions).”

[113] On page 26 the product disclosure statement provided further:

“Investors should however, be aware that **any delay or shortfall in income or capital payments from the fund may result in a loss for the fund due to breaking a FFEC**. In such an event, the investment will not be currency hedged and income and/or capital may be impacted.” (emphasis added)

[114] The overall intention pursuant to the product disclosure statement, in my view, was that an investor who invested in the FMIF in a foreign currency would be protected against changes in the exchange rate from the prevailing spot market rate as at the date the units were issued by LMIM taking out a forward foreign exchange contract between the AUD and the foreign currency. Even so, by the terms of the product disclosure statement, the underlying assumption or provision was that the investment would be converted into units in the FMIF issued in AUD at the prevailing spot market rate at the time of investment.

[115] Accordingly, on maturity, it was intended that the foreign currency investor would be entitled to a distribution of an underlying amount in AUD at that date and an adjustment of that amount on conversion into the foreign currency by the net gain or loss made on the forward foreign exchange contract entered into as a hedge to cover the investment for the period of the investment. These arrangements, in my view, reflected the underlying intention that an investment in the FMIF was to be made in units issued in an AUD value and number, although made in a foreign currency. This conclusion is consistent with the contextual circumstances that the scheme property of the FMIF was invested in loans made to borrowers in AUD repayable with interest in AUD and secured by first mortgage over Australian assets. Investors in the scheme were necessarily exposed to the financial risk of it earning income and maintaining capital in AUD only.

[116] Mr Whyte submits that the arrangements disclosed by the product disclosure statement have the effect that at the end of the period of the investment, an investor in foreign currency would be entitled to an increased or decreased amount reflected in a different number of units measured in AUD than the initial investment. I do not agree. The number of units that an investor in a foreign currency received should have been the number of units into which the foreign currency converted as at the date of investment and issue of the units. The adjustment of the amount of the redemption value of those units in AUD under the arrangements provided for by the product disclosure statement was to be made by payment at redemption in the foreign currency of an amount that reflected the AUD amount of the value of the units to be redeemed at the date of redemption together with the adjustment, whether negative or positive, represented by the forward foreign exchange contract made to sell the AUD into the foreign currency.

[117] If those conclusions are correct, it follows logically that a change occurred in the rights of investors in foreign currency who were Class C unit holders when it was ordered that the FMIF be wound up on 8 and 21 August 2013. From that time, there was no reinvestment of the interests of any investor in foreign currency or redemption made under the arrangements provided for under the product disclosure statement. Any existing unexpired investment terms came and went without repayment and without any continuing hedging cover against the nominal value of those investments. I was not informed of the outcome for LMIM when the relevant hedge covers ceased.

[118] In my view, the relevant date at which a foreign investor’s unit holding is to be ascertained is either the date at which they last invested in the FMIF at the conversion rate of the

foreign currency into AUD or the date on which it was ordered that the FMIF be wound up at the conversion rate of the foreign currency into AUD as at that date. The conversion of the foreign currency into AUD as at that date yields the number of units to which the investor is entitled and forms the basis of their rateable entitlement to receive distributions from the FMIF as against other members, including other Class C unit holders and unit holders who did not invest in a foreign currency.

- [119] Although arguments may be advanced in support of either of those alternatives, in my view, the date of the order that the FMIF be wound up is the better date. Until then, the terms of the product disclosure statement expressly required that the forward foreign exchange contracts be in place, notwithstanding that there was a suspension of redemptions from an earlier date. However, the effect of the order that the FMIF be wound up was to change the business of the FMIF, so that the assets were to be realised, the debts paid and the net proceeds of realisation are to be distributed to the unit holders in the rateable proportions that applied among them.
- [120] As between the AUD investors and the foreign currency investors, the calculation of the rateable proportions requires that a choice be made of the date at which the conversion of the foreign currency investor's investments should be made.
- [121] The complication lies in the circumstance that LMIM as responsible entity ceased to observe the contractual requirement to investors in Class C units that it would hedge the position of those unit holders against movements between the AUD and the foreign currency by forward foreign exchange contracts. However, LMIM's breach of contract in that respect does not alter the unit entitlement of the Class C members in comparison to the other classes of members under the terms of the constitution of the FMIF. Unless the constitutional arrangements expressly or impliedly provided that in the event of the winding up the investors in a foreign currency were to have an entitlement to a greater distribution based on the arrangements made under the product disclosure statement, the unit entitlements of the members should be treated as crystallised as at that date. The product disclosure statement did not contemplate a greater entitlement in the winding up. To the contrary, it expressly contemplated that a shortfall in income and capital might expose a foreign currency investor to the risk of a break in a forward foreign exchange contract, that the investment would not thereafter be currency hedged and that income and capital may be impacted.
- [122] Accordingly, in my view, distributions to Class C members should be made on the footing that their entitlements to units are to be ascertained by reference to the appropriate calculation of units in AUD utilising the spot exchange rate for the investment of foreign currency as at the date of order made for the winding up of the FMIF.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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 & INVESTMENTS
COMMISSION**

CERTIFICATE OF EXHIBIT

Volume 2 of 2

Exhibit "**DW-122**" (pages 189 to 353) to the Affidavit of **DAVID WHYTE** sworn
this 11th day of June 2020


Deponent


Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Applicant

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Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

INDEX OF EXHIBITS

Volume 2 of 2

No.	DW-122	Date	Page No.
18.	Letter from Tucker & Cowen to Senior Judge Administrator	23 November 2018	189 – 204
19.	Email from Associate of Senior Judge Administrator	26 November 2018	205 – 207
20.	Liquidator's submissions with respect to Dual Appointment Application	6 December 2018	208 – 216
21.	<i>Bruce v LM Investment Management Limited (in liq) & Ors</i> [2019] QSC 126	22 May 2019	217 – 227
22.	Orders of Mullins J	22 May 2019	228 – 229
23.	Schedule of work performed – the Auditor's Claim	Undated	230 – 276

No.	DW-122	Date	Page No.
24.	Schedule of work performed – the Bellpac bonds proceedings	Undated	277
25.	Schedule of work performed – the Ross Lamb bankruptcy	Undated	278 – 279
26.	Schedule of work performed – the Appeal/the Drake Proceeding	Undated	280 – 282
27.	Schedule of work performed – other proceedings	Undated	283 – 284
28.	Affidavit of John Park	17 April 2020	285 – 302
29.	Transcript of hearing before Justice Mullins	28 November 2018	303 – 320
30.	Reasons for judgment of Justice Mullins	2 July 2019	321 – 325
31.	Correspondence from Russells	25 May 2020	326 – 333
32.	List of Registered Liquidators	31 May 2020	334 – 353

Alex Nase

From: Jessica Roberts on behalf of David Schwarz
Sent: Friday, 23 November 2018 11:02 AM
To: associate.alyonsj@courts.qld.gov.au
Cc: atiplady@russellsllaw.com.au; jwalsh@russellsllaw.com.au;
hugh.copley@asic.gov.au; David Schwarz; Alex Nase
Subject: Proceedings Concerning the LM First Mortgage Income Fund
Attachments: Letter to Associate to Senior Judge Administrator (TCS01605032).pdf

Dear Associate

Please find **attached** correspondence and enclosures for your attention.

Yours faithfully,

Sent on behalf of **David Schwarz**, Principal

E: dschwarz@tuckercowen.com.au | D: 07 3210 3506 | M: 0438 400 348

by:

Jessica Roberts
Personal Assistant

E: jroberts@tuckercowen.com.au

D: 07 3210 3517 | T: 07 300 300 00 | F: 07 300 300 33

Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001

TCS Solicitors Pty Ltd. | ACN 610 321 509

Tucker&CowenSolicitors.

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Our reference: Mr Schwarz / Mr Nase

23 November 2018

Your reference:

The Associate to the Honourable Justice Ann Lyons
Senior Judge Administrator
Supreme Court of Queensland

Email: associate.alyonsj@courts.qld.gov.au

Principals.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Consultant.
David Tucker.

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.
Marcelle Webster.

Dear Associate

Associates.
Emily Anderson.
James Morgan.
Scott Hornsey.
Paul Armit.
Wesley Hill.

Proceedings Concerning the LM First Mortgage Income Fund

1. We act for Mr David Whyte ("Mr Whyte"). Mr Whyte was appointed by an order of Justice Dalton to take responsibility for the winding up of the LM First Mortgage Income Fund ("FMIF") and to be the Court-Appointed Receiver of the FMIF ("the Appointment").
2. The winding up of the FMIF is a complex matter which has given rise to a number of Supreme Court proceedings.
3. Four of these proceedings have been placed on the Commercial List, with Justice Jackson as the supervising Judge.
4. We expect, however, that the winding up of the FMIF will require a number of applications to the Court by Mr Whyte which cannot properly be heard by a potential Trial Judge (eg applications for judicial advice to Mr Whyte about whether he would be justified in settling these matters).
5. To date, applications which potentially fall into this category have been heard by a range of different Judges on the Applications List.
6. This has required each of the Judges to familiarize themselves with the rather complex history and background of this matter.
7. From both the Court's and the parties' perspective, it would seem desirable that these applications should, in future, be heard and determined by a Judge with an ongoing role in these matters.
8. The purpose of this letter is to enquire of the Senior Judge Administrator whether an arrangement of this kind would be possible.
9. We should mention that copies of this letter have been forwarded to:
 - (a) the solicitors for the liquidator of the trustee of the FMIF (Russells); and
 - (b) ASIC.
10. We should also mention that this proposed approach was also foreshadowed to Justice Jackson at a recent directions hearing in one of the FMIF matters.

11. For the Senior Judge Administrator's assistance, further detail of this matter is set out below.

FMIF and its Winding Up

12. The FMIF is a managed investment scheme. The scheme was registered under Chapter 5C of the *Corporations Act 2001* (Cth) on about 28 September 1999. The responsible entity and trustee of the FMIF was LM Investment Management Ltd ("LMIM").
13. The FMIF raised funds from the public through the issue of prospectuses and/or public disclosure statements. The FMIF then invested those funds in loans to property developers, which were secured by registered mortgages over real property. As at today's date, the FMIF has 4559 separate members in its unit register. The total funds invested by those members in the FMIF totalled about \$478 million.
14. On 19 March 2013, LMIM was placed into voluntary administration. It was then placed into liquidation on 1 August 2013. Mr John Park ("the Liquidator") was an Administrator and is now the Liquidator of LMIM. Russells are the solicitors for the Liquidator.
15. On 21 August 2013, orders were made by Justice Dalton for the winding up of the FMIF as a managed investment scheme in Supreme Court proceedings 3383/13. By those orders our client, Mr Whyte, was appointed as the person responsible to ensure the winding up of the FMIF in accordance with its Constitution, and as the receiver of its property. A copy of those orders is attached. These orders were upheld by the Court of Appeal in [2014] QCA 136 (Fraser JA, Gotterson JA and Daubney J agreeing).
16. In the time since his appointment in August 2013, Mr Whyte has undertaken substantial work to realise the value in the property of the FMIF, as a result of which there is currently cash at bank in excess of \$60 million.
17. However, the winding up has also involved Mr Whyte commencing a number of proceedings in the Supreme Court to resolve substantive issues concerning the FMIF (namely BS 12317/14, 2166/15, 11560/16 and 13534/16).
18. Three of these proceedings have been placed on the Commercial List (namely BS 12317/2014, 2166/15, 13534/16) and are being managed by Justice Jackson.
19. In conducting these proceedings, our client has been conscious of the need to maintain separation between:
- (a) matters before the Court relating to the substantive actions – which may properly be heard by a potential Trial Judge; and
 - (b) matters before the Court which may involve the internal management of the litigation by Mr Whyte – which (depending upon the issues raised) may not be appropriate for consideration by a potential Trial Judge.
20. There are two main categories of application which potentially fall into the second category:
- (a) applications by Mr Whyte for judicial advice (eg as to whether he is justified in settling a particular action).
 - (b) applications by Mr Whyte for approval of his remuneration as receiver (which may require him to provide the Court with an explanation of the approach he is taking to particular actions).

21. To date, applications within this second category have been heard on the Applications List by a range of different Judges.

Applications for Judicial Advice and Approval of Remuneration

22. To date, Mr Whyte has brought several applications for judicial advice. The most recent application was brought in proceeding BS 3508/15 and was heard by Justice Burns.
23. However, a number of further applications for judicial advice are expected to be filed over the next six months, as proceedings go to mediation.
24. Indeed, in one of these matters, a successful mediation has just been completed (BS 13534/16). It is envisaged that an application for judicial advice in relation to this matter will be brought in February or March 2019.
25. Over the course of his receivership, Mr Whyte has also brought a total of ten applications for approval of remuneration in relation to his appointment to the FMIF, as to which:-
- (a) nine of which have been heard and determined, as follows:
 - (i) by McMurdo J on 28 August 2014;
 - (ii) by Mullins J on 27 November 2014;
 - (iii) by Jackson J on 23 June 2015;
 - (iv) by Martin J on 11 December 2015;
 - (v) by Douglas J on 26 June 2016;
 - (vi) by Daubney J on 2 December 2016;
 - (vii) by Mullins J on 30 June 2017;
 - (viii) by Applegarth J on 30 November 2017;
 - (ix) by Boddice J on 21 June 2018;
 - (b) all have been brought in proceeding BS 3383/13, the proceeding in which Mr Whyte was appointed; and
 - (c) the tenth was filed on 14 November 2018, for approval of remuneration for the six month period from 1 May 2018 to 31 October 2018. That application is listed for hearing in the applications list on 29 November 2018 and members of the FMIF have been served in accordance with substituted service Orders made by the Honourable Justice Peter Lyons dated 1 June 2015 in proceeding 3383/13. A copy of those orders is attached.
26. Both of the Applications List Judges listed for the week of 29 November 2018 (Mullins J and Applegarth J) have heard at least one of these applications in the past.

27. Subject to any change which may occur in the future arrangements for dealing with remuneration, Mr Whyte envisages that he will continue making periodic applications for remuneration until the conclusion of his Appointment in relation to the FMIF.
28. It is possible that these arrangements will change, as a result of an application filed by the Liquidator in BS 3508/18. That application is listed to be heard by Justice Jackson on 10 December 2018.
29. At a review of that application on 19 November 2018, the question of whether the current remuneration application should also be heard by Justice Jackson was raised with his Honour – as was Mr Whyte's proposal that a nominated Judge deal with matters of this kind.
30. His Honour indicated that he was not in a position to hear the remuneration application, but otherwise did not express a view about the present proposal.

Request for allocation of matters to a Judge

31. As appears from the circumstances outlined above, the winding up and receivership of the FMIF, including the remaining litigation, is attended by considerable factual and legal complexity.
32. Over at least the next six months, it seems likely that a number of applications will be brought by Mr Whyte to seek judicial guidance about the proper conduct of the receivership and to obtain approval of his remuneration. It is envisaged that all such applications would be brought in the one proceeding - BS 3383/13.
33. In these circumstances, it would seem desirable for all these applications to be heard and determined by the same Judge (other than a potential Trial Judge), to avoid the need for a number of different Judges to familiarize themselves with this matter.
34. We are conscious of the practical difficulties involved in managing the Court's workload and appreciate that arrangements of this kind may not be feasible. However, we would be most grateful if such an arrangement could be considered.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au

Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

cc: Russells Lawyers, by email: atiplady@russellslaw.com.au, jwalsh@russellslaw.com.au

cc: Mr Hugh Copley, Australian Securities and Investments Commission, by email: hugh.copley@asic.gov.au

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/13

Applicants: RAYMOND EDWARD BRUCE AND VICKI
PATRICIA BRUCE

AND

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

ORDER

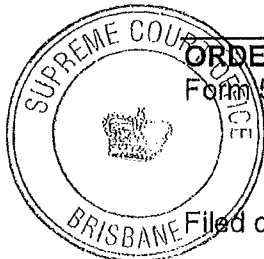
Before: Justice Dalton

Date: 21 August, 2013

Initiating document: Application filed 29 April, 2013 by Roger Shotton and
Application filed 3 May 2013 by Australian Securities
and Investments Commission ("Applications").

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth) ("the Act") LM Investment Management Limited (Administrators



ORDER
Form 59 R.661

Filed on behalf of the Third Respondent

TUCKER & COWEN
Solicitors
Level 15
15 Adelaide Street
Brisbane, Qld, 4000.
Fax: (07) 300 300 33

Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").
3. Pursuant to section 601NF(2), that Mr Whyte:-
 - (a) have access to the books and records of LMIM which concern the FMIF;
 - (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;
 - (c) be entitled 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 the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.
4. Nothing in this Order prejudices the rights of:
 - (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or
 - (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.
5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.
6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.
7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:
 - (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

- (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;
 - (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
 - (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;
 - (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and
- (b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.
8. The First Respondent must, within 2 business days of the date of this Order:
- (a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and
 - (b) make a copy of this order available, in PDF form, on:
 - (i) its website www.lmaustralia.com, together with a link to the www.bdo.com.au website;
 - (ii) its website www.lminvestmentadministration.com, together with a link to the www.bdo.com.au website.
9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.
10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.

IT IS DIRECTED THAT:

11. Any party wishing to contend that the First Respondent is not entitled to indemnity from the ~~FMI~~^{FMI} in relation to the Applications shall file an application to be heard and determined at the same time as the other issues as to costs.
12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed: *Neil*

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

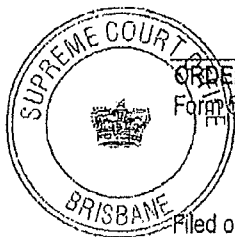
Intervener: AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION

ORDER

Before: Peter Lyons J
Date: 1 June 2015
Initiating document: Application filed 29 May 2015

THE ORDER OF THE COURT IS THAT:

1. Order 6 of the Honourable Justice Ann Lyons made on 5 May 2014 be vacated.



ORDER
Form 59 R.661

Filed on behalf of the Applicant, Mr David Whyte

TUCKER & COWEN
Solicitors
Level 15
15 Adelaide Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
Fax: (07) 300 300 33

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(TCS00985806-002).docx

2. That service on the members of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), the companies listed in order 2(b)(i) to 2(b)(vi) below and LM Administration Pty Ltd (In Liquidation) ("LMA") of an application (including without limitation, the application filed on 29 May 2015) for approval of:-

- (a) remuneration of David Whyte, as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution; and/or
- (b) remuneration of David Whyte and Andrew Fielding, as the persons appointed as agents of The Trust Company (PTAL) Ltd, in lieu of LMIM, in respect of the securities held by the following companies:-
 - (i) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296;
 - (ii) Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 787;
 - (iii) OVST Pty Ltd (In Liquidation) (Controllers Appointed) ACN 103 216 771;
 - (iv) Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916;
 - (v) Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed)-ACN 112 002 383; and
 - (vi) Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780.

together, "a Remuneration Application", and any supporting affidavit of Mr Whyte ("a Remuneration Affidavit") be effected by:-

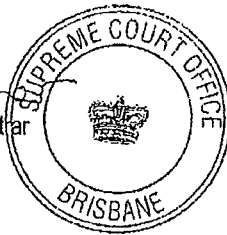
- (c) posting in a prominent place on the website "lmfmif.com" ("the Website"):-
 - (i) a notice substantially in the form of Annexure A to this Order ("the Notice") adapted as necessary to the relevant Remuneration Application;

- (ii) the relevant Remuneration Application and Remuneration Affidavit;
and
 - (d) sending a copy of the Notice to all members of the FMIF by each member's preferred method for distribution of notices recorded on the FMIF's register of members maintained by BDO;
 - (e) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, service is to be effected by sending to the financial advisor, the notice by email and identifying in the email the member to whom the notice is directed;
 - (f) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending it to the member "care of" the postal address of a financial advisor
 - (g) sending a copy of the Notice to the companies listed in order 2(b)(i) to 2(b)(vi) by forwarding it to the address of the company's Receiver and Manager or Liquidator (as the case may be) recorded in the company searches exhibited to the affidavit of David Schwarz sworn 1 June 2015;
 - (h) sending a copy of the Notice to LMA at the office of Mr David Clout, the Liquidator of LMA.
3. That service of a Remuneration Application and a Remuneration Affidavit be deemed to have been effected on each of the members of the FMIF ten (10) days after all of those documents are sent pursuant to orders 2(d) to 2(h) above.
4. That service on the members of the FMIF of any further documents filed in this proceeding in support of a Remuneration Application be effected by:
- (a) causing such documents to be posted to the website www.lmfimif.com;
and

- (b) sending a notice to each of the members and entities referred to in paragraph 2(d) to 2(h) above directing their attention to the further documents posted on the website www.lmfmf.com.
5. That service of any documents referred to in paragraph 4 above be deemed effected on each of the members of the FMIF ten (10) days after all of the notices are sent pursuant to order 4(b) above.
 6. That Mr Whyte's costs of and incidental to this application be reserved.
 7. That all further Remuneration Applications and Remuneration Affidavits be served on the members of the FMIF in accordance with these orders.

Signed:

Burton
Deputy Registrar



ANNEXURE A

TO THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
(RECEIVERS AND MANAGERS APPOINTED)(RECEIVER APPOINTED) ("FMIF")

TAKE NOTICE that David Whyte, the person appointed:-

- a) pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution; and
- b) pursuant to clause 2.1, 2.2 and 3 of Deeds of Appointment signed 24 September 2014, together with Mr Andrew Fielding, as agent of The Trust Company (PTAL) Ltd in respect of the securities it holds from Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296, Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 786, OVST Pty Ltd (In Liquidation) (Controllers Appointed) ACN 103 216 771, Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916, Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed) ACN 112 002 383, and Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780,

has applied to the Supreme Court of Queensland for orders that:-

8. the amount that Mr Whyte, as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution, is entitled to claim as remuneration in respect of time spent by him and by any servants or agents of BDO who have performed work in the winding up of the FMIF for the period [date] to [date], be fixed in the amount of \$[amount] (inclusive of GST); and
9. the amount that Mr Whyte and Mr Andrew Fielding, as agents of The Trust Company (PTAL) Ltd in respect of the securities held from the companies named at paragraph b) above, are entitled to claim as remuneration in respect of time spent by them and by any servants or agents of BDO who have performed work in connection with the appointment as agents for the period [date] to [date], be approved in the amount of \$[amount] (inclusive of GST).

This application is set down to be heard by the Supreme Court of Queensland at Brisbane on [date] at [time].

Copies of the court documents in respect of the application will be available on the website www.lmfmif.com.

Any member who reasonably requires a hard copy of the application and supporting material should call BDO on +61 7 3237 5999.

Dated: [date]

David Whyte

Court Appointed Receiver

Alex Nase

From: Associate A LyonsJ <Associate.ALyonsJ@courts.qld.gov.au>
Sent: Monday, 26 November 2018 4:55 PM
To: David Schwarz
Cc: atiplady@russellslaw.com.au; jwalsh@russellslaw.com.au;
hugh.copley@asic.gov.au; Alex Nase; Associate JacksonJ; Associate MullinsJ
Subject: RE: Proceedings Concerning the LM First Mortgage Income Fund

Dear Mr Schwarz,

RE: Proceedings Concerning the LM First Mortgage Income Fund

Thank you for your letter of 23 November 2018. This matter has been referred to Her Honour.

As this matter is a complex matter, giving rise to a number of Supreme Court proceedings, and as the winding up of the LM First Mortgage Income Fund will require a number of applications to the Court which cannot properly be heard by a potential trial judge, Her Honour has determined that applications of this nature will be heard and determined by Justice Mullins. Justice Mullins will therefore have an ongoing role in respect of these matters.

Justice Mullins will deal with the application for remuneration on 29 November 2018 and any future applications, other than the ones managed by Justice Jackson, prior to the matter being listed for trial.

Kind regards

Georgina Morgan

Associate to the Honourable Justice Ann Lyons Senior Judge Administrator
Supreme Court of Queensland
| tel (07) 3247 4282 | e-mail associate.alyonsj@courts.qld.gov.au



From: Associate A LyonsJ
Sent: Monday, 26 November 2018 8:51 AM
To: 'David Schwarz' <dschwarz@tuckerowen.com.au>
Cc: atiplady@russellslaw.com.au; jwalsh@russellslaw.com.au; hugh.copley@asic.gov.au; Alex Nase <anase@tuckerowen.com.au>
Subject: RE: Proceedings Concerning the LM First Mortgage Income Fund

Dear Mr Schwarz,

Thank you for your email. I have passed on your correspondence to Her Honour.

Kind regards

Georgina Morgan

Associate to the Honourable Justice Ann Lyons Senior Judge Administrator
Supreme Court of Queensland
| tel (07) 3247 4282 | e-mail associate.alyonsj@courts.qld.gov.au



From: Jessica Roberts [mailto:JRoberts@tuckercowen.com.au] **On Behalf Of** David Schwarz
Sent: Friday, 23 November 2018 11:02 AM
To: Associate A LyonsJ <Associate.ALyonsJ@courts.qld.gov.au>
Cc: atiplady@russellslaw.com.au; jwalsh@russellslaw.com.au; hugh.copley@asic.gov.au; David Schwarz <dschwarz@tuckercowen.com.au>; Alex Nase <anase@tuckercowen.com.au>
Subject: Proceedings Concerning the LM First Mortgage Income Fund

Dear Associate

Please find **attached** correspondence and enclosures for your attention.

Yours faithfully,

Sent on behalf of **David Schwarz**, Principal
E: dschwarz@tuckercowen.com.au | D: 07 3210 3506 | M: 0438 400 348

by:

Jessica Roberts
Personal Assistant

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SUPREME COURT OF QUEENSLAND

**REGISTRY: BRISBANE
NUMBER: 3508/15**

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS APPOINTED) ACN 077 208 461

First Applicant: JOHN RICHAD PARK AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE REPOSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE REPOSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

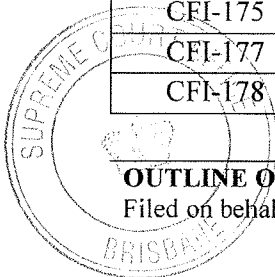
APPLICANTS' OUTLINE OF SUBMISSIONS

LIST OF MATERIAL

Court File Index (CFI)	Description	Date Filed
CFI-173	Application	10/10/2018
CFI-174	Affidavit of John Richard Park and Exhibit JRP-10	12/11/2018
CFI-175	(the Liquidator's Affidavit)	
CFI-177	Affidavit of Julian Walsh	19/11/2018
CFI-178	Affidavit of Neil Dempster	20/11/2018

OUTLINE OF SUBMISSIONS
Filed on behalf of the Applicants

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CFI-185	Affidavit of Kelly-Anne Lavina Trenfield (Ms Trenfield's Affidavit)	28/11/2018
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OVERVIEW

1. This is an application to vary the regime that was set up in August 2013 and varied in December 2015. The winding up of the LM Estate¹ has been complex. Nevertheless, it has now reached a stage where it is appropriate to consider a further variation so as to:
 - (a) enable the finalization of the winding-up of LMIM and all of the Funds in the most efficient manner;
 - (b) implement a transparent and accountable regime for the approval and payment of remuneration and expenses so as to maximize the return to fund members;
 - (c) as part of that regime, make funding available to the Liquidator, on an interim basis, to enable him to carry out his tasks.
2. These aims will be achieved, in essence, by varying the powers of the Receiver to enable him to focus on the outstanding litigation, and allowing the Liquidator to progress the winding up of the FMIF in conjunction, and consistently, with the winding up of the other solvent funds. The varied regime will, in summary, streamline the winding up of the Funds, at significant savings to the costs of the current regime.

BACKGROUND

3. On 21 August 2013, Dalton J made orders:
 - (a) pursuant to sub.601ND(1) of the Act,² directing LMIM to wind up the FMIF;
 - (b) pursuant to sub.601NF(1) of the Act, appointing the Receiver to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution; and
 - (c) appointing the Receiver as receiver of the property of the FMIF and granting him powers consistent with that appointment.
4. On 17 December 2015, Jackson J varied the existing regime by the making of orders that clarified the roles of, and work to be undertaken by, the Liquidator and the Receiver.

¹ "LM Estate" being a term adopted in the Liquidator's Affidavit at paragraph [8], including LMIM and each of the Funds.

² Capitalised terms in these submissions have the same meaning as in the application filed 10 October 2018, CFI-173.

5. Since December 2015, the winding up of the LM Estate has proceeded such that the current position is that:
- (a) in respect of LMIM, the Liquidator has received some 150 proofs of debt and there are some outstanding claims for indemnity against the Funds which the Liquidator is yet to adjudicate upon, due to a lack of funds;³
 - (b) all of the assets of the AIF, which is solvent, have been converted to cash. There are some final steps to be taken, including the completion and lodgement of audited financial accounts, the payment of creditors, distributing surplus funds to members and attending to the necessary formalities with ASIC;⁴
 - (c) the position in respect of the ASPF is the same as the AIF – all of its assets have been converted to cash, it is solvent and the Liquidator will shortly attend to the final tasks set out in relation to the AIF;⁵
 - (d) the future of the Feeder Funds depends on the outcome of the Feeder Fund Proceeding, given the only assets of the Feeder Funds are cash and units in the FMIF;⁶
 - (e) the CPF will be wound up as an insolvent scheme as it presently has a negative net asset position. The Liquidator intends to complete the winding up of the CPF in the next few weeks;⁷
 - (f) the real property assets secured to the FMIF have all been realised, with the only remaining assets being potential proceeds of litigation, including damages claims, litigation funding arrangements with other insolvency practitioners, payments due under a deed of settlement and some costs orders.⁸
6. By an exchange of correspondence between the parties, comprising a letter on behalf of the Liquidator dated 21 September 2018 (“**21 September letter**”),⁹ a letter on behalf of the Receiver dated 27 September 2018 (“**27 September letter**”)¹⁰ and a letter on behalf of the Liquidator dated 3 October 2018 (“**3 October letter**”),¹¹ the issues regarding the ongoing dual appointments and possible solutions were ventilated. The Liquidator relies on the 21 September letter and 3 October letter as setting out his position.

³ Paragraphs [14] to [21] of the Liquidator’s Affidavit.

⁴ Paragraphs [26] to [28] of the Liquidator’s Affidavit.

⁵ Paragraphs [29] to [31] of the Liquidator’s Affidavit.

⁶ Paragraphs [32] to [36] of the Liquidator’s Affidavit.

⁷ Paragraphs [37] to [39] of the Liquidator’s Affidavit.

⁸ See Part C of the affidavit of the Receiver filed 3 December 2018, CFI-186 to CFI-189 (“**the Receiver’s Affidavit**”), pages 28 to 40 of the body of the affidavit.

⁹ Pages 391-392 of the exhibits to the Liquidator’s Affidavit.

¹⁰ Pages 393-399 of the exhibits to the Liquidator’s Affidavit.

¹¹ Pages 1-6 of the exhibits to the Liquidator’s Affidavit.

7. Whilst the earlier correspondence and the Application as filed (in paragraph 2(a)) refer to the Liquidator being appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution, on reflection such an order may not be necessary, given that there is already an order¹² directing LMIM to wind up the FMIF. If the order in respect of the Receiver's ongoing role were made, then the work of winding up the scheme will fall back to LMIM as the responsible entity, which the Liquidator can oversee, without further specific order.
8. The Liquidator deposes to the current status of the windings up of LMIM and each Fund and the difficulties he is experiencing in that process (including in relation to the prompt payment of his remuneration and expenses and the potentially complex reallocation of expenses, depending upon the currently reserved judgment concerning corporate remuneration). The Liquidator's evidence expands on the matters set out in the letters above.
9. Ms Trenfield's Affidavit sets out the Liquidator's estimates for the remaining winding up of FMIF and the Other Funds, and the current status of the proofs of debt process.
10. This outline will address the relevant principles to apply and expand upon the reasons for the Orders.

RELEVANT LEGAL PRINCIPLES

11. Subsection 601NF(2) of the Act is expressed in more limited terms than sub.601EE(2) of the Act, a provision which the authorities have often treated as comparable though more broadly expressed. While observing that distinction, the Courts have repeatedly declined to state the outer limits of the power under s.601NF of the Act.¹³
12. In *Re Stacks Managed Investments Ltd*, White J said that sub.601EE(2) of the Act empowers the court to "*fashion the winding up process*" but sub.601NF(2) gives a power to make directions about *how* a registered scheme is to be wound up, where the winding up may already be on foot and should be provided for by the scheme's constitution.¹⁴
13. In *Rubicon*, Ms Dougall J held that sub.601NF(2) empowered the Court to make directions about how the costs and expenses of winding up a registered managed investment scheme should be paid.¹⁵

ARE DIRECTIONS NECESSARY?

¹² Paragraph [1] of the orders made by Dalton J on 21 August 2013.

¹³ See, e.g., *Re Rubicon Asset Management Ltd (adm'n apptd)* ("*Rubicon*") (2009) 77 NSWLR 96, 106 [56]; *Equititrust Ltd v Members of the Equititrust Income Fund* (2011) 288 ALR 800, 811-812 [47] (Applegarth J).

¹⁴ (2005) 219 ALR 532, 541, [37].

¹⁵ At 106, [56].

14. The necessity for directions is identified in the 21 September letter and 3 October letter. In essence, the current framework is not optimal for the finalization of the winding up of the FMIF, in the context of the winding up of the LM Estate. The proposed Finalization Strategy (as outline in the 3 October 2018 letter) will be cheaper, more transparent and make the insolvency practitioners more accountable for their remuneration and expenses going forward.
15. The Receiver identifies five “key reasons” to oppose the change in regime, as summarised in paragraph 52 of his affidavit. These are addressed as follows.
16. First, as to paragraph 52(a), in relation to the deferral of remuneration and expense claims, it is submitted that:
 - (a) the Receiver is not being singled out, as the proposal is in respect of the remuneration and expenses of both the Liquidator and the Receiver;
 - (b) the deferral of remuneration to the conclusion will enable an overall assessment to be made of the remuneration and expenses of all practitioners, at the same time, with all facts of work done and recoveries made open to public scrutiny in a single application, which will inevitably be more efficient than multiple applications (as currently occurs);
 - (c) the figure of 50% for the “advance” on the remuneration and expense amounts is a proposal only, such that if the Receiver (or the Court) considers that 60% or even 80% is more appropriate, that can be accommodated;
 - (d) if the Receiver remains unwilling to defer even a relatively small amount of remuneration to the conclusion, then there is an obvious alternative, namely to make the orders sought in relation to his continuing appointment.
17. Secondly, as to paragraph 52(b), in relation to the bulk of work being the litigation matters, that matter is consistent with the orders sought being made, as the Receiver will be able to focus on the litigation matters without being distracted by the administration of the winding up itself.
18. Thirdly, as to paragraph 52(c), in relation to his opinion that costs will increase, that is a risk for the Liquidator (who has agreed to cap his fee). There is a meaningful difference between the estimated remuneration and expenses moving forward, as appears in paragraphs 29 and 30below.
19. Fourthly, as to paragraph 52(d), in relation to conflicts, the Receiver’s position as contradictor to the Liquidator’s remuneration and expenses application will be unaffected because there will be only one such application, at the conclusion, at which he will be promulgating his own remuneration and will be able to contradict the Liquidator’s application. As for the conflict of adjudicating upon proofs, there are

currently two proofs, totalling \$442,621.29, claimable against the FMIF.¹⁶ There are potentially some more, but the Liquidator is awaiting further information about those.¹⁷

20. Accordingly, on the current state of the evidence, the quantum of the potential conflict problems is \$442,621.29. Even assuming that the total to be allowed by the Liquidator and claimed against in the FMIF is that sum, such an amount would be potentially dwarfed by the remuneration and expenses of the Liquidator and the Receiver litigating the Clear Accounts Proceeding to a conclusion. If the orders were granted, there is nothing to prevent the Liquidator negotiating a commercial settlement with creditor/claimants.
21. Fifthly, as to paragraph 52(e), in relation to the dual appointments, the Receiver is correct, however the Finalization Strategy offers a cheaper, more transparent and more accountable way forward, with potentially fewer areas of potential dispute.
22. Apart from the key areas identified by the Receiver, the one issue not addressed by him is the ongoing problem faced by the Liquidator in his being without funds and not being paid promptly the amounts payable to him out of the FMIF. The delays and reductions in remuneration being experienced by the Liquidator are addressed in paragraphs 50 to 76 of his affidavit.

COST EFFECTIVE WINDING UP

23. The winding up of the FMIF has been a lengthy and expensive task. By way of example, the Receiver's remuneration (not including expenses) since his appointment has been \$14,216,555.65 (including GST).¹⁸ To that must be added the remuneration and expenses of the Liquidator (including while acting as voluntary administrator) and the DB Receivers (who remain appointed).
24. However, with all of the assets of the FMIF (leaving aside choses in action which may be recovered by litigation) now having been realised, any course which lessens the cost burden on the members of the FMIF is, against the background of what has been charged by all parties to date, more than merely desirable; it is necessary.
25. To that end, the Liquidator has indicated that, if he were appointed to continue the winding up of the FMIF, he would cap his remuneration for the work necessary to wind up the FMIF at the relatively modest sum of \$180,000.00 (excluding GST) per annum for ongoing work and \$200,000.00 (excluding GST) for identified 'one off' tasks which would need to be completed.¹⁹

¹⁶ Paragraph [38] of Ms Trenfield's Affidavit.

¹⁷ Paragraph [39] of Ms Trenfield's Affidavit.

¹⁸ Paragraph [417] of the Receiver's Affidavit.

¹⁹ Paragraphs [20]-[24] of Ms Trenfield's Affidavit.

26. The Liquidator has procedures in place for the winding up of the other Funds and is in a position, based on his experience with those Funds, to make a reliable estimate of his costs in winding up the FMIF.²⁰
27. Combined with the lack of necessity in the Receiver remaining appointed, the Liquidator's commitment to capped remuneration for those identified tasks in completing the winding up of the FMIF is a factor in favour of making the orders sought by the Application.
28. The Liquidator and the Receiver have each estimated their remuneration for the non-litigious tasks relating to the winding up of the FMIF. The Liquidator's estimate proceeds on the basis of 'one off' costs and a recurring monthly sum, while the Receiver has provided an estimate of (approximately) the next six months.
29. The figures to 30 June 2019 for the recurring amounts, adjusting for the differing bases of the estimate, are reflected in the table below:²¹

Item	Liquidator (ex GST)	Receiver (ex GST)
Liaising with Receiver/Liquidator	\$3,000.00 ²²	Not provided
Registry issues/report to members	\$34,000 ²³	\$170,000 to \$210,000
General administration	\$45,000.00	Not provided

30. The figures for the 'one off' amounts, adjusting for the differing bases of the estimate, are reflected in the table below:²⁴

Item	Liquidator (ex GST)	Receiver (ex GST)
Transition	\$30,000	Not provided
Final Audit	\$30,000	Not provided
Remuneration claim at conclusion	\$50,000	Not provided
Winding up costs	\$100,000	Not provided

²⁰ Paragraphs [17] and [23]-[49] of the Liquidator's Affidavit.

²¹ Paragraphs [330]-[331] of the Receiver's Affidavit and paragraph [22] of Ms Trenfield's Affidavit.

²² 6 x \$500.

²³ 6 x \$5,000 (Registry issues) + 2 x \$2,000 (Quarterly report).

²⁴ Paragraphs [117](d) and [118] of the Receiver's Affidavit and paragraph [20] of Ms Trenfield's Affidavit.

FUTURE BUDGETS

31. The Court's power under sub.601NF(2) includes a power to make directions about how the costs and expenses of the winding up should be paid.
32. In order to improve transparency in relation to the remuneration and expenses being charged to all Funds, and to combat the problems presently being experienced by the (substantially unfunded) Liquidator in the recovery of his remuneration and expenses from the Funds, the Liquidator proposes a regime whereby:
- (a) the Court approves budgets for the Liquidator and Receiver;
 - (b) the Liquidator and Receiver are permitted to draw 50% (or such other proportion as may be just) of their remuneration and expenses from the assets of the appropriate Funds on an interim and ongoing basis; and
 - (c) there is a final application for the approval of all appointees' remuneration and expenses at which the Court will approve the amounts of the total remuneration for the winding up and permit any balance to be drawn from the appropriate Fund.
33. That approach to remuneration and expenses has a number of advantages over the present situation where the parties are making repeated *ad hoc* applications to Court for the approval of their remuneration:
- (a) *first*, a recurring difficulty in the Court determining the quantum of each party's remuneration has been the need to assess the proportionality of the sum claimed.²⁵ By leaving the final approval of the total quantum of remuneration to the conclusion of the windings up, the Court will be better placed to address that issue in an informed way.

Additionally, combining all of the repeated applications for remuneration will obtain efficiencies in the expenses being incurred. One of the Liquidator's concerns has been the cost effectiveness of those applications.²⁶ A single, final application will allow for economies of scale to be achieved and avoid the problems of significant disputes over fees which ultimately result in very little net benefit to the members of the FMIF;²⁷

- (b) *second*, requiring the parties to prepare and publish budgets imposes an important measure of transparency and accountability on what is a complex process without limiting their ability to claim a reasonable sum for remuneration.

²⁵ See, e.g., *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (No 2)* [2017] QSC 229, [299] and the transcripts of argument before Applegarth J on 30 November 2017 at T1-4:l.34 to T1-5:l.13 (pages 503 to 504 of the exhibits to the Receiver's Affidavit) and T1-6:l.10 to T1-7:l.22 (exhibit pages 505-506).

²⁶ Paragraph [30] of Ms Trenfield's Affidavit.

²⁷ Paragraphs [66]-[70] of the Liquidator's Affidavit.

Nothing in the proposed orders prevents a party from explaining, at the final remuneration hearing, the justified reasons why they exceeded their initial estimates and seeking approval of that sum, if reasonable;

- (c) *third*, permitting the parties to draw a percentage of the budgets allows for the commercial practicalities of ongoing practice to be managed. That course will balance the need to provide the parties with an ongoing flow of funds without delay²⁸ against the need to ensure that, in permitting the distribution of interim amounts the Court does not unknowingly approve a total amount which is thought to be excessive.

CONCLUSION

34. For those reasons, the Court should make the orders sought by the application.

J Peden QC and S Russell

Counsel for the applicants

6 December 2018

²⁸ Paragraphs [71]-[73] of the Liquidator's Affidavit and paragraphs [30]-[31] of Ms Trenfield's Affidavit.

SUPREME COURT OF QUEENSLAND

CITATION: *Bruce v LM Investment Management Limited (in liq) & Ors*
[2019] QSC 126

PARTIES: **RAYMOND EDWARD BRUCE AND VICKI PATRICIA
BRUCE**
(applicants)

v

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

(first respondent)

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

(second respondent)

ROGER SHOTTON

(third respondent)

**AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

(intervener)

**IN THE MATTER OF: LM INVESTMENT
MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED)
ACN or ARBN 077 208 461**

**SAID JAHANI AS RECEIVER AND MANAGER OF
THE ASSETS, UNDERTAKING, RIGHTS AND
INTEREST OF LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) (RECEIVERS AND
MANAGERS APPOINTED) ACN 077 208 461 IN ITS
CAPACITY AS THE RESPONSIBLE ENTITY OF THE
LM CURRENCY PROTECTED AUSTRALIAN
INCOME FUND ARSN 110 247 875 (RECEIVER
APPOINTED) AND THE LM INSTITUTIONAL
CURRENCY PROTECTED AUSTRALIAN INCOME
FUND ARSN 122 052 868 (RECEIVER APPOINTED)**
(applicant)

v

**LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) ACN 077 208 461**

(first respondent)

**THE MEMBERS OF THE LM CURRENCY
PROTECTED AUSTRALIAN INCOME FUND ARSN
110 247 875**

(second respondent)

THE MEMBERS OF THE LM INSTITUTIONAL

**CURRENCY PROTECTED AUSTRALIAN INCOME
FUND ARSN 122 052 868**
(third respondent)

**TRILOGY FUNDS MANAGEMENET LIMITED ACN
080 383 679 AS RESPONSIBLE ENTITY OF THE LM
WHOLESALE FIRST MORTGAGE INCOME FUND
ARSN 099 857 511**

(first applicant)

**THE TRUST COMPANY LIMITED ACN 004 027 749
AS CUSTODIAN OF THE PROPERTY OF THE LM
WHOLESALE FIRST MORTGAGE INCOME FUND
ARSN 099 857 511**

(second applicant)

v

**THE MEMBERS OF THE LM WHOLESALE FIRST
MORTGAGE INCOME FUND ARSN 099 857 511**

(respondents)

FILE NOS: BS3383 of 2013
BS1031 of 2019
BS2000 of 2019

DIVISION: Trial Division

PROCEEDINGS: Applications for judicial advice/directions

DELIVERED ON: 22 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 2-3 May 2019

JUDGE: Mullins J

ORDER: **In each proceeding, order as per amended draft initialled
by Mullins J and placed with the file.**

CATCHWORDS: CORPORATIONS – RECEIVERS, CONTROLLERS AND
MANAGERS – POWERS – TO APPLY TO COURT FOR
DIRECTIONS – where a court appointed receiver applies for
directions in the inherent jurisdiction of the court – whether the
court appointed receiver is justified in entering into and
performing, and in causing the company in receivership as
responsible entity of a managed investment scheme to enter
into and perform, a deed of settlement that compromises
complex litigation – whether the court appointed receiver is
justified in making the interim distribution proposed in the
deed

CORPORATIONS – RECEIVERS, CONTROLLERS AND
MANAGERS – POWERS – TO APPLY TO COURT FOR
DIRECTIONS – where a privately appointed receiver applies
for a direction under s 424 of the *Corporations Act* 2001 (Cth)

– whether the privately appointed receiver is justified in entering into and performing, and in causing the company in receivership, as responsible entity of two managed investment schemes, to enter into and perform a deed of settlement that compromises complex litigation

EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – GENERALLY – where the applicants which are the trustee and custodian of the property of a managed investment scheme apply for directions under s 96 of the *Trusts Act 1973* (Qld) – whether the applicants are justified in entering into and performing a deed of settlement that compromises complex litigation

Corporations Act 2001 (Cth), s 424, s 601NF

Trusts Act 1973 (Qld), s 96

Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd (2002) 42 ACSR 240; [2002] NSWSC 576, considered

Expo International Pty Ltd v Chant [1979] 2 NSWLR 820, considered

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; [2008] HCA 42, considered

Re One.Tel Ltd (2014) 99 ACSR 247; [2014] NSWSC 457, considered

COUNSEL: J D McKenna QC and D J Ananian-Cooper for the applicant D Whyte as receiver of the property of LM First Mortgage Income Fund in proceeding BS3383 of 2013
D B O’Sullivan QC and D M Turner for the applicant in proceeding BS1031 of 2019
P Ahern for the applicants in proceeding BS2000 of 2019

SOLICITORS: Gadens Lawyers for the applicant D Whyte in proceeding BS3383 of 2013
HWL Ebsworth Lawyers for the applicant in proceeding BS1031 of 2019
Squire Patton Boggs for the applicants in proceeding BS2000 of 2019

[1] Three related applications in separate proceedings brought by three separate sets of applicants were heard together. The applicants are some of the parties to another proceeding in this court BS13534 of 2016 (referred to as the Feeder Fund Proceeding) and are parties to a deed of settlement and release as amended by the insertion of clauses 8.12 to 8.16 (the deed) in respect of the Feeder Fund Proceeding. Each of the applications

is brought, in general terms, for judicial advice or directions as to whether the relevant applicant would be justified in entering into and implementing the deed. Consistent with the nature of the applications, there was no contradictor.

- [2] Mr Whyte is a registered liquidator. By order of this court made on 8 August 2013, he was appointed pursuant to s 601NF(1) of the *Corporations Act* 2001 (Cth) (the Act) to take responsibility for ensuring that the LM First Mortgage Income Fund (FMIF) is wound up in accordance with its Constitution and pursuant to s 601NF(2) of the Act as receiver of the property of FMIF.
- [3] FMIF was registered as a managed investment scheme in 1999 and LM Investment Management Limited (Receivers & Managers appointed) (in liq) (LMIM) is and has been the responsible entity of the FMIF since its inception. LMIM has been in liquidation since 1 August 2013 and Mr Park is the liquidator.
- [4] FMIF has over 4,500 ordinary unitholders. The members of FMIF subscribed capital for investment purposes that was used to advance funds to borrowers under loan agreements on the security of first registered mortgages. There are three different classes of issued units in FMIF, class A units issued to ordinary unitholders, class B units held for the Feeder Funds and class C units issued to unitholders who invested in foreign currencies. The class B units are divided among three Feeder Funds.
- [5] Each of the Feeder Funds was a managed investment scheme in its own right. LMIM is the responsible entity for two of the Feeder Funds: LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF). Registered liquidator Mr Jahani is the privately appointed receiver and manager of LMIM in its capacity as responsible entity of CPAIF and ICPAIF. Mr Jahani was appointed to that role by a secured creditor of those two Feeder Funds.
- [6] Trilogy Funds Management Limited is now the responsible entity of the LM Wholesale First Mortgage Income Fund (WFMIF) which is the third Feeder Fund. The Trust Company Limited is the custodian of the property of WFMIF as agent for Trilogy.
- [7] Substituted service orders had been made on 22 February 2019 in respect of each application and the associated non-confidential court documents on the unitholders of FMIF or each of the Feeder Funds, as required by the relevant application. These orders were complied with.
- [8] Mr Whyte as receiver of FMIF commenced the Feeder Fund proceeding against CPAIF and ICPAIF as the first and third defendants, Trilogy and Trust Company as the second and fifth defendants, and LMIM (in liq) as the fourth defendant. In the Feeder Fund Proceeding, Mr Whyte is seeking to confirm that FMIF is entitled to withhold further distributions to each of the Feeder Funds to the extent of the value of redemptions that were allowed in their favour at a time when redemptions were suspended other than in circumstances of hardship, between 11 May 2009 and 31 January 2013, as it is alleged those redemptions had been allowed by LMIM without power under the Constitution of FMIF and/or in breach of trust. Mr Whyte is also seeking relief to authorise him to reinstate those redeemed units to each of the respective Feeder Funds. Mr Whyte also

seeks authorisation to cancel further units issued to each of the Feeder Funds between 1 July 2011 and 1 November 2012 as the purported reinvestment of income distributions, at a time when there was no Distributable Income of the FMIF and it is alleged that those distributions were without power and in breach of trust. Mr Jahani disputes the allegations made in the Feeder Fund Proceeding against CPAIF and ICPAIF. Trilogy and Trust Company dispute the allegations made in the Feeder Fund Proceeding against WFMIF. The resolution of the questions raised in the Feeder Fund Proceeding is critical to the winding up of FMIF.

- [9] The further amended claim and second further amended statement of claim in the Feeder Fund Proceeding were filed in June 2018. Defences had not yet been filed by any of the defendants. A mediation was organised to commence on 5 November 2018 with The Hon Richard Chesterman AO RFD QC as mediator. Detailed position papers were prepared by Mr Whyte and the active defendants for the purpose of the mediation. The mediation continued on 6 and 20 November 2018 and was successful in that Mr Whyte entered into the deed with Mr Jahani on behalf of CPAIF and ICPAIF and Trilogy and the Trust Company on behalf of WFMIF. The fourth defendant is not a party to the deed. The liquidator of LMIM was aware of, but did not appear on, these applications.
- [10] In broad terms, the deed provides for an agreed settlement sum reflecting a compromise of the FMIF's claims, for the FMIF retaining some (but not all) of each distribution payable to the Feeder Funds (up to the amount of the settlement sums) with the proportion and timing of each distribution fairly and equitably distributed over the course of the winding up, and for the units that would ordinarily have been restored to the Feeder Funds upon the FMIF recovering the amount of redemptions that were allowed in the past, by providing for rebate payments to be made and/or set off against the settlement sums in place of relief rectifying the register of members to formally reinstate the units.
- [11] There are conditions precedent to the deed coming into effect. One is that Mr Whyte obtains an order from the court to the effect that he is justified in settling the Feeder Fund proceeding on the terms set out in the deed and in causing LMIM as responsible entity of the FMIF to enter and perform the deed. There is a similar condition precedent applying to Mr Jahani that he obtain an order from the court pursuant to s 424 of the Act that in his capacity as receiver and manager of the assets of LMIM as responsible entity respectively of CPAIF and ICPAIF is justified in entering into and performing and in procuring the first defendant and the third defendant to enter into and perform the deed. It is also a condition precedent that Trilogy as responsible entity of WFMIF and Trust Company obtain an order from this Court pursuant to s 96 of the *Trusts Act* 1973 (Qld) that they are justified in entering into and performing the deed. It was also a condition precedent to the deed coming into effect that the interim distribution from FMIF be in an amount of at least \$30m.
- [12] It became apparent by the hearing on 2 May 2019 that there were two points of potential ambiguity in the interpretation of the deed. Those ambiguities were appropriately resolved by agreement among all the parties by the resumption of the hearing on 3 May 2019. It also became apparent by the hearing on 2 May 2019 that there was a discrepancy between the number of units in FMIF recorded in the financial accounts of 478,100,385 and the number of units recorded in the unit register of FMIF as 493,792,150.36. That discrepancy had a minimal effect on the calculation of proposed distribution amounts, but

the parties agreed that did not materially alter the operation of the deed and did not preclude the applications from proceeding. A revised economic analysis of the proposed distributions was prepared and exhibited to the affidavit of Mr Melrose filed by leave on 3 May 2019 in proceeding BS3383 of 2013.

Mr Whyte's application

- [13] Mr Whyte makes his application in reliance on the inherent jurisdiction of the court to give him advice in his capacity as a court appointed receiver: *Australian Securities and Investments Commission v Commercial Nominees of Australia Ltd* (2002) 42 ACSR 240 at [11].
- [14] Mr Whyte made a separate application in proceeding BS3508 of 2015 that was heard by Jackson J seeking authority as a court appointed receiver to make the distribution pursuant to the deed. That authority was necessary as Mr Whyte, not being the responsible entity of the FMIF, does not have the authority to make any distributions without a further order of the court. That authority is a separate question from the issue of whether Mr Whyte is justified in entering into the deed and carrying out its terms. The decision on the application before Jackson J was reserved, pending the outcome of the application before me.
- [15] In addition to seeking the advice as to whether he is justified in entering into and performing the deed, Mr Whyte also seeks advice (if the deed is approved) on the quantum of the interim distribution proposed under the deed.
- [16] Guidance on the approach that should be taken by the court on the giving of advice is found in authorities that have considered applications in similar circumstances by a trustee, liquidator or privately appointed receiver. In *Re One.Tel Ltd* (2014) 99 ACSR 247 Brereton J considered the approach to be taken in giving directions to liquidators under s 511 of the Act (as it then stood) to the effect they had acted properly and reasonably in entering into a deed of settlement in respect of litigation. Brereton J noted at [36]:
- “While the court’s function under s 511 does not involve it in reconsidering every factor that has informed the liquidator’s decision, let alone developing alternatives or deciding whether the court would have made the same decision, the court needs to be satisfied, before making a direction, that the decision is proper and reasonable; at least usually, this will necessitate consideration of the liquidator’s reasons, and the process by which the decision has been reached.”
- [17] That approach is appropriate to follow in considering whether or not to make the directions that are sought by Mr Whyte as the court appointed receiver. Extensive affidavits were filed on behalf of Mr Whyte for the purpose of this application, including his confidential affidavit that exhibits an extremely detailed advice provided by Mr McKenna of Queen’s Counsel and Mr Ananian-Cooper of Counsel in relation to the issues in the Feeder Fund Proceeding, Mr Whyte’s prospects and a consideration of the appropriateness of the deed. Legal professional privilege has not been waived in respect of that advice. What can be said is that there are many legal and factual issues to be

determined in the Feeder Fund Proceeding and many of the legal issues are finely balanced.

- [18] When the application was heard, Mr Whyte was holding about \$64m from the proceeds of the assets he had collected on behalf of FMIF. Apart from the Feeder Fund Proceeding, he has commenced other proceedings that are ongoing for which he needs to preserve funds for paying costs and any costs orders that are made against him. He has caused LMIM as the responsible entity for FMIF to bring proceeding BS2166 of 2015 in this court against EY, the former auditors of FMIF, in which EY has (with leave before defending) issued multiple third party notices, including against LMIM as responsible entity of the Feeder Funds. In correspondence with the solicitors for Mr Whyte, Mr Jahani and Trilogy, EY expressed a concern that the deed might compromise EY's indemnity, subrogation and proprietary claims in respect of the Feeder Funds that are the subject of the third party notices. Mr Whyte considers that some of the claims in the third party notice may be affected by the covenants not to sue in the deed. It appears likely that there will be a dispute regarding the extent and effectiveness of the covenants not to sue in the deed which may arise for determination in the proceeding against the auditor. EY was advised of the hearing date of Mr Whyte's application and the other applications before me, but did not appear to make any submissions on any of the applications. The proceeding against the auditor is still at an early stage. Mr Whyte has foreshadowed that he will in due course seek judicial advice, as to whether he is justified in continuing to prosecute the claim against the auditor and the way the proceeding should be conducted.
- [19] Apart from estimating costs of conducting the proceeding against the auditor and potential costs orders made in that proceeding against him, Mr Whyte has outlined in detail his estimates of likely further recoveries on behalf of FMIF and other liabilities, including contingent liabilities, and his remuneration. In view of the fact that his administration has been ongoing for almost six years without any distribution to the unitholders, Mr Whyte is obviously keen to proceed to a distribution and would prefer to do so on the basis that possible exposures of FMIF in the proceeding against the auditor are managed as that proceeding progresses. It is apparent from the fact that Mr Whyte applies for advice to the effect he was justified in causing LMIM as responsible entity of FMIF to enter into and perform the deed that he is of the view that the preferred course is to obtain the benefit for FMIF of the compromise of the Feeder Fund Proceeding now, notwithstanding the complication of the ongoing proceeding against the auditor.
- [20] As Mr Whyte's reasons for pursuing the application are set out in his confidential affidavit that discloses the confidential legal advice he has obtained, I cannot summarise those reasons, but merely note that they exist and are supported by legal opinion.
- [21] In all these circumstances and even allowing for the complication of the proceeding against EY, I am satisfied that the decision that Mr Whyte has made in relation to the deed is proper and reasonable and that I should make the direction he seeks in the exercise of the court's inherent jurisdiction that he is justified in settling the Feeder Fund Proceeding on the terms set out in the deed and in causing LMIM as responsible entity of the FMIF to enter into and perform the deed and, subject to obtaining the authority from the court to do so, he is justified in making the interim distribution in the quantum provided for in the deed.

[22] It is therefore appropriate to make the following orders:

1. It is directed in the inherent jurisdiction of this Honourable Court that David Whyte as the person appointed under section 601NF(1) of the *Corporations Act* 2001 (Cth) to ensure that the LM First Mortgage Income Fund (FMIF) is wound up in accordance with its constitution and any orders of the Court, and as the receiver of the property of the FMIF (Mr Whyte), is justified in settling Supreme Court proceeding 13534 of 2016 on the terms set out in the Deed of Settlement and Release as varied by the Deed of Variation ('the Deed of Settlement'), and in causing LM Investment Management Limited (in liquidation) (LMIM) as responsible entity of the FMIF (receiver appointed) to enter into and perform the Deed of Settlement.
2. It is directed in the inherent jurisdiction of this Honourable Court that Mr Whyte is justified in making an interim distribution to the members of the FMIF, if he is conferred with the authority to do so on his application dated 1 February 2019 filed in Supreme Court proceeding 3508 of 2015, of 6.5 cents per unit in the FMIF.
3. Mr Whyte's costs of and incidental to the application filed 1 February 2019 be paid from the assets of the FMIF.

[23] As a draft order was provided by Mr Whyte's solicitors that is substantially in those terms, the formal order that I make will be order as per the amended draft initialled by me and placed with the file.

Mr Jahani's application

[24] Because Mr Jahani is a receiver appointed by a secured creditor, his primary duty is to his appointor to protect and preserve the assets he obtains principally for the benefit of his appointor. He owes secondary duties to LMIM to act in good faith and to use his powers for the sole purpose of securing payments of the debt owed to his appointor, but this duty includes a duty not to sacrifice the interests of the company recklessly: *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820, 834. The Feeder Fund Proceeding is on the court's Commercial List under the management of Jackson J and on 13 June 2018 Jackson J made an order pursuant to s 59 of the *Trusts Act* 1973 (Qld) that the first and third defendants in that proceeding be represented by Mr Jahani. Mr Jahani did not oppose the making of the order, but made clear his position in regard to his primary duty as a privately appointed receiver to his appointor and his secondary duty to LMIM.

[25] As Mr Jahani is a privately appointed receiver, he can seek to rely on s 424 of the Act in applying to the court for directions. Reference was made to authorities that appear to be against the proposition that s 424 permits a court to give a direction that a receiver is justified to enter a compromise of a legal proceeding. As is apparent from the allegations in the Feeder Fund Proceeding and the provisions of the deed, the compromise of the Feeder Fund Proceeding from any party's perspective involved more than the exercise of a commercial judgment. Because of the complexity of the Feeder Fund Proceeding, I consider the approach of Brereton J in *Re One.Tel Ltd* as to whether the liquidators were justified in entering into the deed of settlement as much more preferable than declining

to apply s 424 in the circumstances. The approach taken in *Re One.Tel Ltd* at [35]-[36] applies equally to a privately appointed receiver in Mr Jahani's position, as it does to a court appointed receiver in Mr Whyte's position.

- [26] Mr Jahani's affidavit filed on 26 April 2019 explains the extensive work that was undertaken by him and his staff in preparing for the mediation and his consideration of the advices he obtained from Mr O'Sullivan of Queen's Counsel and Mr Turner of Counsel prior to, during and subsequent to the mediation. Legal professional privilege is claimed in respect of those advices which have been exhibited to the separate confidential affidavit filed by leave on 2 May 2019 of Mr Jahani's solicitor, Mr O'Farrell.
- [27] The portion of the proposed interim distribution under the deed that would be paid to Mr Jahani as the receiver and manager of LMIM as the responsible entity of CPAIF and ICPAIF will result in the secured creditor of those Feeder Funds being paid in full, with a balance remaining for distribution to the unitholders of those Feeder Funds. Mr Jahani has provided detail of the anticipated calculation of the distributions to CPAIF and ICPAIF that reflects the agreed compromise of FMIF's claim against those two Feeder Funds.
- [28] Mr Jahani sets out in paragraph 74 of his affidavit the reasons for his support of the settlement reflected in the deed. He notes that the interim distribution in the sum of at least \$30m will result in his being able to finalise the receivership, removing the ongoing burden of receivership costs from the unitholders of CPAIF and ICPAIF. The repayment of the secured debt stops interest accruing on that debt. The settlement was consistent with the pre-mediation advice that Mr Jahani had received on prospects of success. There would have been additional costs if the Feeder Fund Proceeding had gone to a trial and the settlement avoids the risk of the plaintiff being entirely successful in its claims and saves the expense of further costs. Mr Jahani believes that the deed is proper and consistent with his primary duty to the secured creditor and his secondary duties to LMIM as responsible entity of the CPAIF and the ICPAIF.
- [29] Mr Jahani discloses that EY has served third party notices and a third party statement of claim on LMIM as responsible entity of the CPAIF and the ICPAIF seeking indemnity against those Feeder Funds against any liability to the plaintiff in that proceeding on the basis of allegations, among others, that LMIM as responsible entity of those two Feeder Funds is liable to make equitable contribution to EY in respect of the liability to LMIM as the responsible entity of FMIF. Despite the correspondence that passed between EY's solicitors and Mr Jahani's solicitors, EY did not seek to be heard on Mr Jahani's application and Mr Jahani considered it appropriate to proceed with the application.
- [30] Even allowing for the potential complication of EY's third party notices, I am satisfied that Mr Jahani's decision to enter into the deed was a proper and reasonable one in the circumstances and it is therefore appropriate to make the direction that Mr Jahani seeks in the following terms:

Pursuant to section 424 of the *Corporations Act* 2001 (Cth), the applicant is justified in entering into and performing, and in causing the first respondent in its capacity as the responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 and the LM Institutional

Currency Protected Australian Income Fund ARSN 122 052 868 to enter into and perform, the Deed of Settlement and Release a copy of which appears at exhibit SJ-12 to the Affidavit of Said Jahani affirmed on 24 April 2019, as varied by the Deed of Variation a copy of which appears at exhibit SJ-13 to that affidavit.

- [31] The draft order provided by Mr Jahan's solicitors that includes that direction also included an order that it is now no longer necessary to make. I will therefore make an order as per the amended draft initialled by me and placed with the file.

Application by Trilogy and the Trust Company

- [32] Trilogy and the Trust Company bring their application pursuant to s 96 of the *Trusts Act* 1973. The directions are sought on the basis of a statement of facts that is exhibited to the affidavit of their solicitor Ms Goodman that was filed on 1 May 2019. Reliance on s 96 is appropriate for the responsible entity of a managed investment scheme which holds the scheme property on trust for scheme members. Trust Company as the holder of the legal title of the scheme property on trust for Trilogy is also clearly a trustee. The nature of the advice given to a trustee under provisions such as s 96 of the *Trusts Act* 1973 is explained in *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 at [64] and [196].
- [33] Mr Ryan who is the managing director of Trilogy and was authorised by both Trilogy and the Trust Company to do so made the affidavit which was filed on 1 May 2019 that summarised, in general terms, the reasons for those parties entering into the deed. Those reasons are:
- (a) settlement of the Feeder Fund Proceeding obviates the need for those applicants to incur further legal costs in defending the Feeder Fund Proceeding;
 - (b) as litigation is unpredictable, there is a risk that the applicants' defence of the claims against them will be unsuccessful;
 - (c) the applicants' solicitors have estimated that the costs of defending the Feeder Fund Proceeding to trial will be in the order of \$1.3m exclusive of GST;
 - (d) the settlement will lead to the interim distribution being made within a short timeframe, instead of members of the WFMIF having to wait until the conclusion of the trial of the Feeder Fund Proceeding;
 - (e) if the applicants do not successfully defend the Feeder Fund Proceeding, the WFMIF may not receive any distribution at all, or may receive a smaller distribution than it would do if the proposed settlement proceeds;

- (f) the settlement is consistent with the legal advice the applicants received on prospects of success in the Feeder Fund Proceeding.

- [34] Mr Ryan's confidential affidavit exhibited advice obtained from Ms Ahern of Counsel on whether the settlement of the Feeder Fund Proceeding on the terms of the deed was reasonable and a further advice obtained from Ms Ahern of Counsel on the prospects of success in the Feeder Fund Proceeding and the settlement. Legal professional privilege is not waived by Trilogy and the Trust Company in respect of those advices.
- [35] Notwithstanding the potential complication of the third party notice against Trilogy as the responsible entity of WMIF in the proceeding against the auditor, it is appropriate in the circumstances to make the direction that the applicants Trilogy and the Trust Company seek in the following terms:

Pursuant to s.96 of the *Trusts Act 1973* (Qld), the Applicants are justified:

- (a) in settling Supreme Court proceeding 13534 of 2016 on the terms set out in the Deed of Settlement and Release as varied by the Variation to the Deed of Settlement and Release (**Deed of Settlement**); and
- (b) in entering into and performing the Deed of Settlement.
- [36] The draft order provided by the solicitors for Trilogy and the Trust Company incorporated that direction (as well as orders that are now not necessary to make). The formal order that I will make in this proceeding is also an order as per the amended draft initialled by me and placed with the file.

Conclusion

- [37] Because each set of applicants has relied on legal opinions that remain confidential and other material disclosed in the confidential affidavits (which I had the benefit of considering), these reasons have been limited to general statements to support the conclusion that I reached in respect of each application, that it was appropriate to give the direction in the terms in which it was sought. The Feeder Fund Proceeding is complex litigation that would have absorbed significant resources of each of the parties, if it had proceeded to a hearing (and also significant court resources), with the attendant risks and delays for each of the parties that are inevitably associated with complex litigation. The unitholders of FMIF and the Feeder Funds would have borne the consequences. The fact that parties to the deed were able to resolve the Feeder Fund Proceeding on terms that were satisfactory to the respective parties (from the perspective of each of the parties) in a mediation is a matter of some public interest.

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: S3383 of 2013

**IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) IN
ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 089 343 288**

ACN: 077 208 461

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 & INVESTMENTS
COMMISSION**

ORDER

Before: Mullins J

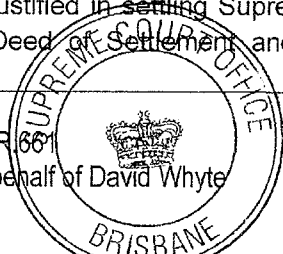
Date: 22 May 2019

Initiating document: Interlocutory Application filed 1 February 2019

THE ORDER OF THE COURT IS THAT:

1. It is directed in the inherent jurisdiction of this Honourable Court that David Whyte as the person appointed under section 601NF(1) of the *Corporations Act 2001* (Cth) to ensure that the LM First Mortgage Income Fund (**FMIF**) is wound up in accordance with its constitution and any orders of the Court, and as the receiver of the property of the FMIF (**Mr Whyte**), is justified in settling Supreme Court proceeding 13534 of 2016 on the terms set out in the Deed of Settlement and Release as varied by the Deed of Variation ("**the Deed of**

Order
Form 59 R 601
Filed on behalf of David Whyte



Gadens Lawyers
Level 11, 111 Eagle Street
Brisbane QLD 4000
Phone No: 07 3231 1666

Settlement"), and in causing LM Investment Management Limited (in liquidation) (**LMIM**) as responsible entity of the FMIF (receiver appointed) to enter into and perform the Deed of Settlement.

2. It is directed in the inherent jurisdiction of this Honourable Court that Mr Whyte is justified in making an interim distribution to the members of the FMIF, if he is conferred with the authority to do so on his application dated 1 February 2019 filed in Supreme Court proceeding 3508 of 2015, of 6.5 cents per unit in the FMIF.
3. Mr Whyte's costs of and incidental to the application filed 1 February 2019 be paid from the assets of the FMIF.

Signed: _____

Deputy Registrar



Last Name Registered Name	Description	Name	Position	Milestone	Disbursement	W/P Date	Hours	Value	Narration
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		4/11/2019	0.30	\$184.50	reviewed correspondence from Arthur Taylor regarding consolidated particulars for the proceedings against the auditors/analysis of the loan book at each relevant date
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		5/11/2019	0.30	\$184.50	reviewed correspondence from our solicitors regarding auditors defence/claims for privilege/reviewed draft letter in relation to issues relating to pleadings and review hearing/provided instructions regarding same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		7/11/2019	1.10	\$676.50	research and consideration of candidates in relation to appointment of experts in respect of proceedings against the auditors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		7/11/2019	1.50	\$922.50	continued research and consideration of candidates in relation to appointment of experts in respect of proceedings against the auditors/telephone conversation with Clerk Jarrod regarding same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		7/11/2019	0.70	\$430.50	reviewed correspondence between LM staff and the auditors and including various drafts of financial statements for two audit periods in relation to proceedings against the auditors and allegations of who prepared same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		11/11/2019	0.30	\$184.50	reviewed correspondence regarding potential expert regarding compliance plan audits in respect of proceedings against the auditors/reviewed cv of expert/forward to our solicitors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		12/11/2019	0.70	\$430.50	reviewed correspondence from our solicitors regarding potential expert for the proceedings against the auditors/reviewed cv and court decision relating to proceedings where the expert had acted/sent response to our solicitors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		12/11/2019	0.50	\$307.50	reviewed correspondence from our solicitors regarding proceedings against the auditors/reviewed request for further and better particulars and draft letter to EY's solicitors/prepared response with instructions
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		12/11/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and updated letter to EY's solicitors requesting further and better particulars of defence and response to other issues
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		18/11/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding engagement of expert in respect of proceedings against the auditors/reviewed documents supplied by expert/respond to our solicitors regarding same and update on matter
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		18/11/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding potential compliance plan experts in respect of proceedings against the auditors/provided instructions regarding same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		18/11/2019	0.90	\$553.50	reviewed correspondence from our solicitors and to the auditors solicitors regarding review of proceedings and issues relating to pleadings and further and better particulars required
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		19/11/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding status of expert reviewing loan documentation for the proceedings against the auditors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		19/11/2019	0.40	\$246.00	telephone conversation with our solicitors regarding review hearing on 21 November in respect of proceedings against the auditors/status of outstanding correspondence and strategy for hearing
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		19/11/2019	1.10	\$676.50	reviewed documents relating to review of 31 December 2008 and audit of 30 June 2009 financial statements/reviewed correspondence between EY and LM to assist with proceedings against the auditors and who prepared the accounts
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		21/11/2019	3.90	\$2,398.50	preparation for and court hearing in relation to review and progression of proceedings against the auditors/discussed outcome with our solicitors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		21/11/2019	0.80	\$492.00	telephone conversation with Arthur Taylor regarding proceedings against the auditors/work papers and correspondence relating to two audits and further work to be done in respect of same

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.30	\$184.50	reviewed correspondence from our solicitors regarding potential expert for proceedings against the auditors/reviewed CV and other material
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.30	\$184.50	reviewed correspondence from our solicitors and including court application and supporting affidavit in respect of application to strike out certain paragraphs in the defence of the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.20	\$123.00	reviewed documentation to be provided to expert in relation to proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		5/12/2019	0.30	\$184.50	telephone conversation with Clark Jarrod regarding proposed brief to expert in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		5/12/2019	0.10	\$61.50	reviewed email from Clark Jarrod to our solicitors regarding briefing of experts in respect of financial statement and compliance plan audits in relation to the proceedings against the auditors and questions to be answered
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/12/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding counter claim lodged by the auditors in respect of the proceedings against the auditors and correspondence to the auditors about application for leave to lodge the claim
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/12/2019	0.10	\$61.50	reviewed correspondence from our solicitors and to the court regarding conferring with EY in relation to the briefing of experts/request to extend court deadline/reviewed draft order requested/reviewed accounts
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/12/2019	0.50	\$307.50	reviewed correspondence from expert appointed in relation to proceedings against the auditors/financial statements from 30 June 2008 to 30 June 2012/further accounts requested/reviewed accounts
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/12/2019	0.50	\$307.50	reviewed correspondence from our solicitors regarding proceedings against the auditors/draft document protocol documents/provided instructions regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/12/2019	0.50	\$307.50	reviewed correspondence from our solicitors and the auditors solicitors regarding proceedings against the auditors and questions to be raised with experts/reviewed schedule detailing issues to be addressed and sent to the court/reviewed draft court order regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/12/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and correspondence sent to the auditors solicitors regarding the proposed disclosure protocols and plan
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/12/2019	0.30	\$184.50	reviewed correspondence from our solicitors regarding appointment of expert in the proceedings against the auditors/reviewed CV of potential expert/email our solicitors regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		6/01/2020	0.80	\$492.00	reviewed correspondence from our solicitors and EY's solicitors regarding document plan and protocol for discovery in relation to the proceedings against the auditors/reviewed changes proposed by EY/email our solicitors regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		6/01/2020	0.30	\$184.50	telephone conversation with our solicitors regarding status of proceedings against the auditors/response to further and better particulars/strategy in respect of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		6/01/2020	1.50	\$922.50	reviewed EY counter claim (155 pages) in relation to proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		6/01/2020	0.30	\$184.50	reviewed EY's response to request for further and better particulars regarding their defence in the proceedings
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		7/01/2020	1.50	\$922.50	reviewed correspondence from our solicitors and counsel regarding EY's response to further and better particulars/issues regarding professional standard scheme legislation/reviewed applicable High Court judgement/reviewed schemes/email our solicitors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/01/2020	1.10	\$676.50	consider/research potential experts in relation to proceedings against the auditors/email our solicitors regarding compliance plan expert

LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		9/01/2020	1.10	\$676.50	meeting with our solicitors regarding the status of the proceedings against the auditors/applications relating to privilege and further application regarding lack of particularity of defence/appointment of experts in the proceedings
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		14/01/2020	0.60	\$369.00	reviewed request for further and better particulars/apply and letter to EY's solicitors regarding deficiencies in pleadings and proposed application for relief/reviewed draft application/reviewed letter to EY's solicitors regarding privilege application
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		14/01/2020	0.60	\$369.00	telephone conversation with Arthur Taylor regarding proceedings against the auditors and work to be done in respect of preparation of financial statements/position regarding borrower settlement agreement and further information requested
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		14/01/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding proceedings against the auditors and application relating to privilege claims/reviewed letter to the auditors solicitors regarding their evidence in support of the application
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		20/01/2020	0.70	\$430.50	telephone conversation with expert regarding further information required to assist with loss calculation/discussed with RW/reviewed AX database
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		21/01/2020	0.20	\$123.00	reviewed correspondence from our solicitors and EY's solicitors regarding three matters being disclosure, privilege and appointment of expert/proposed way forward for each
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		21/01/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding proposed appointment of senior counsel specialising in administrative law, basis of brief and questions to be addressed
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		23/01/2020	0.70	\$430.50	reviewed correspondence from our solicitors regarding request for further and better particulars from EY in respect of their defence of the proceedings against the auditors/reviewed response from EY's solicitors/RW and AT re further work required
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		23/01/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding appointment of expert in respect of proceedings against the auditors/proposed meeting/discussed with Clark Jarrold/email our solicitors
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		23/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding response to EY's solicitors regarding request for further and better particulars in relation to their defence of the proceedings against the auditors
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		23/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding appointment of financial statements expert in respect of proceedings against the auditors/reviewed correspondence from EY's solicitors regarding potential objection/email our solicitors regarding same
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		28/01/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding appointment of expert/proposed meeting with expert/correspondence with EY's solicitors regarding expert/meeting with our solicitors and counsel regarding proceedings against EY
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		28/01/2020	1.90	\$1,168.50	meeting with our solicitors and counsel including teleconference with expert in the proceedings against the auditors and draft letter to auditors solicitors regarding application to be heard on 14 February/discussed proceedings generally
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		30/01/2020	1.50	\$922.50	meeting with our solicitors and counsel regarding proceedings against the auditors/auditors/preparation for hearing on 14 February regarding privilege application and particulars application/next steps in proceedings
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		30/01/2020	1.10	\$676.50	meeting with experts regarding proceedings against the auditors and further information required
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		30/01/2020	1.00	\$615.00	reviewed counsels submissions in relation to proceedings against the auditors and application in respect of limiting defence due to fears of self incrimination
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		3/02/2020	1.20	\$738.00	reviewed correspondence from our solicitors regarding disclosure protocol for proceedings against the auditors/reviewed updated document plan and updated document exchange protocol

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding potential experts to be appointed in respect of several matters raised in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/02/2020	1.50	\$922.50	reviewed draft accounts and correspondence between LM and EY regarding preparation of and finalisation of audited accounts for half year to 31/12/2008 and year ended 30/06/2009/reviewed summaries prepared by Arthur Taylor re proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors and including email sent to Judge's Associate regarding court application in respect of seeking further particulars in respect of defence of proceedings against the auditors/reviewed application
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		4/02/2020	4.40	\$2,706.00	meeting with our solicitors, counsel and experts in respect of proceedings against the auditors/audit files available and pleadings
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/02/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding invoices received from experts in respect of proceedings against the auditors/reviewed invoices
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/02/2020	0.60	\$369.00	reviewed access privileges and court undertakings regarding access to LM server and issues of confidentiality and disclosure in the proceedings against the auditors/discussed with RW
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/02/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding potential appointment of experts and potential witnesses in respect of proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/02/2020	1.30	\$799.50	meeting with Craig Jenkins and Clark Jarrold regarding correspondence received from our solicitors regarding potential experts and witnesses regarding proceedings against the auditors and information to be provided to experts
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/02/2020	0.60	\$369.00	reviewed background information on potential expert for proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/02/2020	1.40	\$861.00	reviewed EY's and our counsel's submissions in relation to privilege application regarding proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		11/02/2020	1.00	\$615.00	telephone conversation with Arthur Taylor regarding status of proceedings against the auditors/upcoming court hearings/further information to be provided to appointed experts and issues relating to provision of same/responses to our solicitors requests
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		11/02/2020	1.50	\$922.50	considered potential witnesses and experts in relation to proceedings against the auditors/reviewed information on same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		11/02/2020	1.20	\$738.00	reviewed loan summaries and other information requested by potential experts in relation to proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		11/02/2020	2.30	\$1,414.50	meeting with our solicitors and counsel regarding appointment of experts and potential witnesses in respect of proceedings against the auditors/considered information to be provided to experts
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		13/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding status of proceedings against the auditors and proposed meeting with senior counsel
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		13/02/2020	0.70	\$430.50	reviewed correspondence regarding preparation of audited accounts for the half year ended 31 December 2008 and year ended 30 June 2009/reviewed and amended AT draft email to our solicitors regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		17/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding outcome of hearing of privilege application in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		18/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding hearing of privilege application in respect of proceedings against the auditors and issues relating to the health of one of the defendants/Judge's position on same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		18/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding appointment of expert in the proceedings against the auditors and fee estimate to review position/confirmed instructions regarding same

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		20/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding discussions with counsel and proposed meeting in relation to proceedings against the auditors/sent response
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		20/02/2020	0.80	\$492.00	reviewed information to be provided to expert appointed in relation to proceedings against the auditors/reviewed proposed undertaking regarding books and records/email our solicitors regarding access to records
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		25/02/2020	1.50	\$922.50	reviewed correspondence from our solicitors regarding the proceedings against the auditors/reviewed amended statement of claim to be filed with the court
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		25/02/2020	2.70	\$1,660.50	meeting with our solicitors, counsel, Clark Jarrold and experts regarding proceedings against the auditors followed by meeting with CJ to discuss outcomes and further work to be done
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/03/2020	0.20	\$123.00	reviewed correspondence from our solicitors and EY's solicitors in respect of the proceedings against the auditors and amendments to court timetable/reviewed correspondence with the court and orders made
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding experts access to records relating to proceedings against the auditors and proposed undertakings to be signed/provided instructions regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/03/2020	3.50	\$2,152.50	reviewed judgement in respect of appeal of decision relating to proceedings against the auditors and rights of non involved partners to claim privilege and not comply with orders to produce documents
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding expert accessing books and records relating to the fund in respect of the proceedings against the auditors/reviewed undertaking to be executed
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/03/2020	0.10	\$61.50	email experts in the proceedings against the auditors regarding access to financial database and further information required
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/03/2020	0.10	\$61.50	reviewed letter to our solicitors regarding process of collating EY hard and soft copy records and creating files for various audit periods from those working papers in respect of proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/03/2020	0.50	\$307.50	telephone conversation with Arthur Taylor regarding analysis of loan book to be done to support work being performed by experts in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding reply to counterclaim and defence in the proceedings against the auditors and timing of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/03/2020	0.90	\$553.50	reviewed correspondence from our solicitors regarding further amendments to statement of claim in the proceedings against the auditors/reviewed amendments/discussed with Clark Jarrold/prepared response
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/03/2020	0.50	\$307.50	reviewed further updated amended statement of claim in respect of proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/03/2020	0.60	\$369.00	telephone conversation with Arthur Taylor regarding proceedings against the auditors/information request from expert on loan book over various periods/collation of information/analysis of loan book
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/03/2020	0.10	\$61.50	telephone conversation with expert appointed in relation to proceedings against the auditors and proposed meeting to discuss quantification of loss
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		10/03/2020	0.30	\$184.50	telephone conversation with Clark Jarrold regarding loss quantification and cash flows in respect of the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/03/2020	0.80	\$492.00	meeting experts and Clark Jarrold regarding loss quantification and cash flows in respect of the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and leave being granted to the auditors to lodge counterclaim/reviewed court order in that respect

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding the proceedings against the auditors and loan documentation supplied to expert
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and updated statement of claim to clarify/correct some issues/reviewed correspondence to defendants regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/03/2020	0.60	\$369.00	reviewed correspondence from our solicitors regarding proceedings against the auditors/information required by counsel to assist with preparing a reply to EY's counterclaim/telephone call with Arthur Taylor regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		12/03/2020	0.20	\$123.00	telephone conversation with our solicitors regarding proceedings against the auditors/their request for information and documentation to prepare reply to counterclaim/advised our position on each of the issues and work being done/email BDO staff regarding
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/03/2020	0.40	\$246.00	reviewed correspondence from Arthur Taylor regarding proceedings against the auditors and the management representation letters and related correspondence with EY for each of the audits
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/03/2020	0.30	\$184.50	reviewed correspondence from our solicitors regarding planning documents required for the proceedings against the auditors/reviewed documents provided in response
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/03/2020	0.40	\$246.00	reviewed plaintiffs and defendants counsels submissions in relation to privilege application made in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/03/2020	0.20	\$123.00	reviewed correspondence from our solicitors and EY's solicitors regarding submissions to be made to the court in respect of proceedings against the auditors and privilege application/provided instructions regarding approach to same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/03/2020	0.50	\$307.50	reviewed correspondence with our solicitors regarding documentation required to assist with reply to defence and counterclaim in respect of proceedings against the auditors/reviewed documents provided
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/03/2020	0.50	\$307.50	telephone conversation with our solicitors regarding meeting with counsel tomorrow in respect of proceedings against the auditors/run through agenda items and current status of proceedings
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		17/03/2020	0.30	\$184.50	telephone conversation with Arthur Taylor regarding loan schedules as at each half year reporting date for audits and in relation to the proceedings against the auditors/information to be provided to the experts in respect of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		17/03/2020	1.00	\$615.00	teleconference with our solicitors and counsel regarding proceedings against the auditors/discussed current status of proceedings/work to be done/strategy
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		17/03/2020	2.40	\$1,476.00	reviewed correspondence from our solicitors and counsel regarding application of professional standards legislation and potential inconsistencies between state and federal law in respect of proceedings against the auditors (60 pages)
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		17/03/2020	0.60	\$369.00	reviewed schedules of loans at nine half year reporting dates in relation to proceedings against the auditors and for high level consideration of how to best categorise loans to assist with quantification of claims
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/03/2020	0.30	\$184.50	reviewed correspondence from our solicitors regarding current status of proceedings against the auditors/reconference regarding same and list of matters to be progressed/consider key issues relating to BDO and resourcing of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/03/2020	0.30	\$184.50	reviewed documents provided to our solicitors in relation to the proceedings against the auditors and to assist with preparation of reply to counterclaim
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and role of two officers of LMIM and allegations relating to same in the EY counterclaim

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/03/2020	0.40	\$246.00	reviewed correspondence from our solicitors regarding the proceedings against the auditors and draft response to privilege claims in relation to paragraph 64 of the statement of claim/reviewed EY's submissions and proposed response/provided instructions
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		23/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding the proceedings against the auditors/reviewed letter to EY's solicitors regarding proposed application regarding further particulars required in respect of defence
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		23/03/2020	0.90	\$553.50	telephone conversation with Arthur Taylor regarding our solicitors/counsel's request for information relating to counterclaim in the proceedings against the auditors in order to prepare reply/discussed status and timing of responses
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		24/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and assistance required from counsel/provided instructions regarding same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		24/03/2020	3.20	\$1,968.00	reviewed privilege schedule of relevant paragraphs of the statement of claim against the auditors which includes the allegations, the response, the reasons why the defendants claim privilege and our response (105 pages)
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		25/03/2020	0.80	\$492.00	Discuss with Clerk Jarrod work plan re EY claim, steps to amend/complete 31 December fund accounts, issues re number of units and related matters
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.20	\$123.00	reviewed documentation in respect of EY management representation letters and ownership of LMIM provided to our solicitors regarding the proceedings against the auditors to assist in responding to counterclaim
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding proceedings against the auditors/status of preparation of reply to counterclaim and other issues to consider in respect of lead auditor/reviewed response from Craig Jenkins regarding letter issue
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.60	\$369.00	telephone conversation with Arthur Taylor regarding status of provision of information to support response to counterclaim in the proceedings against EY/further work being done/preparation of management accounts and report to investors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.80	\$492.00	reviewed investor updates, PDS and other documentation to assist in the preparation of a response to the counterclaim in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.20	\$123.00	reviewed profile and experience of one of the auditors relating to the proceedings against the auditors/email Arthur Taylor regarding initial engagement of auditors and documentation supplied in respect of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and queries relating to counterclaim by EY
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		26/03/2020	0.30	\$184.50	reviewed documents provided to our solicitors relating to payment of distributions to assist with preparing the reply to the counterclaim in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		31/03/2020	0.30	\$184.50	reviewed correspondence from our solicitors regarding proceedings against the auditors and documentation and explanations provided to assist with drafting reply to counterclaim
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		31/03/2020	1.50	\$922.50	reviewed draft response to counterclaim in relation to 2008 audits regarding proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		31/03/2020	0.50	\$307.50	telephone conversation with third party regarding proceedings against the auditors/work to be done/further information required
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		31/03/2020	2.10	\$1,291.50	reviewed counterclaim and reply to counterclaim in respect of proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/04/2020	0.50	\$307.50	telephone call with our solicitors regarding proceedings against the auditors/briefing to compliance plan expert and further information to be collated and provided

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		6/04/2020	0.40	\$246.00	telephone conversation with Clark Jarrold regarding the proceedings against the auditors/collation of documentation relating to compliance plan audit for 2008/other information to be provided to experts
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/04/2020	0.10	\$61.50	reviewed correspondence from our solicitors in relation to proceedings against the auditors and draft letter to appointed expert
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/04/2020	1.70	\$1,045.50	reviewed updated draft reply to counterclaim in respect of proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/04/2020	0.30	\$184.50	telephone conversation with our solicitors regarding proceedings against the auditors/appointment of experts/reply to counterclaim
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/04/2020	0.60	\$369.00	telephone conversation with potential expert in relation to proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/04/2020	0.40	\$246.00	telephone conversation with our solicitors regarding proceedings against the auditors/potential expert to be appointed
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/04/2020	1.20	\$738.00	reviewed correspondence from our solicitors and EY's solicitors regarding the draft disclosure plan and protocol in relation to the proceedings against the auditors/reviewed draft documents and proposed way forward to finalise position/replied
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/04/2020	0.30	\$184.50	telephone conversation with Arthur Taylor regarding request for further information from expert in relation to proceedings against EY/categorisation of loan book/approach to same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/04/2020	0.20	\$123.00	reviewed request from expert regarding loan impairments across several reporting periods/reviewed spreadsheets supporting balance sheet entries/authorised release of information
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		20/04/2020	1.20	\$738.00	reviewed documents provided to our solicitors regarding work papers for two audits in respect of proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		20/04/2020	1.60	\$984.00	reviewed draft reply to counterclaim in respect of proceedings against the auditors (150 pages)
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		28/04/2020	0.40	\$246.00	reviewed draft letter to EY's solicitors and updated draft document exchange protocol and draft document plan regarding proceedings against EY
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		28/04/2020	0.40	\$246.00	reviewed further documents relating to compliance plan audits for FY2018 and HY2019 provided to our solicitors to assist experts in preparing reports on audits
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		7/11/2019	0.10	\$61.50	Discuss loan files and referencing systems with expert
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		11/11/2019	0.30	\$184.50	Discuss with Wayne Bastford possible experts for EY claim as requested by our solicitors/David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		18/11/2019	0.20	\$123.00	Discuss status of work and issues re audit work papers and loan impairment papers etc with Julie Pagou as well as work plan for remaining work to be done
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		22/11/2019	0.40	\$246.00	Consider request from our solicitors re experts questions
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		26/11/2019	1.40	\$861.00	Review/check updated loan impairment calcn papers re calcns requested by our solicitors, review/consider requests from our solicitors re experts and questions etc
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		26/11/2019	1.90	\$1,168.50	Continue review/check updated loan impairment calcn papers re calcns requested by our solicitors, review/consider requests from our solicitors re experts and questions and related matters etc
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/11/2019	0.30	\$184.50	Meet with Julie Pagou to discuss review/comments on updated loan impairment calcn papers and amendments to complete
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/11/2019	0.50	\$307.50	Meeting with Craig Jenkins to discuss what the key questions are for the auditor experts in response to Gaders request

LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/11/2019	0.20		\$123.00	Review email and consider request from our solicitors re questions for experts
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/11/2019	0.60		\$369.00	Continue review/check updated loan impairment calcn papers re calcns requested by our solicitors, review/consider requests from our solicitors re experts and questions and related matters etc
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		29/11/2019	0.70		\$430.50	Consider request from our solicitors re questions for experts, consider key issues, review statement of claim etc in considering matters
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		3/12/2019	0.50		\$307.50	Telephone discussion with Wayne Bastord re questions for experts re request from our solicitors on this matter
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		4/12/2019	0.60		\$369.00	Discuss with our solicitors issues re questions for experts for court re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		4/12/2019	1.50		\$922.50	Consider further response to our solicitors request re questions of experts for court re EY claim, including review background
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		4/12/2019	1.90		\$1,168.50	Consider further response to our solicitors request re questions of experts for court re EY claim, including review background and draft response to our solicitors
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		5/12/2019	0.30		\$184.50	Telephone conversation with David Whyte regarding proposed brief to expert in the proceedings against the auditors
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		5/12/2019	1.30		\$799.50	Consider further draft response to our solicitors re questions for experts and related background issues, discussion with our solicitors and update/complete response re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		10/12/2019	0.10		\$61.50	Discuss status of work with Julie Pagcu re compilation of audit work papers, EY laptop and loan impairment calculations
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		12/12/2019	1.30		\$799.50	Attend meeting at Gaddens to discuss matters re experts for EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		19/12/2019	0.40		\$246.00	Review status of impairment calculations requested by our solicitors incl final impairment calcn and work plan forward
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		28/01/2020	1.30		\$799.50	Attend meeting at Gaddens for meeting with our solicitors and counsel re discussion regarding experts for EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		31/01/2020	0.50		\$307.50	Review emails/consider prepn for meetings next week re experts, follow up on EY laptop with GAMX, discuss with Julie status of access, follow up with Ryan etc to fix to gain access
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		4/02/2020	2.30		\$1,414.50	Attend meeting with Counsel and Gaddens and proposed Financial Report Audit Expert
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		4/02/2020	2.10		\$1,291.50	Continue to attend meeting with Counsel and Gaddens and proposed Financial Report Audit Expert
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		4/02/2020	1.70		\$1,045.50	Continue to attend meeting re proposed Financial Report Audit Expert
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		5/02/2020	0.30		\$184.50	Review/consider email from Gaddens re steps going forward, discuss these with Gaddens to clarify work required re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		10/02/2020	1.30		\$799.50	Meeting with Craig Jenkins and David Whyte regarding correspondence received from our solicitors regarding potential experts and witnesses regarding proceedings against the auditors and information to be provided to experts
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		10/02/2020	0.60		\$369.00	Consider issues re independence, accounts prep etc review APES requirements and identify queries to address
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		11/02/2020	2.30		\$1,414.50	Meeting with our solicitors and counsel regarding appointment of experts and potential witnesses in respect of proceedings against the auditors/considered information to be provided to experts

LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		25/02/2020	2.70	\$1,660.50	Meeting with our solicitors, counsel, David Whyte and experts regarding proceedings against the auditors followed by meeting with David to discuss outcomes and further work to be done
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		5/03/2020	0.40	\$246.00	Review loss quantification issues discussed with David
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		9/03/2020	0.20	\$123.00	Review 7th statement of claim as requested by David Whyte and provide feedback on matters noted
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		9/03/2020	1.90	\$1,168.50	Review 7th statement of claim as requested by David Whyte and provide feedback on matters noted
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		10/03/2020	0.50	\$307.50	Discuss loss quantification with Mark Whitaker
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		10/03/2020	0.40	\$246.00	Review/assess previous loss calculations as discussed with David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		10/03/2020	0.30	\$184.50	Phone conversation with David Whyte regarding loss quantification and cash flows in respect of the proceedings against the auditors
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		12/03/2020	0.80	\$492.00	Meeting experts and David Whyte regarding loss quantification and cash flows in respect of the proceedings against the auditors
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		16/03/2020	0.20	\$123.00	Discuss with Gadens re response to their query re planning documents and EY laptop
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		16/03/2020	0.10	\$61.50	Discuss with Julie EY planning documents re query from Gadens re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		24/03/2020	0.20	\$123.00	Discuss with Julie issues re difference in number of units and resolving this as requested by David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		24/03/2020	0.40	\$246.00	Further discussion with Julie re difference in number of units and work to identify the causes incl work to date and to be done as requested by David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		26/03/2020	0.20	\$123.00	Consider query from our solicitors re EY partner experience and provide feedback thereon
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		26/03/2020	0.60	\$369.00	Consider query from our solicitors re representation letters and related matters and discuss issues related to this with Gadens
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		26/03/2020	0.50	\$307.50	Further consider query from our solicitors re representation letters, consider initial comments from Craig as well as comments in earlier correspondence with our solicitors on similar topics
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/03/2020	0.10	\$61.50	Discuss query from Gadens re management representations and audit impacts with Craig Jenkins re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/03/2020	0.60	\$369.00	Discuss with Craig Jenkins draft proposed response to our solicitors query regarding management representations and directors declarations and update response re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		27/03/2020	0.30	\$184.50	Teleconference with Craig Jenkins and counsel and Gadens to address queries from counsel re auditors and management representations as well as directors declarations
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		31/03/2020	0.50	\$307.50	Review draft answer to counterclaim as requested by Gadens
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		31/03/2020	0.40	\$246.00	Continue review of draft answer to counterclaim as requested by Gadens
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		1/04/2020	1.00	\$615.00	Continue review of draft answer to counterclaim as requested by Gadens

LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		1/04/2020	0.60	\$369,00	Discuss with Craig Jenkins results of our review of the draft answer to the counterclaim as requested by Gadens and our feedback to David Whyte thereon
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		2/04/2020	0.20	\$123,00	Review/consider email from Gadens re EY compliance plan matters
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		2/04/2020	0.20	\$123,00	Discuss with Julie status of EY compliance plan work papers including GAMX and hardcopy records for provision to expert
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		3/04/2020	0.30	\$184,50	Discuss with Julie steps and issues to address in compiling EY compliance work papers both hardcopy and gamx as requested by Gadens
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		6/04/2020	0.20	\$123,00	Discuss with Julie work plan for completing compliance work paper compilation requested by Gadens incl timing
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		6/04/2020	0.40	\$246,00	Discuss with David Whyte work plan for Gadens compliance plan request as well as other matters in addressing queries raised/expert info requests
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		9/04/2020	0.40	\$246,00	Review/consider letter from gadens re expert and feedback to David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		9/04/2020	0.20	\$123,00	Review/consider further letter from our solicitors re EY claim matters
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		14/04/2020	0.70	\$430,50	Review/consider proposed loan classification for loss calc as requested by David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		15/04/2020	0.30	\$184,50	Discuss with Julie access issues re EY audit files for 12/08 and related work papers etc, response to query from our solicitors re same
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		15/04/2020	0.10	\$61,50	Address query from our solicitors re 12/08 EY work paper address
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		22/04/2020	0.70	\$430,50	Discuss with Arthur Taylor Gadens request for information from BDO re proposed categorisation of loans and processes to do so etc
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		22/04/2020	0.80	\$492,00	Continue to review Answer to Counterclaim re EY matter prepared by counsel as requested
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		22/04/2020	0.10	\$61,50	Continue to review Answer to Counterclaim re EY matter prepared by counsel as requested and provide comments to David Whyte
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		22/04/2020	2.80	\$1,722,00	Review Answer to Counterclaim re EY matter prepared by counsel as requested
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		23/04/2020	0.30	\$184,50	Discuss with Julie Pagou steps for provision of EY audit work papers to Gadens as requested and work plan to provide these re EY claim
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		28/04/2020	0.10	\$61,50	Discuss with Julie status of 12/08 EY audit work papers request from Gadens and provision thereof/issues in completing
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		30/04/2020	2.40	\$1,476,00	Review/check updated final loan impairment calculation re sample requested by solicitors
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		30/04/2020	0.80	\$492,00	Attend conference call with Arthur and Julie with counsel and Gadens as requested to discuss loan categorisation for loss calc purposes
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		30/04/2020	0.40	\$246,00	Follow up teleconference with Arthur and Julie to discuss work plan steps and matters for completion of loan schedule as requested for loss calc purposes
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		27/11/2019	0.50	\$262,50	CFJ & CRJ meeting to discuss what the key questions are for the auditor experts in response to Gadens request
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		23/01/2020	0.50	\$270,00	Review Clifford Chance corro and respond to accounting standard clarification to DW re reference error in their corro
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		28/01/2020	1.30	\$702,00	Attend meeting at Gadens for meeting with our solicitors and counsel re discussion regarding experts for EY claim

LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		4/02/2020	4.50	\$2,430.00	Attend meeting with Counsel and Gadens and proposed Financial Report Audit Expert
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		10/02/2020	1.30	\$702.00	Meeting with David Whyte and Clark Jarrold regarding correspondence received from our solicitors regarding potential experts and witnesses regarding proceedings against the auditors and information to be provided to experts
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		10/02/2020	0.70	\$378.00	Ascertain EY laptop is in order for experts to commence their reviews and confirm EY did not classify fund as a PIE for assessing independence
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		11/02/2020	1.90	\$1,026.00	Meeting with our solicitors and counsel regarding appointment of experts and potential witnesses in respect of proceedings against the auditors/considered information to be provided to experts
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		6/03/2020	1.10	\$594.00	Review 7th FASOC against EY
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		9/03/2020	0.80	\$432.00	Discuss with CEI changes and feedback on 7th FASOC against EY, communicate same and look for ASIC coro re Reid appointment
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		26/03/2020	0.80	\$432.00	Consider Gaden's request re 2nd defendant's experience and respond re EY FASOC
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		26/03/2020	0.60	\$324.00	Review and respond to Gaden's requests regarding management representations and the directors declaration for the response in the FASOC
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		27/03/2020	0.80	\$432.00	Response to Gaden's re MRL's and directors Dec for response to FASOC
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		27/03/2020	0.40	\$216.00	Response to Gaden's re MRL's and directors Dec for response to FASOC
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		31/03/2020	2.10	\$1,134.00	Review answer response to counterclaim drafted by counsel/Gadens for FASOC against EY
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		1/04/2020	0.80	\$432.00	Liaise with CEI re answer to counter-claim regarding feedback and draft/send coro communicating same to David Whyte for benefit of Counsel and Gaden's
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		2/04/2020	0.20	\$108.00	Consider Gaden's requests from Compliance Plan Auditor Independent Expert re FASOC against EY and advise David Whyte of appropriate manner to proceed
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		15/04/2020	0.90	\$486.00	Review 31/12/2008 working paper request from Gaden's and advise of history of availability and request instructions for same
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		21/04/2020	2.60	\$1,404.00	Review answer to counterclaim for FASOC against EY and provide feedback to DW/CI
LM First Mortgage Income Fund	CF	Mark Whitaker	Partner	Assets		10/03/2020	0.50	\$290.00	Discuss loss quantification with Clark Jarrold
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		1/11/2019	0.90	\$450.00	For the auditor claim and identifying any changes to the consolidated particulars due to changes to FMIF loan summary schedule, collate all findings after reviewing the consolidated particulars and all annexures for a report to David
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		1/11/2019	0.90	\$450.00	For the auditor claim and identifying any changes to the consolidated particulars due to changes to FMIF loan summary schedule, prepare and forward report to David
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		4/11/2019	1.00	\$500.00	For the auditor claim review the 121 page statement of claim for any impact due to changes to FMIF loan book summary
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		4/11/2019	0.20	\$100.00	For the auditor claim submit email to David advising LM's PST files I received in 10/7/8 from IT support may include correspondence that further supports some of the allegations pleaded, and ask if I should conduct targeted interrogations
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		4/11/2019	1.50	\$750.00	For the auditor claim conduct reviews of 2 more audit periods (31/12/10 and 30/6/11) to corroborate my earlier findings regarding the author of the financial statements, starting with the LM Financial Controller's emails for 31/12/10

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		21/11/2019	1.30	\$650.00	For the auditor claim and in response to SMS from David review all email regarding the author of the financial statements to prepare for scheduled telecom with David at 2pm
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		21/11/2019	0.80	\$400.00	telephone conversation with David regarding proceedings against the auditors/work papers and correspondence relating to two audits and further work to be done in respect of same
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.10	\$50.00	For the auditor claim compile and forward email to Doug Harrison of IT support for looking at LM emails with attachments that appear to be corrupted and cannot be opened
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.20	\$100.00	For the auditor claim telephone Doug Harrison of IT support to discuss if he has any ways to access attachments in emails I forwarded earlier
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.30	\$150.00	For the auditor claim, and pursuant to my discussion with Doug Harrison, discuss with Ryan: who administers the LM PST files, where the remote server/s are located, how we can access the original PST files? Ryan will look into the matter and email me
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.20	\$100.00	For the auditor claim email update to David on the opening of attachments to emails and my discussion with IT Support and Ryan, consider an anomaly and call Ryan to clarify before completing update
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.40	\$200.00	Discuss with Ryan access to the remote server for accessing LM PST files and the copying of emails from the server to our server. During our telecom we tested our access to this server, we both failed, Ryan to contact the administrator to resolve access
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.20	\$100.00	For the auditor claim complete update email to David regarding accessing LM emails with attachments
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		22/11/2019	0.10	\$50.00	Review email from Doug Harrison regarding recovering corrupted attachments to emails and advise David the attachments cannot be recovered
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		21/12/2019	0.10	\$50.00	Discuss with Ryan the status of the LM server administrators restoring our access to the server containing the PST files: they are still working on restoring the connection for us
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		21/12/2019	0.10	\$50.00	Review emails regarding the auditor claim regarding the corrupted attachments to LM emails to establish if there has been any progress
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/12/2019	0.20	\$100.00	For the auditor claim telephone Ryan to discuss LM server restoration and process to follow for checking if corrupted attachments to emails can be opened from the server copy of PST files
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/12/2019	0.60	\$300.00	For the auditor claim, connection to the LM remote server has been restored, access the remote server, locate the PST files for the relevant LM staff member for indexing in Outlook, try several time to open Outlook in remote server, will not open
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/12/2019	1.20	\$600.00	Tell Ryan to discuss opening Outlook in remote server and procedures for accessing emails in the exchange server within the remote server, again cannot open Outlook, try multiple times, ask Ryan to explore further and contact server administrator in need
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/12/2019	0.20	\$100.00	For the auditor claim, telecom with Ryan regarding corrupted attachments to LM emails and his resolution of the problem
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/12/2019	0.10	\$50.00	For the auditor claim review and respond to SMS messages from David and Ryan
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/12/2019	0.50	\$250.00	For the auditor claim log into LM remote server and discuss with Ryan the methods and procedures followed to locate, open LM emails with attachments, and copy the emails to our main server
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/12/2019	0.10	\$50.00	For the auditor claim advise David the corrupted email attachments can be recovered from the original email archives on the LM server

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	11/12/2019	1.00	\$500.00	#1 For the auditor claim review the draft Documentation Plan (7 pages) and Protocol (22 pages) received from our solicitors and provide comment to David, complete review of Plan
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	11/12/2019	0.40	\$200.00	#2 For the auditor claim review the draft Documentation Plan (7 pages) and Protocol (22 pages) received from our solicitors and provide comment to David, complete review of Protocol
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	11/12/2019	0.80	\$400.00	#3 For the auditor claim review the draft Documentation Plan (7 pages) and Protocol (22 pages) received from our solicitors, complete my overview and provide comment, recommendations to David
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	14/01/2020	0.50	\$300.00	telephone conversation with David regarding proceedings against the auditors and work to be done in respect of preparation of financial statements/position regarding borrower settlement agreement and further information requested
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/01/2020	0.60	\$300.00	Telcom with Ryan Whyte regarding the emails between the former auditors and the employees of LM regarding the financial statements. Discuss the emails to be obtained from the LM servers. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.10	\$50.00	Discuss with David the work undertaken so far in demonstrating the auditors prepared the financials for LM and preparing a summary for our solicitors outlining why we allege this was the case
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.30	\$150.00	For the auditor claim locate all work undertaken previously as evidence the auditor prepared LM financial statements and start working on summary for our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.30	\$150.00	For the auditor claim, telcom with Ryan regarding ledger records located of fees invoiced by/paid to the auditor for the various audit periods in the claim, and preparation of summary schedule
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.70	\$350.00	For the auditor claim continue working on summary for our solicitors outlining evidence the auditors prepared the financial statements for LM, reviewing all documentation previously located to ensure allegations are incontrovertible
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.50	\$250.00	For the auditor claim, telcom with Ryan regarding corrupted attachments to emails in LM records, access to LM server being restored and process to access original emails archived in the LM Exchange Server
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.60	\$300.00	For the auditor claim and interrogating the LM OnTrack email archive server containing original copies of LM emails, review and copy across emails from the LM Financial Controller responsible for the 31-12-08 audit
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.50	\$250.00	For the auditor claim and interrogating the LM OnTrack email archive server containing original copies of LM emails, review and copy across emails from the LM Financial Controller responsible for the 30-6-09 and 31-12-09 audits
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.50	\$250.00	For the auditor claim and interrogating the LM OnTrack email archive server containing original copies of LM emails, review and copy across emails from the LM Financial Controller responsible for the 31-12-10 audit
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/01/2020	0.80	\$400.00	For the auditor claim and interrogating the LM OnTrack email archive server containing original copies of LM emails, review and copy across a director's emails regarding audits generally
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	1.10	\$550.00	For confirming who prepared the financial statements, search emails, in the LM Exchange Server/OnTrack email archives, using 6 keywords and starting with the Financial Controller and the 31-12-08 audit
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	0.40	\$200.00	For confirming who prepared the financial statements, search emails, in the LM Exchange Server/OnTrack email archives, using 6 keywords and continuing with the Financial Controller and the 30-06-09 audit
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	0.30	\$150.00	Discuss with Ryan his interrogation of the LM server and findings regarding the authorship and preparation of MIF financial statements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	1.50	\$750.00	#1 For confirming who prepared the FMIIF financial statements, search emails of the CFO, in the LM Exchange Server/OnTrack email archives, using 6 keywords and for the 31-12-08 and 30-6-09 audits

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	1.00	\$500.00	#2 Emails of CFO not categorised like the Financial Controller, all in a Deleted folder, find numerous emails relating to the auditors. Save for further interrogation tomorrow
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	0.60	\$300.00	For the auditor claim log in to LM remote server and Exchange Server. OnTrack email archives, review all emails folders to overview for any folders relevant to audit process, and shortlist only relevant LM staff that worked with the auditor
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/01/2020	0.40	\$200.00	Telecom with Ryan regarding the authorship and preparation of MIF financial statements, a background to interrogation results so far, and requested he conduct an in depth interrogation of the LM server for further audits
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	26/01/2020	1.50	\$750.00	Interrogate CFO Deleted emails folder using keywords -draft financials- (100 hits) and - FMI draft financials- (13 hits), copy relevant emails - all confirm the auditor prepared the fin statements and LM provided accounting info to facilitate preparation
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	26/01/2020	0.50	\$250.00	Interrogate CFO Deleted emails folder using keyword - five financials - locate and interrogate results (40 hits), copy relevant emails - all confirm the auditor prepared the fin statements and LM provided the accounting info to facilitate preparation
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	26/01/2020	0.50	\$250.00	Further interrogation of CFO Deleted emails folder for any internal correspondence regarding preparation of draft fin statements and providing to the auditors, no emails located
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	26/01/2020	1.20	\$600.00	Further interrogation of CFO ASIC - Audit emails and Sent Items folders for any correspondence regarding preparation of draft fin statements, all results support the auditor prepare the fin statements and LM provided accounting info
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	27/01/2020	1.00	\$500.00	For determining who prepared the FMI fin statements, locate emails previously found with corrupted attachments, all up 33 emails, note details of emails and corrupted attachments for ease of interrogation the LM server OnTrack program
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	27/01/2020	0.10	\$50.00	#1 Access the LM server and the OnTrack email archive program for emails with corrupted attachments. For 31/12/18 find emails, check accessibility attachments, copy emails and attachments to BDO server. MSWord attachments will not open on BDO server. cf
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	27/01/2020	1.30	\$650.00	#2 b/f: Test: open Word docs and save to desktop in OnTrack, copy Word docs to BDO server. Can open Word docs now in BDO server. No problems with Excel or pdf docs. Time consuming operation due to multiple Word docs in emails
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	27/01/2020	0.10	\$50.00	#1 Access the LM server and the OnTrack email archive program for emails with corrupted attachments. For 30/6/09 find emails, check accessibility attachments, copy emails and attachments to BDO server. MSWord attachments will not open on BDO server. cf
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	27/01/2020	1.90	\$950.00	#2 b/f: Test: open Word docs and save to desktop in OnTrack, copy Word docs to BDO server. Can open Word docs now in BDO server. No problems with Excel or pdf docs. Time consuming operation due to multiple Word docs in emails
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	28/01/2020	0.20	\$100.00	For the auditor claim provide email update to David on the status of the findings that the auditor prepared the financial statements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	28/01/2020	0.40	\$200.00	For the auditor claim collate all info/docs located that support the allegation the auditor prepared the financial statements and draft up an outline for our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	28/01/2020	0.60	\$300.00	Continue with: For the auditor claim collate all info/docs located that support the allegation the auditor prepared the financial statements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	28/01/2020	0.90	\$450.00	For the auditor claim search through LM remote server OnTrack email archive for audit assistance package for 31/12/08
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	28/01/2020	1.10	\$550.00	For the auditor claim start preparing detailed finding for our solicitors regarding the authorship of FMI financial statements

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		28/01/2020	0.80	\$400.00	Continue: For the auditor claim start preparing detailed finding for our solicitors regarding the authorship of FMIF financial statements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		28/01/2020	1.40	\$700.00	Continue: For the auditor claim start preparing detailed finding for our solicitors regarding the authorship of FMIF financial statements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		28/01/2020	1.30	\$650.00	Complete and forward to David for review: For the auditor claim prepare detailed finding for our solicitors regarding the authorship of FMIF financial statements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		29/01/2020	0.40	\$200.00	For the auditor claim prepare email to David confirming an issue not dealt with in my email yesterday: the Audit folder in the Finance folder in LM's electronic records, access LM remote server and review 2011 audit folder, find anomaly
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		29/01/2020	0.70	\$350.00	Telecom with Ryan re draft fin statements saved in the 2011 Audit folder in LM electronic records, ask Ryan to review Audit Committee meetings for any references to fin statement preparation
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		29/01/2020	0.60	\$300.00	Review 2011 emails of LM Financial Controller to confirm when the auditor provided the draft financial statements for 31/12/10 and correspondence with Ey
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		29/01/2020	0.50	\$250.00	For the auditor claim complete and forward email to David regarding the contents of the Audit folder in the Finance folder in LM's electronic records.
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		29/01/2020	0.40	\$200.00	Telecom with Ryan Whyte regarding the audit committee minutes for December 2008 and June 2009. Discuss the findings in relation to the preparation of the financial statements by the auditors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/02/2020	0.30	\$150.00	For the auditor claim, telecom with Ryan regarding files to be copied to USB for our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/02/2020	1.00	\$500.00	Telephone conversation with David regarding status of proceedings against the auditors/upcoming court hearings/further information to be provided to appointed experts and issues relating to provision of same/ responses to our solicitors requests
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/02/2020	0.10	\$50.00	For the auditor claim send an email to Ryan outlining information to save to a USB and deliver to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/02/2020	0.20	\$100.00	For the auditor claim determine and consider info required by our solicitors for briefing expert witness
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/02/2020	0.40	\$200.00	For the auditor claim telecom with Ryan regarding status of providing LM server read-only access to various parties, and copying of data to a USB for our solicitors - 2 matters, viz. prep of fin statements and info used for loan summary schedule
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/02/2020	0.30	\$150.00	For the auditor claim telecom with our solicitors regarding info and data used to prepare loan summary schedule
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/02/2020	1.40	\$700.00	For the auditor claim review all information used to prepare the loan schedules over nine reporting periods and summarise same
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/02/2020	1.50	\$750.00	For the auditor claim and determining who prepared the FMIF statutory fin statements, prepare a draft email to our solicitors covering 2 audit periods and forward to David for approval
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/02/2020	0.60	\$300.00	For the auditor claim review emails from David and prepare 2 emails and forward to our solicitors regarding the preparation of FMIF financial statements and the overall loan book summary schedule.
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/02/2020	0.10	\$50.00	Email Ryan and request he deliver a USB to our solicitors containing the supporting documentation for the 2 emails forwarded earlier to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		3/03/2020	0.50	\$250.00	Telephone conversation with David regarding analysis of loan book to be done to support work being performed by experts in the proceedings against the auditors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		8/03/2020	0.40	\$200.00	For the auditor claim review 3 emails received from our solicitors requiring urgent responses and prioritise responses

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		8/03/2020	1.20	\$500.00	For the auditor claim attend to request from our solicitors to locate copies of 14 letters of representation and determine how they were generated and who generated them. Start with checking our server for letters already located, locate 8
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		8/03/2020	1.10	\$550.00	For the auditor claim continue with checking our server for letters already located, locate 8 most of the remaining representation letters except for the signed letters for 5 categories
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		8/03/2020	0.70	\$350.00	For the auditor claim interrogate the LM remote server for signed copies of the remaining 5 representation letters requested by our solicitor, locate 4
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		8/03/2020	0.60	\$300.00	Continued from 20:00 below: For the auditor claim interrogate LM emails on the LM remote server for signed copy of the remaining representation letter, locate the document
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		8/03/2020	0.40	\$200.00	For the auditor claim prepare and forward an email to our solicitors outlining the results of my findings as regards the 14 management representation letters
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.40	\$200.00	For the auditor claim telecom with Ryan to discuss representation letters, delivering them to our solicitors, and coding the MIF loan book schedule to facilitate categorising for expert witnesses
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.80	\$400.00	For the auditor claim check the representation letter docs located yesterday and identify 3 of the 14 letters that are outstanding. Search through our server for documentation previously located, but could not find the missing letters
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.30	\$150.00	For the auditor claim and after review of the representation letter documentation located yesterday, telecom with Ryan regarding some missing documents
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.60	\$300.00	For the auditor claim and locating the 3 missing representation letters access the LM remote server G Drive and conduct a search. Located one of the documents - signed representation letter for 31/12/09 fm report audit
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.20	\$100.00	For the auditor claim and various requests from our solicitors, telecom with our solicitors to discuss rep letter findings and query/clarify the loan agreements required for several loans
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.20	\$100.00	For the auditor claim telecom with Ryan regarding loan agreements previously copied from the LM server and the 23 required by our solicitors not being fully covered
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.20	\$100.00	For the auditor claim start copying from the LM remote server G Drive and collating loan agreements for 23 loans requested by our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.20	\$100.00	For the auditor claim start copying from the LM remote server G Drive and collating loan agreements for 23 loans requested by our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.40	\$200.00	For the auditor claim and categorising the MIF overall loan book schedule consider alternatives for presenting the book to the expert witnesses to facilitate their analysis of the loan book
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.60	\$300.00	Telecom with David regarding categorising the loan book for assisting the expert witness to determine the expected loss had a receiver been appointed earlier
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	1.30	\$650.00	For the auditor claim continue copying from the LM remote server G Drive and collating loan agreements for 23 loans requested by our solicitors, locate loan chronology, loan agreements, variations and interest rate increase letters for 9 of 23 loans
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.90	\$450.00	For the auditor claim continue copying from the LM remote server G Drive and collating loan agreements for 23 loans requested by our solicitors, locate loan chronology, loan agreements, variations and interest rate increase letters for 11 of 23 loans
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		9/03/2020	0.40	\$200.00	For the auditor claim continue copying from the LM remote server G Drive and collating loan agreements for 23 loans requested by our solicitors, locate loan chronology, loan agreements, variations and interest rate increase letters for 2 of 23 loans

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		10/03/2020	0.60	\$300.00	For the auditor claim telecom with Ryan regarding the LM remote server OnTrack service restoration, providing a USB copy of all docs requested by our solicitors, codifying the MIF overall loan schedule for a pivot table and the logic behind the exercise
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		10/03/2020	2.10	\$1,050.00	For the auditor claim check the loan agreements for 23 loans extracted from the LM server yesterday before asking Ryan to deliver a USB to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		10/03/2020	0.50	\$250.00	For the auditor claim and in preparation for the discussion later today with David review the MIF loan book schedules
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/03/2020	0.40	\$200.00	For the auditor claim telecom with Ryan regarding codifying the MIF loan book schedule
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/03/2020	0.20	\$100.00	For the auditor claim telecom with our solicitors regarding information requested and an email they had just sent requesting further information
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		11/03/2020	0.20	\$100.00	For the auditor claim detailed review of the email from our solicitors requesting further instructions/documentation for counsel and note what I need to attend to and for further discussion with David
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		12/03/2020	0.40	\$200.00	telephone call with David regarding correspondence from our solicitors in relation to the proceedings against the auditor/s/information required by counsel to assist with preparing a reply to EV's counterclaim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	0.20	\$100.00	For the auditor claim telecom with Ryan regarding further info requested by our solicitors to facilitate a reply by 20-Mar
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	0.30	\$150.00	For the auditor claim itemise all outstanding requests for info from our solicitors to facilitate a reply by counsel and prioritise tasks for discussion with Ryan
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	1.60	\$800.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/08 compl report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	1.10	\$550.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 31/12/08 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	0.90	\$450.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 31/12/08 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	0.80	\$400.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/09 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	1.10	\$550.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 31/12/09 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	1.20	\$600.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 31/12/09 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	0.90	\$450.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/10 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		13/03/2020	0.30	\$150.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/10 compl report audit and interrogating emails of 10 LM staff

LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	13/03/2020	0.70	\$350.00	C/f from 19:54 below locating all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/10 compl report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.80	\$400.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 31/12/10 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.70	\$350.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/11 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.60	\$300.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/11 compl report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.70	\$350.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 31/12/11 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.70	\$350.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/12 fin report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.60	\$300.00	Access the LM remote server to locate all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, for fin and compl report audits, continue with 30/6/12 compl report audit and interrogating emails of 10 LM staff
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	14/03/2020	0.50	\$250.00	For all correspondence between the auditor and LM re the management rep letters across the relevant 9 audit periods, only 10 of the rep letters located, review all correspondence located and prepared a detailed response to our solicitors
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	15/03/2020	2.10	\$1,050.00	# 1 For the auditor claim overview of LM emails to determine key LM and auditor staff involved for all audit periods as 31/12/08 and 30/6/09, access LM remote server and OnTrack email archives
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	15/03/2020	1.80	\$900.00	# 2 For the auditor claim overview of LM emails to determine key LM and auditor staff involved for all audit periods as 31/12/08 and 30/6/09, access LM remote server and OnTrack email archives, also locate an outstanding management representation letter
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.30	\$150.00	For the auditor claim telecom with Ryan regarding information requested by David for briefing expert witness
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.30	\$150.00	telephone conversation with David regarding loan schedules as at each half year reporting date for audits and in relation to the proceedings against the auditors/information to be provided to the experts in respect of same
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.30	\$150.00	Telecom with Ryan re further info requested by our solicitors, relevantly all correspondence (hard copies or electronic copies on our server) relating to loan management fees, redemptions, income distributions and carrying out of audits the subject of the claim
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.50	\$250.00	For the auditor claim review all outstanding information required by our solicitors to facilitate a reply to the auditor's solicitors by 20/3 for assigning tasks to Ryan and myself
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.20	\$100.00	For the auditor claim telecom with our solicitors to confirm the LM remote server is down and confirm outstanding information required
LM First Mortgage Income Fund BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.10	\$50.00	# 1 access OnTrack email archive and continuing from 15/3 verify all key auditor/LM staff involved in audit process across the 9 audit periods in the claim, continued:

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	1.40	\$700,000	#2 Continued: at the same time progressively locating/extracting all relevant correspondence for each period for confirming that the same process for conducting audits in the 31/12/08 and 30/6/09 audits was followed for all others, starting with 30/6/08
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	1.20	\$600,000	For the 31/12/08 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	17/03/2020	0.80	\$400,000	For the 30/6/09 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	18/03/2020	0.30	\$150,000	For the auditor claim telecom with Ryan regarding categorising LM/auditor emails located so far
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	18/03/2020	0.70	\$350,000	For the 31/12/09 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	18/03/2020	0.60	\$300,000	For the 30/6/10 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	18/03/2020	0.50	\$250,000	For the 31/12/10 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	18/03/2020	0.60	\$300,000	For the 30/6/11 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	18/03/2020	0.40	\$200,000	For the 31/12/11 audit verify all key auditor/LM staff involved in audit process, at the same time progressively locating/extracting all relevant correspondence for the audit period for confirming that the same process was followed as 31/12/08 and 30/6/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.30	\$150,000	For the auditor claim telecom with our solicitors to clarify some issues regarding outstanding info and additional info requested
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.10	\$50,000	Telecom with Ryan to advise the deadline for providing info to our solicitors for responding to the counterclaims has been extended to next Friday
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.70	\$350,000	Telecom from our solicitors to discuss an email they had just sent me regarding additional info required
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.10	\$50,000	Telecom with Ryan requesting his assistance in responding to our solicitors additional info requirements
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.50	\$250,000	Check LM email records to find out when the incumbent CFO left LM and when his replacement joined. Locate relevant email and advise our solicitors accordingly
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.90	\$450,000	Start reviewing emails of key LM staff located to answer question who were the key LM/auditor staff involved in the financial statement preparation at each audit period
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.80	\$400,000	Continue reviewing emails of key LM staff located to answer question who were the key LM/auditor staff involved in the financial statement preparation at each audit period
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.50	\$250,000	Continue reviewing emails of key LM staff located to answer question who were the key LM/auditor staff involved in the financial statement preparation at each audit period

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	19/03/2020	0.50	\$250.00	For add info requested by our solicitors, start search through LM email records for emails from LM to auditor sending signed management rep letters - our solicitors already have emails from the auditor submitting drafts for signing, found letter for 31/12/08 fin rep
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	0.20	\$100.00	Telecom with Ryan regarding auditor engagement letters for confirming audit process for 9 audits, and asked him to locate all letters and forward to me for review
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	0.50	\$250.00	Continue reviewing emails of key LM staff located to answer question who were the key LM/auditor staff involved in the financial statement preparation at each audit period
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	1.10	\$550.00	Complete reviewing emails of key LM staff located to answer question who were the key LM/auditor staff involved in the financial statement preparation at each audit period
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	1.40	\$700.00	Review engagement letters located by Ryan on our server and identify several outstanding, interrogate LM emails to locate remaining letters for confirming how audit was conducted for each audit period
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	0.60	\$300.00	Review all engagement letters and establish same audit process conducted for all periods except 31/12/11 and 30/6/12 audits
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	1.10	\$550.00	For confirming key LM and audit staff at each audit period, review all emails located, identify key staff and start preparing spreadsheet summarising key staff
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	20/03/2020	1.20	\$600.00	Complete spreadsheet for confirming key LM and audit staff at each audit period, review all emails located, and forward detailed findings to our solicitors in response to one of their queries
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	21/03/2020	1.10	\$550.00	For providing instructions to our solicitors regards audit conducted at each audit period, review all emails, docs and engagement letters located so far and forward detailed instructions to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.30	\$150.00	For the auditor claim telecom with our solicitors regarding responses already provided to facilitate a response to the auditor's counterclaim and clarifying several issues
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.20	\$100.00	Telecom with Ryan regarding auditor fees paid and searching for records of payment in Composer and AX
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.20	\$100.00	For the auditor claim and pursuant to request from our solicitors, extract from LM emails previously located all emails regarding management fees, distributions and redemptions for all audit periods the subject of the claim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.90	\$450.00	Telephone conversation with David regarding our solicitors/counsel's request for information relating to counterclaim in the proceedings against the auditors in order to prepare reply/discussed status and timing of responses
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	1.90	\$950.00	Continue: For the auditor claim and pursuant to request from our solicitors, extract from LM emails previously located all emails regarding management fees, distributions and redemptions for all audit periods the subject of the claim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.90	\$450.00	Telecom with Ryan regarding fees paid to the auditor, the payment records he had located on Composer/AX and an anomaly between fees proposed and fees paid for the 2012 FY audit, asked him to review LM's records to resolve/clarity
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.60	\$300.00	Access OnTrack email archive on the LM remote server to check for further correspondence between the auditor and LM re management fees, redemptions and distributions, starting with the LM Financial Controller from 30/6/08 to 31/12/10 uncatagorised Inbox
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.80	\$400.00	Access OnTrack email archive on the LM remote server to check for further correspondence between the auditor and LM re management fees, redemptions and distributions, continuing with the LM Financial Controller from 30/6/08 to 31/12/10 Sent Items

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.60	\$300.00	Access OnTrack email archive on the LM remote server to check for further correspondence between the auditor and LM re management fees, redemptions and distributions, starting with the LM Financial Controller from 30/6/08 to 31/12/10 Deleted Items folder
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.50	\$250.00	Access OnTrack email archive on the LM remote server to check for further correspondence between the auditor and LM re management fees, redemptions and distributions, starting with the LM Financial Controller from 31/12/10 to 30/6/08 uncategorised AUDIT folder
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	23/03/2020	0.90	\$450.00	Access OnTrack email archive on the LM remote server to check for further correspondence between the auditor and LM re management fees, redemptions and distributions, starting with the LM Financial Controller from 31/12/10 to 30/6/08 uncategorised AUDIT folder
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.30	\$150.00	Copy across appropriate folder in our server all emails located relating to management fees, redemptions and distributions and prepare the folder for Ryan to double check before sending to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.50	\$250.00	Telecom with Ryan regarding the search results for management fees, redemptions and distributions, and reviewing/double checking results for consistencies and relevance to facilitate submitting to our solicitors later today
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.30	\$150.00	Telecom with our solicitors regarding the status of responses to their various queries
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.10	\$50.00	Telecom with Ryan regarding our solicitors querying the shareholding of LMIM historically and the CEO status historically
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.10	\$50.00	Telecom with Ryan regarding progress on checking the management fees, redemptions and distribution email search results
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.50	\$250.00	Access the OnTrack email archive on the LM remote server and interrogate emails of the CEO to report back to our solicitors if he was CEO for the entire period the subject of the claim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.70	\$350.00	Check board minutes, letters to investors and other docs previously located to report back to our solicitors the CEO held the position for the entire period the subject of the claim, locate letters/updates to investors, PDSs but only relating to 2008/09
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.20	\$100.00	Telecom with our solicitors regarding documentation located so far regarding the CEO of LMIM but only relating to 2008/09, confirmed docs for management fees, redemptions and income distributions would follow shortly
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.10	\$50.00	Telecom with Ryan regarding all documents found regarding CEO of LMIM and asked him to forward to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.10	\$50.00	Telecom with Ryan regarding management fees, redemptions and distributions that he had checked asked him to forward to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	24/03/2020	0.50	\$250.00	Access LM remote server OnTrack email archive of LM CFO, locate emails confirming the CEO across the audit periods the subject of the claim, export from OnTrack and save on our server
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	25/03/2020	0.30	\$150.00	Telecom with our solicitors regarding the remaining responses they require from us to facilitate a response to the auditor's counterclaim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	25/03/2020	0.20	\$100.00	Telecom with Ryan regarding the remaining issues our solicitors require to respond to the auditor's counterclaim by 27/3 and matters he will be attending to
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	25/03/2020	1.20	\$600.00	For responding to the auditor's counterclaim locate all emails from LM to the auditor's returning the signed management rep letters for the 14 categories identified by our solicitors, locate only 3 of the categories in email search results conducted so far

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	0.10	\$50,00	1# Access LM remote server email archives and conduct further searches in CFO, executive directors and Finance Manager using signed rep letter and signed representation letter as key words, based on results prepare and submit a detailed reply continued:
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	2.10	\$1,050,00	# 2 continued : to our solicitors to respond to their request for all emails from LM to EY submitting rep letters
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	0.20	\$100,00	Telecom with our solicitors regarding my management rep letter response and the remaining 2 issues Ryan and I are working on
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	1.10	\$550,00	In response to our solicitors query regarding the shareholding and shareholders in LMTM, prepare and forward a detailed confirming the 2 entities having a 100% shareholding and the CEO having a 100% shareholding in the 2 entities
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	0.30	\$150,00	Telecom with Ryan regarding the status of what he had found on the LM remote server G Drive relating to various review functions the CFO is alleged to have participated in
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	0.20	\$100,00	Start working on the final matter our solicitors require us to respond to, i.e. para 7.3(a) of the auditor's counterclaim.
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	0.60	\$300,00	Telecom with our solicitors seeking clarification regarding para 7.3(a) of the auditor's counterclaim, and the 11 issues it is alleged the CFO participated in regular reviews
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		25/03/2020	0.20	\$100,00	Telecom with Ryan regarding the matters clarified by our solicitors in respect of our response to para 7.3(a) of the auditor's counterclaim, to assist with his interrogation of the LM remote server G Drive for relevant material
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.20	\$100,00	Telecom with Ryan regarding the last query to respond to, some further context within which to consider the 10 categories in para 7.3 (a) of the auditor's counterclaim and to aim to have everything ready to submit to our solicitors by midday
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.20	\$100,00	Telecom with our solicitors regarding para 7.3(a) of the auditor's counterclaim, discussing the context we are adopting to respond to the query and that we will have all information with them by midday
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.20	\$100,00	Telecom with our solicitors regarding status of our response to para 7.3(a) of the auditor's counterclaim and a further refinement of the context we are using to facilitate a timely response
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.60	\$300,00	Telephone conversation with David regarding status of provision of information to support response to counterclaim in the proceedings against EY/further work being done/preparation of management accounts and report to investors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.30	\$150,00	Telecom with Ryan regarding a refinement to the context to use to respond to para 7.3(a) of the auditor's counterclaim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.70	\$350,00	For responding to our solicitor's query regarding allegations in para 7.3(a) of the auditor's counterclaim access the LM remote server and start interrogating folders other than the Finance folder that Ryan is interrogating
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.20	\$100,00	For responding to para 7.3(a) of the auditor's counterclaim review docs located by Jordan in the auditor's records for each of the audits the subject of the claim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.50	\$250,00	Telecom with Ryan regarding the docs located by Jordan in the auditor's records for each of the audits the subject of the claim in part response to para 7.3(a) of the auditor's counterclaim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.30	\$150,00	Telecom with Ryan regarding response to para 7.3(a) and information LM may have considered at the time of initial appointment in 2003
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.20	\$100,00	Telecom with our solicitors to advise we now anticipate a full response apropos para 7.3(a) of the auditor's counterclaim later today and a possible clarification/interpretation of the issues raised in the para

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.30	\$150.00	#1 For responding to para 7.3(a) of the auditor's counterclaim, start preparing a detailed email to our solicitors outlining the context we adopted to facilitate a response and the scope of discovery we had conducted
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	1.10	\$550.00	Discuss and review with Ryan all of the docs located in response to para 7.3(a) of the counterclaim, overview results for all 9 audit periods, decide to restrict the response to screenshots of audits which meaningfully identify all reviews by the CFO
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		26/03/2020	0.20	\$100.00	Review and respond to query from David regarding the date of appointment of the auditors, forward a copy of the ASIC Historical and Current Extract of LMW outlining relevant info
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		27/03/2020	0.40	\$200.00	Telecom with our solicitors regarding my response to para 7.3(a) of the auditors' counterclaim and his request for a copy of the contents of the USB provided by the auditors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		27/03/2020	0.20	\$100.00	Telecom with Ryan regarding providing a copy of the auditor USB via One Drive
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		27/03/2020	0.70	\$350.00	#1 Prepare detailed response to our solicitors to para 7.3(a) of the auditor's claim and the final query regarding the CFO and reviews it is alleged he participated in
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		27/03/2020	1.40	\$700.00	#2 complete preparing detailed response to our solicitors to para 7.3(a) of the auditor's claim and the final query regarding the CFO and reviews it is alleged he participated in, and forward to our solicitors
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		30/03/2020	0.10	\$50.00	Telecom with our solicitors requesting a full copy of an audit testing documents previously provided
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		30/03/2020	0.50	\$250.00	In response to request from our solicitors to locate an audit testing report for FY 2011, review our records of previously located documents, telecom with our solicitor to send me copy of incomplete document they have
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		30/03/2020	0.70	\$350.00	Receive copy of incomplete compliance audit testing document for 30/6/11 our solicitors are seeking a full copy of, start with reviewing Eric Leuwendal's emails
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		30/03/2020	1.30	\$650.00	Receive copy of incomplete compliance audit testing document for 30/6/11 our solicitors are seeking a full copy of, continue with reviewing 3 key LM staff emails in LM remote server Ontrack email archives
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		30/03/2020	0.50	\$250.00	Receive copy of incomplete compliance audit testing document for 30/6/11 our solicitors are seeking a full copy of, continue with reviewing documents saved on our server, email Ryan and request he interrogate the auditor's hard copy records
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		30/03/2020	0.10	\$50.00	Telecom with our solicitors to confirm Ryan is looking for the compliance audit testing document in the hard copy records he recently categorised
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		31/03/2020	0.20	\$100.00	Telecom with our solicitors providing an update on our search for a full copy of the compliance audit testing document
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		31/03/2020	0.60	\$300.00	Telecom with Ryan re compliance audit testing findings document for 30 June 2011 prepared by the former auditors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		31/03/2020	0.70	\$350.00	For the complete audit testing document our solicitors are looking for conduct a further detailed search through Eric Leuwendal's emails in his email archives in Outlook
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		31/03/2020	0.20	\$100.00	Telecom with Ryan regarding status of our search for a complete copy of a compliance audit testing document our solicitors are looking for
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		31/03/2020	0.80	\$400.00	For the complete audit testing document our solicitors are looking for conduct a further detailed search our dedicated folder for the auditor claim
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		31/03/2020	0.10	\$50.00	Advise our solicitors that we are unable to locate the full copy of the compliance audit testing document and have only found the incomplete document

LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	1/04/2020	0.40	\$200.00	Telecom with our solicitors regarding complete copy of compliance audit testing document they are looking for, advice that it was used in the 2015 PE's and was forwarded by Eric Laeuwendaal in 10/15, and will email copy to assist with search
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	1/04/2020	0.10	\$50.00	Access copy of Eric Laeuwendaal's emails in my Outlook account, could not locate emails for the PE's conducted in 2015
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	1/04/2020	0.20	\$100.00	Telecom with Ryan regarding incomplete compliance audit testing document for 30/6/11 audit and the location perhaps being in the PE folders in our records, asked him to do a detailed interrogation of the folder to check my findings
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	1/04/2020	0.50	\$250.00	For a complete copy of the compliance audit testing document, search through PE records saved on our server
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	1/04/2020	0.50	\$250.00	Review email from our solicitors providing a copy of correspondence from BDO to Counsel for the 2015 PE, referring to document sought. Further interrogation of PE folder
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	1/04/2020	0.80	\$400.00	Interrogate our audit teams records for the auditor claim and locate the pdf document sought. Advise our solicitors accordingly
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	16/04/2020	0.10	\$50.00	For the auditor claim, our solicitors called to enquire about contact details of an LM staffer counsel want to contact
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	16/04/2020	1.30	\$650.00	For the auditor claim review the loan categorisation and loss incurred assessment proposed by the expert engaged and provide initial comments to David
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	16/04/2020	0.10	\$50.00	Telecom with Clark to discuss the expert's loss assessment proposal and setting up a teleconference on Monday 21/4 at 9am to finalise our review for David
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	16/04/2020	0.30	\$150.00	telephone conversation with David regarding request for further information from expert in relation to proceedings against EY/categorisation of loan book/approach to same
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	22/04/2020	0.30	\$150.00	Prepare for teleconference with Clark to discuss the proposed loss assessment schedule prepared by the expert witness
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	22/04/2020	0.70	\$350.00	Discuss with Clark Jarrod Gardens request for information from BDO re proposed categorisation of loans and processes to do so etc
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	22/04/2020	0.40	\$200.00	Prepare and forward Clark's and my comments/recommendations as regards the proposed loss calculation categorisations and loss assessment schedule to David for consideration
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	30/04/2020	0.80	\$400.00	Attend conference call with Clark, Julie and Ryan with counsel, Gardens and the expert witness as requested to discuss loan categorisation for loss calc purposes
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	30/04/2020	0.40	\$200.00	Follow up teleconference with Clark and Julie to discuss work plan steps and matters for completion of loan schedule as requested for loss calc purposes
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	30/04/2020	0.20	\$100.00	Telecom with our solicitors to clarify some issues discussed during the teleconference earlier today, inc the protocol to be adopted if a valuer is appointed to do retrospective valuations
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	30/04/2020	0.20	\$100.00	Telecom with Ryan to discuss the approach we will be adopting to populate the loan categorisations schedule for the expert evidence report
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets	30/04/2020	0.50	\$250.00	Take notes and further consider issues to discuss, confirm and clarify with David tomorrow
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	4/11/2019	1.10	\$495.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	4/11/2019	0.20	\$90.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	4/11/2019	1.10	\$495.00	Checking sorted EY work papers per reporting period as requested by our solicitors

LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		11/11/2019	1.00	\$450.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		11/11/2019	1.10	\$495.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/11/2019	1.50	\$675.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/11/2019	1.50	\$675.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/11/2019	1.00	\$450.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/11/2019	1.30	\$585.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/11/2019	1.20	\$540.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/11/2019	0.70	\$315.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/11/2019	0.40	\$180.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	1.00	\$450.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	1.50	\$675.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	0.90	\$405.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	0.80	\$360.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	0.20	\$90.00	Discuss status of work and issues re audit work papers and loan impairment papers etc with Clark J as well as work plan for remaining work to be done
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	0.90	\$405.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		18/11/2019	0.50	\$225.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		22/11/2019	0.60	\$270.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		26/11/2019	0.30	\$135.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		26/11/2019	0.50	\$225.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/11/2019	0.30	\$135.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/11/2019	0.80	\$360.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/11/2019	0.30	\$135.00	Meet with Clark Jarrold to discuss review/comments on updated loan impairment calcn papers and amendments to complete

LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		3/12/2019	0.50	\$225.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		4/12/2019	0.80	\$360.00	Checking sorted EY work papers per reporting period as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		4/12/2019	1.00	\$450.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		4/12/2019	0.90	\$405.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		4/12/2019	0.50	\$225.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		4/12/2019	1.00	\$450.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		5/12/2019	0.70	\$315.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		5/12/2019	1.20	\$540.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		5/12/2019	1.00	\$450.00	Making changes on the impairment calculations of a loan including resolving assumptions made in calculations- impairment calculation as requested by our solicitors
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		10/12/2019	0.10	\$45.00	Discuss status of work with Clark Jarrod re compilation of audit work papers. EY laptop and loan impairment calculations
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		3/1/2020	0.50	\$232.50	Trying to access the replacement EY laptop
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		3/1/2020	0.20	\$93.00	Discuss with Clark status of access to the EY replacement laptop
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		4/02/2020	1.40	\$651.00	Meeting with the experts (including Clark, Craig, solicitors etc) to discuss about the EY work papers before commencement of their review
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		10/02/2020	0.70	\$325.50	testing the replacement laptop for access and checking other documents
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		3/03/2020	0.60	\$279.00	Review of file note re- process of preparing the audit files as requested by our solicitors.
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		9/03/2020	1.50	\$697.50	Review of Dec2019 reporting for creditor reporting review purposes (trial balance including other schedules and financial statements).
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		9/03/2020	0.70	\$325.50	Review of Dec2019 reporting for creditor reporting review purposes (trial balance including other schedules and financial statements).
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		10/03/2020	0.40	\$186.00	Review of Dec2019 reporting for creditor reporting review purposes (after review and comments made in the first draft)
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		10/03/2020	0.60	\$279.00	Review of Dec2019 reporting for creditor reporting review purposes (after review and comments made in the first draft including understanding the journal entries on distributions made)
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		10/03/2020	0.90	\$418.50	Review of Dec2019 reporting for creditor reporting review purposes (after review and comments made in the first draft)

LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	12/03/2020	1.20	\$558.00	Review of Dec2019 reporting for creditor reporting review purposes - providing comments for changes to be made in the financial statements after discussions with/ feedback from Craig Jenkins and Clark Jarrod.
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	13/03/2020	0.40	\$186.00	Answering query from our solicitors on process of organising the EY audit work papers to be provided to the experts.
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	16/03/2020	0.10	\$46.50	Discuss with Clark EY planning documents re query from Gaddens re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	19/03/2020	0.70	\$325.50	Review of Dec2019 reporting for creditor reporting review purposes (after review and comments made in the previous draft)
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	24/03/2020	0.40	\$186.00	Further discussion with Clark re difference in number of units and work to identify the causes incl work to date and to be done as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	24/03/2020	0.20	\$93.00	Discuss with Clark issues re difference in number of units and resolving this as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	25/03/2020	0.40	\$186.00	Reviewing fs disclosure re difference in number of units in the Dec2019 financial statements as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	25/03/2020	0.20	\$93.00	Further discussion with Clark issues re difference in number of units and disclosures to the Dec2019 financial statements as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	25/03/2020	0.80	\$372.00	Reviewing workings re number of units and work to identify the cause of diff as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	27/03/2020	0.40	\$186.00	Investigating difference in number of units/investor fund for disclosures to the Dec2019 financial statements as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	27/03/2020	0.80	\$372.00	Investigating difference in number of units/investor fund for disclosures to the Dec2019 financial statements as requested by David Whyte
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	30/03/2020	0.90	\$418.50	Review of updated 31/12/2019 fs including adjustments to investor balance/ units
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	2/04/2020	0.20	\$93.00	Discuss with Clark status of EY compliance plan work papers including GANX and hardcopy records for provision to expert
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	3/04/2020	0.30	\$139.50	Discuss with Clark steps and issues to address in compiling EY compliance work papers both hardcopy and gamx as requested by Gaddens
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.30	\$139.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	1.10	\$511.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.80	\$372.00	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.90	\$418.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.30	\$139.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.70	\$325.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.40	\$186.00	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.30	\$139.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets	8/04/2020	0.80	\$372.00	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts

LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		9/04/2020	0.90	\$418.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		9/04/2020	0.30	\$139.50	checking the 2008 EY compliance work papers as compiled to ensure everything is in order prior to providing to the experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	0.40	\$186.00	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	1.00	\$465.00	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	0.40	\$186.00	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	1.00	\$465.00	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	0.70	\$325.50	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	0.30	\$139.50	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	1.20	\$558.00	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		14/04/2020	1.40	\$651.00	checking the provision of EY compliance work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/04/2020	0.50	\$232.50	checking EY work papers for 12/2008 half year for query made on what is available for review by experts
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		15/04/2020	0.30	\$139.50	Discuss with Clerk access issues re EY audit files for 12/08 and related work papers etc. response to query from our solicitors re same
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		16/04/2020	0.60	\$279.00	checking available 2010 planning work papers in EY laptop
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		16/04/2020	0.30	\$139.50	checking available 2010 planning work papers in EY laptop
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		16/04/2020	0.80	\$372.00	checking available 2010 planning work papers in EY laptop
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		21/04/2020	0.30	\$139.50	searching for 2012 representation letter for both audit and compliance
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		22/04/2020	0.40	\$186.00	checking summary in relation to gathering of compliance documents for 2008 and the other query made by our lawyers.
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		23/04/2020	0.40	\$186.00	going through the 2008 GAMX compliance work papers for the summary of work performed as requested by our lawyers
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		23/04/2020	0.30	\$139.50	Discuss with Clerk steps for provision of EY audit work papers to Gaders as requested and work plan to provide these re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		24/04/2020	0.30	\$139.50	checking the provision of EY audit work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		24/04/2020	0.30	\$139.50	checking the provision of EY audit work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		24/04/2020	1.60	\$744.00	checking the provision of EY audit work papers to Gaders as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		24/04/2020	0.60	\$279.00	checking the provision of EY audit work papers to Gaders as requested re EY claim

LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/04/2020	1.20	\$558.00	checking the provision of EY audit work papers to Gadens as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/04/2020	0.90	\$418.50	checking the provision of EY audit work papers to Gadens as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/04/2020	0.70	\$325.50	checking the provision of EY audit work papers to Gadens as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		27/04/2020	0.80	\$372.00	checking the provision of EY audit work papers to Gadens as requested re EY claim
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		29/04/2020	0.10	\$46.50	Discuss with Clark status of 12/08 EY audit work papers request from Gadens and provision thereof/issues in completing
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		28/04/2020	0.30	\$139.50	discuss without sollicitors re additional documents in GAMX that maybe useful to complete the compiled EY work papers.
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		30/04/2020	0.80	\$572.00	Attend conference call with Arthur and Clark with counsel and Gadens as requested to discuss loan categorisation for loss calc purposes
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		30/04/2020	0.40	\$186.00	Follow up teleconference with Arthur and Clark to discuss work plan steps and matters for completion of loan schedule as requested for loss calc purposes
LM First Mortgage Income Fund	Audit	Julie Pagcu	Associate Director	Assets		30/04/2020	0.40	\$186.00	discussion with Gadens in relation to queries on compiled compliance work papers etc
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		4/11/2019	0.50	\$112.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		4/11/2019	0.20	\$45.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		4/11/2019	2.20	\$495.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		4/11/2019	0.40	\$90.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		4/11/2019	0.60	\$135.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		5/11/2019	0.40	\$90.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		5/11/2019	1.10	\$247.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		5/11/2019	0.70	\$157.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		5/11/2019	0.60	\$135.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		5/11/2019	1.20	\$270.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.

LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	1.80	\$405.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	0.90	\$202.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	1.60	\$360.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	0.60	\$135.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	0.70	\$157.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	1.10	\$247.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	27/11/2019	1.90	\$427.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	6/03/2020	0.40	\$90.00	Review and spot check documents in relation to the audit for FMIF and all FMIF for the period 2008 to 2013 that were scanned and saved to file in preparation for expert review. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	6/03/2020	0.20	\$45.00	Review and spot check documents in relation to the audit for FMIF and all FMIF for the period 2008 to 2013 that were scanned and saved to file in preparation for expert review. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	18/03/2020	1.60	\$360.00	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	18/03/2020	1.20	\$270.00	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	18/03/2020	1.20	\$270.00	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	19/03/2020	0.70	\$157.50	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	19/03/2020	0.80	\$180.00	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	19/03/2020	0.50	\$112.50	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	24/03/2020	0.60	\$135.00	Review emails regarding distributions, redemptions and management fees for the FMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	24/03/2020	1.00	\$225.00	Review emails regarding distributions, redemptions and management fees for the FMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	26/03/2020	0.70	\$157.50	Locate and review documentation in relation to the qualifications for one of the former auditors for a response to our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	26/03/2020	2.40	\$540.00	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.

LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	26/03/2020	0.80	\$180.00	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	31/03/2020	0.90	\$202.50	Locate and review EV audit documents regarding compliance audit testing findings. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	2/04/2020	0.30	\$67.50	Telecon with Ryan Whyte regarding compliance audit documents to be collated and scanned to be provided to the experts for review. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	2/04/2020	0.20	\$45.00	Telecon with Liam Landrigan regarding compliance audit documents to be collated and scanned to be provided to the experts for review. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	3/04/2020	0.10	\$22.50	Telecon with Ryan Whyte regarding compliance audit documents to be collated and scanned to be provided to the experts for review. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	6/04/2020	1.10	\$247.50	Review all documents produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	6/04/2020	0.50	\$112.50	Review all documents produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	14/04/2020	0.30	\$67.50	Review all documents produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	14/04/2020	0.70	\$157.50	Review all documents produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	15/04/2020	0.20	\$45.00	Phone call with Julie Pagcu regarding audit documents provided to BDO by EV. RE Claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	16/04/2020	1.20	\$270.00	Review all documents produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 1 July 2008 to 31 December 2008. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	20/04/2020	2.60	\$585.00	Review documents on EV laptop produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 31 December 2009 to 1 July 2010. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	21/04/2020	2.90	\$652.50	Review documents on EV laptop produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	22/04/2020	2.00	\$450.00	Prepare letter to Gaddens detailing steps taken and processes involved in compiling and filing audit compliance documents for experts to review. Draft response to email from Gaddens regarding missing documents from compliance files.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	22/04/2020	0.20	\$45.00	Prepare letter to Gaddens detailing steps taken and processes involved in compiling and filing audit compliance documents for experts to review. Draft response to email from Gaddens regarding missing documents from compliance files.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	22/04/2020	0.10	\$22.50	Telephone conversation with Ryan Whyte regarding letter to Gaddens detailing process involved in providing compliance documents to experts.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	22/04/2020	1.60	\$360.00	Review documents on EV laptop produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets	22/04/2020	2.70	\$607.50	Review documents on EV laptop produced by the former auditors in relation to the audit for FMIIF and all FMIIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.

LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		23/04/2020	1.10	\$247.50	Review documents on EY laptop produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		23/04/2020	0.60	\$135.00	Review documents on EY laptop produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		23/04/2020	3.50	\$787.50	Review documents on EY laptop produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		23/04/2020	1.80	\$405.00	Review documents on EY laptop produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 1 July 2008 to 31 December 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		24/04/2020	3.20	\$720.00	Review documents on EY laptop produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 31 December 2007 to 1 July 2008. Scan and save to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		24/04/2020	0.80	\$180.00	Deliver EY laptop to Julie Pagou's house to enable her review of the documents in GANX inclusion in files sent to Gaders & experts. RE Claim against former auditors
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		30/04/2020	0.40	\$90.00	Draft email to Ryan Whyte in response to questions Gaders have asked regarding the EY audit proceedings documents provided by BDO to experts. RE Claim against former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		15/11/2019	0.50	\$137.50	Locate and review documentation in relation to the fees charged by the former auditors for the audits between 2008 and 2012. Save to file for Arthur Taylor's review.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		22/11/2019	0.30	\$82.50	Locate and review emails in relation to preparing the financial statements for the period 2008 to 2013. RE claim against the Auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		22/11/2019	0.30	\$82.50	For the auditor claim, and pursuant to Arthur's discussion with Doug Harrison, discuss with Arthur: who administers the LM PST files, where the remote server/s are located, how we can access the original PST files
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		22/11/2019	0.40	\$110.00	Discuss with Arthur access to the remote server for accessing LM PST files and the copying of emails from the server to our server. During our telecon we tested our access to this server, we both failed, contact the administrator to resolve access
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		2/12/2019	2.00	\$550.00	Locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		2/12/2019	0.70	\$192.50	Cont. locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		2/12/2019	1.40	\$385.00	Cont. locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		2/12/2019	2.10	\$577.50	Cont. locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		3/12/2019	1.40	\$385.00	Cont. locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		3/12/2019	0.60	\$165.00	Cont. Locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		3/12/2019	0.80	\$220.00	Cont. Locate and review documentation in relation to the cash outflows, loan statements, sales information and other relevant information in relation to 13 sample loans of the FMIF to provide to the experts for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		3/12/2019	0.50	\$137.50	Collect LMFMIF loan records from our solicitors for review and sorting. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		4/12/2019	0.80	\$220.00	Prepare box listing for LMFMIF loan records provided by our solicitors. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		5/12/2019	0.20	\$55.00	Deliver the laptop with the former auditors audit documents to our solicitors to courier to the former auditors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		9/12/2019	1.20	\$330.00	Telecom with Arthur Taylor regarding emails sent between the employees of LM and the former auditors in relation to the preparation of the financial statements for the LMFMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		9/12/2019	1.20	\$330.00	Locate and review emails sent between the employees of LM and the former auditors in relation to the preparation of the financial statements for the LMFMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		11/12/2019	0.90	\$247.50	Locate and review emails sent between the employees of LM and the former auditors in relation to the preparation of the financial statements for the LMFMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		11/12/2019	0.50	\$137.50	Telecom with Arthur Taylor regarding corrupted attachments to LM employee emails to the former auditors regarding the FMIF audit. RE claim against the Auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		11/12/2019	0.20	\$55.00	Telecom with Arthur Taylor regarding corrupted attachments to LM employee emails to the former auditors regarding the FMIF audit. RE claim against the Auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		13/12/2019	0.20	\$55.00	Telecom with Arthur Taylor regarding corrupted attachments to LM employee emails to the former auditors regarding the FMIF audit. RE claim against the Auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		13/12/2019	0.20	\$55.00	Telecom with Arthur Taylor regarding corrupted attachments to LM employee emails to the former auditors regarding the FMIF audit. RE claim against the Auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		14/01/2020	1.50	\$412.50	Review email from the audit team and Arthur Taylor regarding the fees charged by the former auditors. Locate and review documentation in relation to the former auditors fees and provide to Arthur Taylor. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		20/01/2020	0.60	\$165.00	Telecom with Arthur Taylor regarding the emails between the former auditors and the employees of LM regarding the financial statements. Discuss the emails to be obtained from the LM servers. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/01/2020	0.30	\$82.50	For the auditor claim, discuss with Arthur Taylor ledger records located of fees invoiced by/paid to the auditor for the various audit periods in the claim, and preparation of summary schedule
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/01/2020	0.50	\$137.50	For the auditor claim, telecom with Arthur Taylor regarding corrupted attachments to emails in LM records, access to LM server being restored and process to access original emails archived in the LM Exchange Server
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/01/2020	1.20	\$330.00	Locate documentation in relation to the fees charged by the former auditors for the preparation of the audit of the financial statements of the FMIF. RE claim against the auditors.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	24/01/2020	0.40	\$110.00	Telecom with Arthur Taylor regarding the authorship and preparation of MIF financial statements, a background to interrogation results so far, and requested he conduct an in depth interrogation of the LM server to confirm current findings
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	24/01/2020	0.30	\$82.50	Discuss with Arthur Taylor the interrogation of the LM server and findings regarding the authorship and preparation of MIF financial statements
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	24/01/2020	1.80	\$495.00	Locate documentation in relation to the fees charged by the former auditors for the preparation of the audit of the financial statements of the FMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	24/01/2020	0.30	\$82.50	Locate documentation in relation to the fees charged by the former auditors for the preparation of the audit of the financial statements of the FMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	24/01/2020	0.90	\$247.50	Locate documentation in relation to the fees charged by the former auditors for the preparation of the audit of the financial statements of the FMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	28/01/2020	1.10	\$302.50	Locate documentation in relation to the fees charged by the former auditors for the preparation of the audit of the financial statements of the FMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	28/01/2020	1.10	\$302.50	Locate documentation in relation to the fees charged by the former auditors for the preparation of the audit of the financial statements of the FMIF. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	29/01/2020	0.80	\$220.00	Locate and review the audit committee meeting minutes for information in relation to the preparation of the financial statements. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	29/01/2020	0.40	\$110.00	Telecom with Arthur Taylor regarding the audit committee minutes for December 2008 and June 2009. Discuss the findings in relation to the preparation of the financial statements by the auditors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	29/01/2020	0.70	\$192.50	Telecom with Arthur re draft fin statements saved in the 2011 Audit folder in LM electronic records, concur they are not an issue and are carried forward from a prior audit, review Audit Committee meetings for any references to fin statement preparation
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	29/01/2020	0.90	\$247.50	Locate and review the audit committee meeting minutes for information in relation to the preparation of the financial statements. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/01/2020	1.10	\$302.50	meeting with experts regarding proceedings against the auditors and further information required
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	3/02/2020	1.00	\$275.00	Review instructions provided by the former auditors solicitors in relation to the access to the audit documents for the LM First Mortgage Income Fund. Provide summary of steps to our solicitors to access the information.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	11/02/2020	0.30	\$82.50	For the auditor claim, telecom with Arthur regarding files to be copied to USB for our solicitors and problems accessing the LM server
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	12/02/2020	0.40	\$110.00	For the auditor claim telecom with Arthur regarding status of providing LM server read-only access to various parties, and copying of data to a USB for our solicitors - 2 matters, viz. prep of fin statements and info used for loan summary schedule
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	9/03/2020	0.40	\$110.00	For the auditor claim telecom with Arthur to discuss representation letters, delivering them to our solicitors, and coding the MIF loan book schedule to facilitate categorising for expert witnesses
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	9/03/2020	0.30	\$82.50	For the auditor claim and after review of the representation letter documentation located yesterday, telecom with Arthur regarding some missing documents
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	10/03/2020	0.60	\$165.00	For the auditor claim telecom with Arthur regarding the LM remote server OnTrack service restoration, providing a USB copy of all docs requested by our solicitors, codifying the MIF overall loan schedule for a pivot table and the logic behind the exercise

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		10/03/2020	1.10	\$302.50	Meeting with the experts regarding accessing the records of the LM First Mortgage Income Fund for their expert review of the loss calculations.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		10/03/2020	0.50	\$137.50	Telecon with our solicitors regarding the laptop provided by the former auditors of the Fund. Meeting with the former auditor's IT regarding access to the laptop.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		11/03/2020	0.40	\$110.00	For the auditor claim telecon with Arthur Taylor regarding codifying the MIF loan book schedule
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		11/03/2020	0.60	\$165.00	Prepare summary pivot tables for the loan summary book for Arthur Taylor. Enter formulas to summarise the workbook by state and sector of the loans of the LM First Mortgage Income Fund.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		11/03/2020	1.50	\$412.50	Prepare summary pivot tables for the loan summary book for Arthur Taylor. Enter formulas to summarise the workbook by state and sector of the loans of the LM First Mortgage Income Fund.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		13/03/2020	0.70	\$192.50	Review email from our solicitors and locate the security documentation for various loans of the FMIF. Provide to Arthur Taylor for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		16/03/2020	0.70	\$192.50	Review email from our solicitors and locate the security documentation for various loans of the FMIF. Provide to Arthur Taylor for review. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		17/03/2020	0.30	\$82.50	For the auditor claim telecon with Arthur Taylor regarding information requested by David for briefing expert witness
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		17/03/2020	0.30	\$82.50	Telecon with A.T. re further info requested by our solicitors, relevantly all correspondence (hard copies or electronic copies on our server) relating to loan management fees, redemptions, income distributions and carrying out of audits the subject of the claim
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		17/03/2020	0.60	\$165.00	Locate and review loan summary documents prepared by LM and reviewed by the former auditors to provide to our solicitors to brief the experts. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		18/03/2020	0.30	\$82.50	For the auditor claim telecon with Arthur Taylor regarding categorising LM/auditor emails located.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		18/03/2020	1.30	\$357.50	Locate and review documentation in relation to the former auditors conducting the audits for the LMFMIF during the periods 30 June 2008 to 31 December 2012
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		18/03/2020	0.80	\$220.00	Locate and review correspondence between employees of LM and the former auditors regarding distributions, redemptions and loan management fees. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		18/03/2020	1.70	\$467.50	Locate and review correspondence between employees of LM and the former auditors regarding distributions, redemptions and loan management fees. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		19/03/2020	1.50	\$412.50	Locate and review correspondence between employees of LM and the former auditors regarding distributions, redemptions and loan management fees. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		19/03/2020	0.80	\$220.00	Locate and review correspondence between employees of LM and the former auditors regarding distributions, redemptions and loan management fees. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		19/03/2020	1.50	\$412.50	Locate and review correspondence between employees of LM and the former auditors regarding distributions, redemptions and loan management fees. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		20/03/2020	0.60	\$165.00	Locate and review the former auditors engagement letters for conducting the audit of the LMFMIF for the relevant periods. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		20/03/2020	1.00	\$275.00	Locate and review correspondence between employees of LM and the former auditors regarding distributions, redemptions and loan management fees. RE claim against the former auditors.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.20	\$55.00	Telecom with Arthur Taylor regarding auditor fees paid and searching for records of payment in Composer and AX. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.90	\$247.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.40	\$110.00	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.20	\$55.00	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.60	\$165.00	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.90	\$247.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.30	\$82.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		23/03/2020	0.90	\$247.50	Telecom with Arthur Taylor regarding fees paid to the auditor. the payment records he had located on Composer/AX and an anomaly between fees proposed and fees paid for the 2012 FY audit, asked him to review LM's records to resolve/clarity
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.50	\$137.50	Telecom with Arthur regarding the search results for management fees, redemptions and distributions, and reviewing/double checking results for consistencies and relevance to facilitate submitting to our solicitors later today
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.30	\$82.50	Telecom with Arthur regarding the search results for management fees, redemptions and distributions, and reviewing/double checking results for consistencies and relevance to facilitate submitting to our solicitors later today
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.60	\$165.00	Review emails regarding distributions, redemptions and management fees for the FMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.90	\$247.50	Review emails regarding distributions, redemptions and management fees for the FMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.30	\$82.50	Telecom with Arthur regarding the search results for management fees, redemptions and distributions, and reviewing/double checking results for consistencies and relevance to facilitate submitting to our solicitors later today
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.80	\$220.00	Review emails regarding distributions, redemptions and management fees for the FMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.40	\$110.00	Telecom with Arthur regarding the search results for management fees, redemptions and distributions, and reviewing/double checking results for consistencies and relevance to facilitate submitting to our solicitors later today
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.60	\$165.00	Locate and review documentation in relation to the shareholders of LMIM as requested by our solicitors regarding the claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	1.90	\$522.50	Review emails regarding distributions, redemptions and management fees for the FMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		24/03/2020	0.80	\$220.00	Locate and review documentation in relation to the shareholders of LMIM as requested by our solicitors regarding the claim against the former auditors.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	0.20	\$55,000	Telecom with Arthur regarding the remaining issues our solicitors require to respond to the auditor's counterclaim by 27/3 and matters he will be attending to
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	0.30	\$82,500	Telecom with Arthur regarding the status of what he had found on the LM remote server G Drive relating to various review functions the CFO is alleged to have participated in
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	0.20	\$55,000	Telecom with Arthur regarding the matters clarified by our solicitors in respect of the response to para 7(a) of the auditor's counterclaim to assist with his interrogation of the LM remote server G Drive for relevant material
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	0.90	\$247,500	Review emails regarding distributions, redemptions and management fees for the PMIF. Allocate the emails to folders for each relevant audit period. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	0.50	\$137,500	Locate and review documentation in relation to the shareholders of LMIF as requested by our solicitors regarding the claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	1.40	\$385,000	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	1.50	\$412,500	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	25/03/2020	0.70	\$192,500	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.20	\$55,000	Telecom with Arthur regarding the last query to respond to, some further context within which to consider the 10 categories in para 7(a) of the auditor's counterclaim and to aim to have everything ready to submit to our solicitors by midday
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.30	\$82,500	Telecom with Arthur regarding a refinement to the context to use to facilitate a timely response to para 7.3(a) of the auditor's counterclaim
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.50	\$137,500	Telecom with Arthur regarding the docs located by Jordan in the auditor's records for each of the audits the subject of the claim in part response to para 7.3(a) of the auditor's counterclaim
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.30	\$82,500	Telecom with Arthur regarding response to para 7.3(a) and locating any documentation from EY that LM may have considered at the time of the initial appointment in 2003
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	1.10	\$302,500	Discuss and review with Arthur all of the docs located in response to para 7.3(a) of the counterclaim, overview results for all 9 audit periods, decide to restrict the response to screenshots of audits which meaningfully identify all reviews by the CFO
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.80	\$220,000	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.30	\$82,500	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.50	\$137,500	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	2.00	\$550,000	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	1.00	\$275.00	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	0.20	\$55.00	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	26/03/2020	1.60	\$440.00	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/03/2020	0.20	\$55.00	Telecom with Arthur regarding providing a copy of the auditor USB via One Drive
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/03/2020	0.30	\$82.50	Telecom with Arthur regarding completion of the report to investors and setting up a hyperlink for the information required to facilitate a response to our solicitors in respect of para 7.3(a) of the auditor's counterclaim
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/03/2020	0.70	\$192.50	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/03/2020	1.00	\$275.00	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/03/2020	0.50	\$137.50	Locate and review documentation that was sighted or prepared by the chief finance officer during the relevant audit periods for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/03/2020	0.70	\$192.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/03/2020	0.80	\$220.00	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/03/2020	1.20	\$330.00	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/03/2020	1.40	\$385.00	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	31/03/2020	0.50	\$137.50	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	31/03/2020	0.60	\$165.00	Telecom with Arthur Taylor re compliance audit testing findings document for 30 June 2011 prepared by the former auditors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	31/03/2020	0.30	\$82.50	Telecom with Arthur regarding status of our search for a complete copy of a compliance audit testing document our solicitors are looking for
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	31/03/2020	1.30	\$357.50	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	31/03/2020	1.10	\$302.50	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	31/03/2020	0.90	\$247.50	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	1/04/2020	0.20	\$55.00	Telecom with Arthur regarding incomplete compliance audit testing document for 30/6/11 audit and the location perhaps being in the RE folders in our records. asked him to do a detailed interrogation of the folder to check my findings
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	1/04/2020	1.10	\$302.50	Locate and review documentation in relation to the FYZ2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	1/04/2020	1.10	\$302.50	Locate and review documentation in relation to the FY2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	1/04/2020	0.20	\$55.00	Locate and review documentation in relation to the FY2011 Compliance Audit testing findings for our solicitors. RE claim against the auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	2/04/2020	0.30	\$82.50	Telecon with the experts regarding requests for documentation and queries on documentation received. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	2/04/2020	0.20	\$55.00	Telecon with the experts regarding requests for documentation and queries on documentation received. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	2/04/2020	0.30	\$82.50	Telecon with Jordan Devery regarding compliance audit documents to be collated and scanned to be provided to the experts for review, RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	6/04/2020	0.70	\$192.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	6/04/2020	0.90	\$247.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	6/04/2020	0.50	\$137.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	6/04/2020	0.90	\$247.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	7/04/2020	0.60	\$165.00	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	7/04/2020	0.50	\$137.50	Locate and review documentation in relation to the fees charged by the auditors to conduct the audits for 30 June 2008 to 30 June 2012. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	9/04/2020	1.00	\$275.00	Telecon with experts. Locate and review documentation in relation to secured mortgage loans of the FMIIF and supporting documents for the financial statements for the experts.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	16/04/2020	0.30	\$82.50	Review email from our solicitors in relation to the audit documents for the audit of the FMIIF financial statements. Prepare email to Julie and Jordan regarding the matter.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	20/04/2020	0.70	\$192.50	Review LM Planning Audit documents collated by Jordan Devery. Upload the files to Sharefile to provide to our solicitors for review.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	20/04/2020	0.60	\$165.00	Review LM Compliance Audit documents collated by Jordan Devery. Upload the files to Sharefile to provide to our solicitors for review.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	22/04/2020	2.20	\$605.00	Review email from the experts regarding the loan statements in composer for the loans of the FMIIF. Export 23 loan statements from Composer and provide to the experts for review.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	22/04/2020	1.60	\$440.00	Review email from our solicitors regarding the audit compliance documents for FY2008. Address the solicitors queries regarding how the compliance audit documents were obtained and the missing documents from the compliance audit index.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	23/04/2020	1.00	\$275.00	Review email from our solicitors regarding the audit compliance documents for FY2008. Address the solicitors queries regarding how the compliance audit documents were obtained and the missing documents from the compliance audit index.

LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	24/04/2020	1.50	\$412.50	Review email from our solicitors regarding the audit documents. Review documents collated for the Compliance Audit for FY2008 and the HY2009 financial audit documents.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/04/2020	1.00	\$275.00	Review email from our solicitors and Julie Pagu regarding FY2008 compliance documents. Email a response to the solicitors and collate further compliance documents to provide to the solicitors. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	27/04/2020	0.90	\$247.50	Review email from our solicitors and Julie Pagu regarding FY2008 compliance documents. Email a response to the solicitors and collate further compliance documents to provide to the solicitors. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/04/2020	0.80	\$220.00	Attend conference call with Arthur and Julie with counsel and Gaden's as requested to discuss loan categorisation for loss calc purposes
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/04/2020	0.20	\$55.00	Telecom with Arthur to discuss the approach we will be adopting to populate the loan categorisations schedule for the expert evidence report
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/04/2020	1.10	\$302.50	Prepare summary to our solicitors detailing the procedure to collate and prepare the compliance plan audit documents. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets	30/04/2020	0.80	\$220.00	Review emails from our solicitors and the expert auditors regarding the proposed approach for the categorisation and analysis of the investment loans of the FMIF. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets	17/03/2020	0.10	\$61.50	email expert regarding information to be provided on loan book
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	23/01/2020	0.10	\$61.50	email our solicitors regarding queries in relation to costs orders in the proceedings against the auditors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	23/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding court application for judicial advice in respect of proceedings against the auditors/email our solicitors regarding substituted service orders made by Justice Mullins on 17 December 2019
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	23/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors and draft letter to FTI's solicitors regarding claim for expenses relating to proceedings against the auditors/confirmed instructions in respect of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	28/04/2020	0.10	\$61.50	reviewed correspondence from our solicitors and FTI's solicitors regarding fixing of FTI's solicitors costs in respect of proceedings against the auditors/reviewed draft letter and draft court order in respect of same/provided instructions
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	1/11/2019	0.90	\$202.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	1/11/2019	0.70	\$157.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	1/11/2019	0.80	\$180.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	1/11/2019	1.40	\$315.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	3/12/2019	0.60	\$135.00	Collect LHMIF loan records from our solicitors for review and sorting. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	10/02/2020	2.40	\$540.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.

LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	14/02/2020	1.60	\$360.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	14/02/2020	0.30	\$67.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	10/03/2020	0.30	\$67.50	Move EY Audit documents to USB and deliver to our solicitors
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	16/03/2020	0.70	\$157.50	Collect EY Audit laptop from EY Offices on Eagle Street. Test laptop to ensure programs required performing adequately.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	3/04/2020	0.90	\$202.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	3/04/2020	0.90	\$202.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	3/04/2020	1.20	\$270.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	3/04/2020	1.20	\$270.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Creditors	23/04/2020	0.40	\$90.00	Telephone conversation with Julie Pagu regarding EY Audit Compliance documents. Access EY Laptop and generate reports and documents as instructed by Julie to find documents requested by Gaden. RE Claim against former auditors
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	10/02/2020	3.20	\$720.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	11/02/2020	4.10	\$922.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	11/02/2020	0.90	\$202.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	11/02/2020	2.70	\$607.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	12/02/2020	1.50	\$337.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	12/02/2020	2.60	\$585.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	12/02/2020	1.70	\$382.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	13/02/2020	1.00	\$225.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors	13/02/2020	2.20	\$495.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.

LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors		13/02/2020	1.10	\$247.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors		13/02/2020	1.80	\$405.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors		14/02/2020	1.60	\$360.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors		14/02/2020	2.70	\$607.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors		14/02/2020	0.80	\$180.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Liam Landrigan	Graduate Accountant	Creditors		17/02/2020	1.80	\$405.00	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. Scan, sort and save all documents to file. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Creditors		1/11/2019	0.70	\$192.50	Review all documents produced by the former auditors in relation to the audit for FMIF and all FMIF loan documents for the period 2008 to 2013. File documents by financial period and by audit document type. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Creditors		22/01/2020	0.80	\$220.00	Locate the emails between the former auditors and the employees of LM regarding the financial statements. Discuss the emails to be obtained from the LM servers. RE claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Creditors		20/03/2020	0.90	\$247.50	Locate and review documentation in relation to the shareholders of LMTM as requested by our solicitors regarding the claim against the former auditors.
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Creditors		20/03/2020	0.20	\$55.00	Locate and review documentation in relation to the shareholders of LMTM as requested by our solicitors regarding the claim against the former auditors.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Administration		2/03/2020	0.70	\$157.50	Prepare letter to Gadens detailing steps taken and processes involved in scanning and saving audit documents to file for experts to review.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Administration		3/03/2020	0.30	\$67.50	Prepare letter to Gadens detailing steps taken and processes involved in scanning and saving audit documents to file for experts to review.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Administration		3/03/2020	0.20	\$45.00	Prepare letter to Gadens detailing steps taken and processes involved in scanning and saving audit documents to file for experts to review.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Administration		4/03/2020	0.20	\$45.00	Prepare letter to Gadens detailing steps taken and processes involved in scanning and saving audit documents to file for experts to review.
						TOTAL		\$285,944.00	

Last Name Registered Name	Description	Name	Position	Milestones	Disbursement	W/E Date	Hours	Value	Narration
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		4/11/2019	0.10	\$61.50	reviewed loan statement for borrower/forward to trustee in bankruptcy of guarantor
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		11/11/2019	2.00	\$1,230.00	reviewed transcript from public examination of two parties in respect of estate of bankrupt guarantor
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/11/2019	2.30	\$1,414.50	reviewed transcript of second day of public examinations of two parties in respect of bankrupt estate of guarantor
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/11/2019	1.90	\$1,168.50	reviewed transcript of third day of public examinations of two parties in respect of bankrupt estate of guarantor
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/11/2019	0.10	\$61.50	reviewed correspondence from our solicitors regarding proceedings against guarantor and extension of time granted to comply with terms under settlement deed
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		18/11/2019	0.30	\$184.50	reviewed report from trustee in bankruptcy of guarantor regarding costs incurred and status of bankruptcy/reviewed costs and invoices/authorised payment
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/12/2019	2.10	\$1,291.50	reviewed transcript of fourth day of public examination of two parties relating to bankrupt estate of guarantor
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/12/2019	3.10	\$1,906.50	reviewed transcript of fifth day of public examination of the bankrupt on behalf of his trustee in bankruptcy
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.20	\$123.00	reviewed report to creditors received from trustee in bankruptcy of guarantor
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	1.30	\$799.50	meeting with trustee in bankruptcy of guarantor regarding outcome of public examinations of several parties and proposed next steps
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.10	\$61.50	reviewed instruction letter to custodian and accompanying documents regarding circulating resolution by trustee in bankruptcy of guarantor's estate
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/12/2019	0.50	\$307.50	reviewed correspondence from trustee in bankruptcy of guarantor regarding demands made against certain parties/reviewed demand against third party
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		14/01/2020	0.50	\$307.50	reviewed correspondence from trustee in bankruptcy of guarantor regarding demands sent to several parties following completion of public examination/reviewed demands
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		20/01/2020	0.20	\$123.00	reviewed correspondence from trustee in bankruptcy of guarantor regarding monthly report and funding request/reviewed invoices/approved payment
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/03/2020	0.20	\$123.00	reviewed reports from trustee in bankruptcy of guarantor regarding claims against third parties and proposed mediation/reviewed invoices/sent response
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		19/03/2020	0.50	\$307.50	telephone conversation with trustee in bankruptcy of guarantor regarding proposed mediation and strategy in respect of same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		23/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding guarantor and proposal in relation to deed of settlement/provided instructions regarding same
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		1/11/2019	0.20	\$100.00	for the queries received from the trustee in bankruptcy for an FMIF loan, discuss with Ryan pdf of loan statement he emailed me, formatting, headers and paginating
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		1/11/2019	0.10	\$50.00	for the queries received from the trustee in bankruptcy for an FMIF loan, review the loan statement pdf Ryan had emailed me, note formatting, paginating, headers that need to be sorted out
LM First Mortgage Income Fund	BR	Arthur Taylor	Senior Manager	Assets		1/11/2019	1.70	\$850.00	for the queries received from the trustee in bankruptcy for an FMIF loan, complete final reconciliation of loan statement prepared yesterday, make several amendments to calculations, format headers, logo and page numbers, convert to pdf and send to David

Last_Name_Registered_Name	Description	Name	Position	Milestone	Disbursement	WIP_Date	Hours	Value	Narration
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		3/12/2019	0.20	\$123.00	telephone conversation with our solicitors regarding potential appeal of decision in respect of proceedings against the directors and status of proceedings against the auditors/work being done in respect of same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		9/12/2019	3.20	\$1,968.00	reviewed judgement in relation to proceedings against the directors of LMIM and including telephone conversation with our solicitors regarding same/potential appeal
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		13/12/2019	0.90	\$553.50	telephone conversation with our solicitors and counsel regarding judgement handed down in relation to proceedings against the directors/appeal issues/provided instructions regarding appeal
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		6/01/2020	1.30	\$799.50	reviewed correspondence from our solicitors and counsel regarding appeal against the judgement in respect of the proceedings against the directors/reviewed notice of appeal/telephone conversation with our solicitors regarding same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		7/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding status of application for judicial advice in progressing an appeal of the decision in respect of the proceedings against the directors and correspondence sent to the registry for the court of appeal
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		20/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors and the court of appeal in relation to appeal in respect of the proceedings against the directors/deferral of hearing until judicial advice application determined
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		23/01/2020	0.20	\$123.00	reviewed draft affidavit in relation to court application for judicial advice in respect of appeal of decision in the proceedings against the directors/email our solicitors regarding same
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		23/01/2020	0.20	\$123.00	reviewed correspondence from our solicitors and updated draft affidavit regarding judicial advice application in respect of proceedings against the directors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		30/01/2020	0.90	\$553.50	reviewed two affidavits in relation to court application for judicial advice in respect of bringing appeal against decision in the proceedings against the directors/telephone conversation with our solicitors regarding same/provided instructions
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		3/02/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding lodgement of court application for judicial advice in respect of appeal of decision in the proceedings against the directors/reviewed application and affidavit
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		3/02/2020	0.10	\$61.50	reviewed draft affidavit in support of court application for judicial advice in respect of proposed appeal of decision in relation to the proceedings against the directors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		3/02/2020	0.60	\$369.00	attended our solicitors offices/reviewed and swore affidavit in support of court application for judicial advice in respect of proposed appeal of decision in relation to the proceedings against the directors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		13/02/2020	0.20	\$123.00	reviewed email from our solicitors regarding court application for substituted service in relation to judicial advice in respect of appeal against the decision in the proceedings against the directors/reviewed counsels submissions, draft order and notice
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		17/02/2020	0.20	\$123.00	reviewed correspondence from our solicitors regarding hearing of substituted service application in respect of appeal of decision in the proceedings against the directors/reviewed orders made and draft notice to members
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		18/02/2020	0.10	\$61.50	reviewed/signed notice to members regarding appeal of decision in respect of proceedings against the directors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		18/02/2020	0.20	\$123.00	reviewed draft emails to printers seeking quote and to members regarding notice to members in respect of judicial advice application regarding appeal of decision in the proceedings against the directors
LM First Mortgage Income Fund BR		David Whyte	Partner	Assets		18/02/2020	0.30	\$184.50	reviewed correspondence from our solicitors regarding notice of appeal and other documents to be uploaded to LMFMIF website/reviewed notices and drafted instructions to upload documents and commentary to the website

LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		20/02/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding filing of confidential affidavit in support of application for judicial advice in respect of appeal in the proceedings against the directors;/ reviewed draft court order/provided instructions re same
LM First Mortgage Income Fund BR	Ryan Whyte	Accountant	Assets		20/02/2020	0.40	\$110.00	Prepare mail out of the notice to investors of the appeal for the directors proceedings. Prepare mailing list and send to the printing and email company.
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		2/03/2020	0.10	\$61.50	reviewed correspondence from our solicitors and FTI's solicitors regarding judicial advice application in respect of appeal of decision in the proceedings against the directors and request for provision of advice;/ reviewed draft letter in response;/replied
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		2/03/2020	0.10	\$61.50	reviewed email from our solicitors regarding judicial advice application in respect of appeal of decision in the proceedings against the directors;/ reviewed court order relating to filing of confidential affidavit and list of authorities to be relied upon
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		3/03/2020	0.10	\$61.50	reviewed LM website in relation to application for judicial advice in respect of appeal of decision in the proceedings against the directors;/ reviewed draft email to update contents
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		12/03/2020	0.20	\$123.00	reviewed correspondence from our solicitors and FTI's solicitors regarding FTI's request for release of advices in respect of proceedings against the directors;/ reviewed draft letter in response;/ provided instructions regarding same denying request
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		9/04/2020	0.10	\$61.50	reviewed draft affidavit in relation to meeting service requirements to members of judicial advice application regarding appeal of decision in the proceedings against the directors
LM First Mortgage Income Fund BR	Ryan Whyte	Accountant	Assets		9/04/2020	0.80	\$220.00	Review and update my affidavit for the service on members for the appeal of the Director proceedings for the hearing on 2 June 2020.
LM First Mortgage Income Fund BR	Ryan Whyte	Accountant	Assets		9/04/2020	0.70	\$192.50	Review and update my affidavit for the service on members for the appeal of the Director proceedings for the hearing on 2 June 2020.
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		9/04/2020	0.10	\$61.50	reviewed correspondence from our solicitors and FTI's solicitors regarding judicial advice application in respect of appeal of decision in the proceedings against the auditors and further information requested
LM First Mortgage Income Fund BR	Ryan Whyte	Accountant	Assets		14/04/2020	0.70	\$192.50	Review and update my affidavit for the service on members for the appeal of the Director proceedings for the hearing on 2 June 2020.
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		14/04/2020	0.90	\$553.50	reviewed statement of facts in relation to court application for judicial advice;/ investigated queries to update same;/ provided instructions to our solicitors
LM First Mortgage Income Fund BR	Ryan Whyte	Accountant	Assets		15/04/2020	0.50	\$137.50	Review and update my affidavit for the service on members for the appeal of the Director proceedings for the hearing on 2 June 2020.
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		16/04/2020	0.30	\$184.50	reviewed draft letter to FTI's solicitors regarding judicial advice application regarding appeal against decision in respect of proceedings against the directors;/ reviewed updated statement of facts;/ provided instructions re both
LM First Mortgage Income Fund BR	Ryan Whyte	Accountant	Assets		16/04/2020	0.30	\$82.50	Attend our solicitors office to swear my affidavit for the service on members for the appeal of the Director proceedings for the hearing on 2 June 2020.
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		20/04/2020	3.90	\$2,398.50	reviewed correspondence from our solicitors relating to judicial advice application;/ reviewed three affidavits including confidential affidavit lodged in the proceedings;/ reviewed correspondence and affidavit from FTI's solicitors
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		20/04/2020	0.30	\$184.50	telephone conversation with our solicitors regarding correspondence and affidavit received from FTI's solicitors relating to judicial advice application;/ response required by 8 May
LM First Mortgage Income Fund BR	David Whyte	Partner	Assets		21/04/2020	1.30	\$799.50	reviewed correspondence between FTI's solicitors and our solicitors regarding proceedings against the directors to determine relevance to judicial advice application in respect of appeal and to refile Parks affidavit

LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets	22/04/2020	1.10	\$676.50	teleconference with our solicitors regarding judicial advice application in respect of appeal of decision in the proceedings against the directors/correspondence and affidavit received from FTI's solicitors and proposed response
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets	22/04/2020	0.20	\$123.00	telephone conversation with our solicitors regarding judicial advice application and discussion with receiver and manager of two feeder funds
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets	23/04/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding documents lodged with the court in respect of judicial advice application/sealed copies to be uploaded to the website
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets	28/04/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding judicial advice application/letter sent to FTI's solicitors regarding request for copies of legal advices and other matters
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	23/01/2020	0.10	\$61.50	reviewed correspondence from our solicitors regarding court applications for judicial advice in respect of proceedings against the auditor/s/email our solicitors regarding substituted service orders made by Justice Mullins on 17 December 2019
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	30/01/2020	0.40	\$246.00	attended our solicitors office to review and swear affidavit in support of application for judicial advice in respect of proceedings against the directors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	3/02/2020	0.10	\$61.50	email our solicitors regarding remuneration and judicial advice applications/appointment of judge to hear same
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	4/02/2020	0.30	\$184.50	telephone conversation with our solicitors regarding court applications for judicial advice and future remuneration applications/replacement of judge/correspondence to be sent to the court
LM First Mortgage Income Fund	BR	David Whyte	Partner	Trade On	23/04/2020	0.10	\$61.50	reviewed draft email to IT consultant to update website in relation to judicial advice application
LM First Mortgage Income Fund	BR	David Whyte	Partner	Administration	28/04/2020	0.30	\$184.50	reviewed correspondence from our solicitors regarding remuneration application/timing of hearing/further information to be included in affidavit/reviewed timesheet entries for judicial advice application
					TOTAL		\$12,804.50	

Last Name Registered Name	Description	Name	Position	Milestone	Disbursement	WIP Date	Hours	Value	Narration
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		5/11/2019	0.10	\$61.50	Reviewed correspondence from our solicitors regarding payments made under deed of settlement/confirmed up to date
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		10/03/2020	1.00	\$225.00	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		11/03/2020	0.70	\$157.50	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		11/03/2020	0.90	\$202.50	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		11/03/2020	0.10	\$22.50	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		11/03/2020	1.40	\$315.00	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		11/03/2020	0.30	\$67.50	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	Jordan Devery	Graduate Accountant	Assets		11/03/2020	0.80	\$180.00	Reviewed FTI's solicitors fees and disbursements in the Cost Statement provided on 10/03/2020. Sum fees and disbursements and compare against total fees claimed as the fees were inflated by at least \$17K.
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.10	\$61.50	Reviewed correspondence from our solicitors regarding discontinuance of proceedings against three feeder funds/reviewed notice of discontinuance
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.10	\$61.50	Reviewed correspondence from liquidator of borrower regarding completion of controlship/reviewed letter in response
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		16/12/2019	0.90	\$553.50	Telephone conversation with our solicitors regarding remuneration application/status of litigation matters/affidavit to be sworn for tomorrow's hearing
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		27/02/2020	0.10	\$61.50	emails to our solicitors regarding court hearing tomorrow and if required to be cross examined/Palm Beach solicitors that may assist in witnessing affidavit
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		31/03/2020	0.10	\$61.50	Reviewed correspondence from PTAAL regarding asset register/reviewed draft response and asset register as at 30 March 2020
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		19/03/2020	0.70	\$430.50	Consider/address queries re LM financial statements and disclosures re distributions
LM First Mortgage Income Fund	Audit	Clark Jarrold	Partner	Assets		25/03/2020	0.20	\$123.00	Further discussion with Julie issues re difference in number of units and disclosures to the Dec2019 financial statements as requested by David Whyte
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		10/03/2020	0.50	\$270.00	Review draft 31 Dec 2019 financial report
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		10/03/2020	0.80	\$432.00	Review draft 31 Dec 2019 financial report and discuss technical accounting and measurement issues with Clark J and Julie P
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		19/03/2020	1.60	\$864.00	Review 31 December 2019 Creditors Report
LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		24/03/2020	0.60	\$324.00	Corro re treatment of units and distribution for 31 December 2019 Creditors Report

LM First Mortgage Income Fund	Audit	Craig Jenkins	Partner	Assets		30/03/2020	0.60	\$324,000	Telephone call with David Whyte and Clark Jarrold regarding presentation of management accounts/issues relating to number and value of investor units and amendments to simplify same and forward for review
LM First Mortgage Income Fund	BR	Charles Haines	Associate Director	Assets		13/02/2020	0.20	\$105,000	Litigation Strategy discussion
LM First Mortgage Income Fund	BR	Ryan Whyte	Accountant	Assets		30/03/2020	0.60	\$165,000	Review email from the Trust Company regarding current assets held by the FMIF. Prepare a register of current assets as at 30 March 2020 and provide to David Whyte for review.
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		21/11/2019	0.60	\$369,000	reviewed correspondence from our solicitors regarding upcoming court hearing to hand down judgement on proceedings against the directors/costs position dependant on outcome/reviewed offers made during the proceedings/provided instructions
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		3/12/2019	0.20	\$123,000	reviewed correspondence from our solicitors regarding submissions on costs in respect of proceedings against the directors of LMIM/reviewed four sets of submissions
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		9/12/2019	0.10	\$61,500	reviewed correspondence from our solicitors regarding costs of proceedings against the directors of LMIM/reviewed court order regarding same/provided instructions regarding submissions of seventh defendant
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		28/02/2020	0.10	\$61,500	telephone conversation with our solicitors regarding judgement to be handed down today in respect of costs orders for the proceedings against the directors
LM First Mortgage Income Fund	BR	David Whyte	Partner	Assets		2/03/2020	0.10	\$61,500	reviewed correspondence from our solicitors regarding judgement handed down by Justice Jackson in respect of costs of seventh defendant regarding proceedings against the directors/reviewed judgement
								\$5,745,000	

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**

AND

First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
CURRENCY PROTECTED AUSTRALIAN INCOME FUND
ARSN 110 247 875**

AND

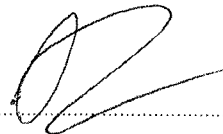
Second Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN
INCOME FUND ARSN 122 052 868**

Page 1

Deponent



Taken by



AFFIDAVIT

Filed on behalf of the First Respondent
Form 46, Version 1
Uniform Civil Procedure Rules 1999
Rule 431

Russells

Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: SCR:MKR:20150298

AFFIDAVIT

I, **JOHN RICHARD PARK** of Level 20, 345 Queen Street, Brisbane in the State of Queensland, Registered Liquidator and Chartered Accountant, state on oath:

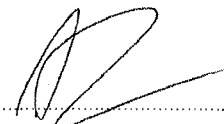
1. I am a Registered Liquidator and Chartered Accountant. I am the Liquidator of the LM Investment Management Limited (Receivers & Managers Appointed) (in Liquidation) ACN 077 208 461 ("**LMIM**").
2. LMIM is the Responsible Entity of the:
 - (a) LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("**ICPAIF**"); and
 - (b) LM Currency Protected Australian Income Fund ARSN 110 247 875 ("**CPAIF**"),
(which have come to be known as the "**Feeder Funds**").
3. Now produced and shown to me and marked "**JRP-01**" is an indexed, paginated bundle of copies of documents to which I shall refer in more detail in my affidavit. References to numbers in [#] are references to the page numbers of the documents in the bundle "**JRP-01**".
4. The Feeder Funds collectively hold 130,053,430 units in the LM First Mortgage Income Fund ARSN 089 343 288 ("**FMIF**"), being more than 25% of the total units. The Feeder Funds each hold the following number of units in the FMIF:
 - (a) 9,350,801 units are held by the ICPAIF; and
 - (b) 120,702,629 units are held by the CPAIF,
(collectively, the "**Unit Holding**").
5. By virtue of the Unit Holding, the Feeder Funds are entitled to receive distributions from the FMIF and have a significant interest in the assets and liabilities of the FMIF. That interest naturally extends to the conduct and outcome of any proceedings involving the FMIF in which the FMIF may be liable to pay any amounts, including adverse costs orders.
6. I have been provided with and have read the following documents:

Page 2

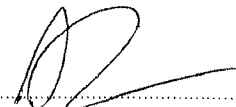
Deponent



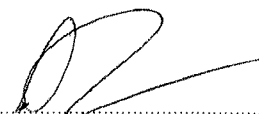
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- (a) reasons for judgment in in Supreme Court proceeding number 1237 of 2014 (“**Bellpac Proceeding**”), reported as *LM Investment Management Ltd (receiver apptd) (in Liq) v Drake & Ors* [2019] QSC 281;
 - (b) notice of appeal dated 20 December 2019 filed in Supreme Court proceeding number 14258 of 2019 (“**Appeal Proceeding**”); and
 - (c) application for judicial advice and associated affidavit material filed in this proceeding (“**Judicial Advice Proceeding**”).
7. As a general proposition, my view as liquidator is that it is, at a basic level, in the interests of the Feeder Funds that an appeal succeed - if the result of the appeal is that the Court of Appeal gives judgment for damages and that the defendants are able to meet that judgment. It was also at a basic level, in my view in the interests of the Feeder Funds that the trial succeed. By that, I mean only that this would (presumably) have increased the funds of the FMIF and therefore the funds notionally available to the Feeder Funds. However, there are now, in my mind, substantial uncertainties in relation to this litigation.
8. Mr Whyte did not consult me before commencing the Bellpac Proceeding or the appeal. As far as I am aware, he did not consult any other beneficiary before doing so.
9. Nor did Mr Whyte consult me at any stage about any possible settlement of the Bellpac Proceeding; about any offers made or received by LMIM. As far as I am aware, he did not consult any other beneficiary about any such matters.
10. I am, in the context of the present application, concerned that I have little or no knowledge of the following matters:
- (a) Beyond Mr Couper’s summary statement that the total costs of the FMIF of the Bellpac Proceedings has been approximately \$2 million, I do not know:-
 - (i) whether Mr Whyte proposes to claim from the FMIF remuneration for and indemnity for the legal costs of this application (or if he has already done so) and, if so, the amount of this remuneration and those legal costs;
 - (ii) how much it cost the FMIF to investigate the Bellpac Proceeding (I understand there were extensive investigations and also public examinations);



- (iii) what remuneration and expenses apart from legal costs Mr Whyte has claimed and been paid or will claim from the FMIF for:-
- (A) attendances to investigate the Bellpac Proceeding;
 - (B) the conduct and trial of the Bellpac Proceeding;
 - (C) the conduct and hearing of the Appeal Proceeding;
 - (D) this application.
- (b) I do not know what legal advice, if any, LMIM (or Mr Whyte on behalf of LMIM) received, or from whom, before instituting the Bellpac Proceeding, regarding:
- (i) evidence required to succeed in the Bellpac Proceeding; or
 - (i) the prospects of success in the Bellpac Proceeding.
- (c) I do not know what assessment, if any, Mr Whyte made, before instituting the Bellpac Proceeding, of the likely commercial result of the Bellpac Proceeding.
- (d) I do not know what may be the prospects of the defendants / respondents in their application under s 1317S of the *Corporations Act 2001*. My understanding is that Justice Jackson has not determined this defence (I refer to paras [285] and [286] of his Honour's judgment.)
- (c) I do not know what legal advice, if any, LMIM (or Mr Whyte on behalf of LMIM) received, or from whom, before instituting the Appeal Proceeding as to:-
- (i) the prospects of success in the Appeal Proceeding;
 - (ii) the prospects of the defendants succeeding in their defence under s 1317S.
- (e) I do not know whether Mr Whyte has undertaken any commercial or economic assessment of the Appeal Proceeding, including the impact on the creditors and members of the FMIF if the Appeal Proceeding succeeds or fails, including:-
- (i) the costs of the further proceedings for the s 1317S defence;
 - (ii) whether the respondents to the Appeal Proceeding are able to pay the

judgment LMIM seeks in the Notice of Appeal.

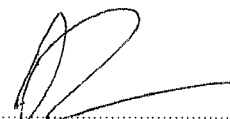
11. I am concerned that funds that will otherwise be available for distribution to creditors and members of the FMIF, including the Feeder Funds, will be dissipated by prosecution of the Appeal Proceeding, especially given that there is, to the best of my present understanding, a need for further proceedings to determine the s 1317S defences, even if the Appeal succeeds. I appreciate that a great deal of money has already been spent – however, this has been done without any judicial advice of which I am aware and without consulting me or, as far as I am aware, any other beneficiary. While it seems that the costs of the Appeal Proceeding will be far less than the costs of the Bellpac Proceedings, they are nonetheless substantial, especially taking into account the possibility of an adverse costs order and the apparent necessity of further proceedings for the defendants' s 1317S defences -which may render a successful appeal a pyrrhic victory at a very substantial cost.
12. In these circumstances, I am concerned that I am unable to make any informed judgment as to whether the present application represents little more than a pointless last ditch effort.
13. I am also concerned that LMIM may have claims against Mr Whyte, and/or LMIM's solicitors and/or counsel in relation to the institution and conduct of the Bellpac Proceeding, and that he or they might be liable to LMIM to indemnify it for some or all of the following costs and expenses that I understand have been incurred by LMIM in prosecuting the Bellpac Proceeding and the Appeal Proceeding:-
 - (a) The legal costs incurred in the Bellpac Proceeding;
 - (b) The remuneration drawn by Mr Whyte in relation to attendances on the Bellpac Proceedings;
 - (c) The legal costs incurred in the Appeal Proceeding;
 - (d) The remuneration drawn by Mr Whyte in relation to attendances on the Bellpac Proceeding;
 - (e) The liability for adverse costs orders in the Bellpac Proceeding and possibly in the Appeal Proceeding.
14. I am not in a position to say that LMIM has any such claim. These are matters I intend to investigate, if possible. However, I am, in these circumstances, concerned to know

Page 5

Deponent



Taken by




whether LMIM has, for the present application, taken independent advice from solicitors and counsel not involved in the institution or conduct of the Bellpac Proceeding as to the prospects of success of the Appeal Proceeding. This concern arises because LMIM's solicitors on this application are the same solicitors who instituted and conducted the Bellpac Proceeding.

15. In light of all of these concerns, in February 2020, I instructed LMIM's and my solicitors, Russells, to request the following documents from Gadens, the solicitors for the applicant:
 - (a) any legal advice on prospects or evidence that exists that led to Mr Whyte instituting the Bellpac Proceeding;
 - (b) any commercial or economic assessment of the appeal which Mr Whyte has performed in respect of the Appeal Proceeding; and
 - (c) Mr Whyte's estimate of his professional fees to conduct the Appeal Proceeding which he will seek to recover from the FMIF.
16. Pages [1] to [8] are true copies of the correspondence between Russells and Gadens between 17 February 2020 and 16 April 2020, which my solicitors have provided to me.
17. I am informed by my solicitors and believe that they have not been provided with copies of any of the documents referred to in paragraph 15 above as at the time of swearing this affidavit.
18. In these circumstances, I intend to make one final attempt to secure from the applicant LMIM – of which I am liquidator – information on a confidential basis so that I may make a private judgment about the matters which are of concern to me. If I remain unable to make any such judgment, I will proceed as I may be advised.
19. All the facts and circumstances herein deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear in this my affidavit.

Sworn by JOHN RICHARD PARK on 17 April 2020 at Brisbane in the presence of:


.....
John Richard Park
Deponent


.....
Name: ADAM SALEEM KHAN
Lawyer/Commissioner for Declarations/IP

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**

AND

First Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
CURRENCY PROTECTED AUSTRALIAN INCOME FUND
ARSN 110 247 875**

AND

Second Third Party: **LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
INSTITUTIONAL CURRENCY PROTECTED
AUSTRALIAN INCOME FUND ARSN 122 052 868**

CERTIFICATE OF EXHIBIT

Filed on behalf of the Applicants
Form 47, Version 2
Uniform Civil Procedure Rules 1999
Rule 435

Russells

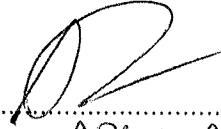
Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: SCR:MKR:20150298

CERTIFICATE OF EXHIBIT

Exhibit "JRP-01" to the affidavit of John Richard Park sworn on 17 April 2020



.....
John Richard Park
Deponent



.....
Name: ADAM AZEEM KHAN
Lawyer/Commissioner for Declarations/JP

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

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AND

Fifth Respondent: SIMON JEREMY TICKNER

AND

**First Third Party: LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
CURRENCY PROTECTED AUSTRALIAN INCOME FUND
ARSN 110 247 875**

AND

**Second Third Party: LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS
APPOINTED) AS RESPONSIBLE ENTITY OF THE LM
INSTITUTIONAL CURRENCY PROTECTED
AUSTRALIAN INCOME FUND ARSN 122 052 868**

**INDEX TO EXHIBIT "JRP-01"
TO AFFIDAVIT OF JOHN RICHARD PARK**

	DESCRIPTION	DATE	PAGE NOS
1.	Letter from Russells to Gadens	17.02.2020	1 - 2
2.	Letter from Gadens to Russells	02.03.2020	3

	DESCRIPTION	DATE	PAGE NOS
3.	Letter from Russells to Gadens	03.03.2020	4 - 5
4.	Letter from Russells to Gadens	08.04.2020	6 - 7
5.	Letter from Gadens to Russells	16.04.2020	8

RUSSELLS

17 February 2020

Our Ref: SCR:MKR:20150298

Gadens Lawyers
GPO Box 129
BRISBANE 4001

By Email: scott.couper@gadens.com

Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020 ("Judicial Advice Application")

As you know, we act for LM Investment Management Limited as Responsible Entity of the:

1. LM Currency Protected Australian Income Fund; and
2. LM Institutional Currency Protected Australian Income Fund.

As holders of approximately 30% of the units in the FMIF, our clients have an interest in the Judicial Advice Application.

To assist our clients in considering whether it is necessary or appropriate for them to appear in the Judicial Advice Application, would you please let us have copies of:

1. Any advice on prospects or evidence that exists that led to your client instituting the original proceedings (BS12317 of 2014); and
2. Any advice on the prospects of the appeal.

We assume that some confidentiality arrangement in respect of such advice will be required. Would you please advise what arrangement your client seeks in respect of the advice. Naturally, our clients will accede to any reasonable regime to maintain the privilege in such advice.

We would appreciate if you would let us know the terms on which your client will release the advice and confirm that your client will, in fact, release the advice as soon as possible and in any event by this Friday, 21 February 2020.

Liability limited by a scheme approved under professional standards legislation

Brisbane
Postal - GPO Box 1472, Brisbane QLD 4001 / Street - Level 18, 300 Queen Street, Brisbane QLD 4001
Telephone (07) 304 8888 / Facsimile (07) 304 8899
RussellLaw.com.au

Please do not hesitate to call the writer should you wish to discuss.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Millie Russell', with a long, sweeping underline that extends to the right.

Millie Russell
Senior Associate

Direct (07) 3004 8829
Mobile 0409 153 692
MRussell@RussellsLaw.com.au

20150298/2706387

Our Reference Scott Couper 201401822
Direct Line 3231 1688
Email claudia.dennison@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

2 March 2020

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

Russells Law
Level 18, 300 Queen Street
BRISBANE QLD 4000

GPO Box 129
Brisbane QLD 4001

Attention: Millie Russell

T +61 7 3231 1666
F +61 7 3229 5850

By email: MRussell@RussellsLaw.com.au

gadens.com

Dear Colleagues

**LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v
Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020**

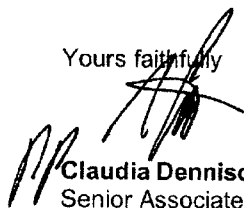
We refer to your letter dated 17 February 2020 requesting provision of copies of certain categories of advice provided to Mr Whyte.

Your letter constitutes a request for copies of communications which are both confidential and legally professionally privileged. We confirm Mr Whyte does not waive privilege in the advice provided to him in relation to the first instance proceeding or the appeal.

There is no need for those confidential and privileged advices to be disclosed in relation to the application for judicial advice. In that regard, we refer to *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 and *Macedonian Orthodox Community Church St Petka Inc v Petar* (2006) 66 NSWLR 112.

Otherwise, we note that as your firm acts for the responsible entity of the two funds referred to in your letter, you have been provided with access to the court documents which have been filed in the judicial advice proceeding through the regime for substituted service which was put in place on 14 February 2020. That material should be sufficient for those funds to determine whether it is necessary or appropriate for them to appear in the judicial advice application.

Yours faithfully


Claudia Dennison
Senior Associate

RUSSELLS

3 March 2020

Our Ref: SCR:MKR:20150298

Gadens Lawyers
GPO Box 129
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By Email: scott.couper@gadens.com

Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund (“FMIF”) v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020

Thank you for your letter dated 2 March 2020.

I apologise if we seem to be at cross-purposes. We act for LMIM which, together with Trilogy Funds Management Limited (“Trilogy”) are the responsible entities for funds which account for 50% of the equity in the LM First Mortgage Income Fund (“FMIF”).

The appeal is being conducted primarily for the benefit of our clients and Trilogy.

Not only do our respective clients have the same interest, but Mr Whyte – who is authorised to sue in the name of LMIM – is, in a very real sense, serving our clients and Trilogy and prosecuting the appeal to their benefit.

The Bellpac litigation and the proposed Bellpac appeal is litigation involving a trustee in the third category described by Lightman J in *Alsop Wilkinson (a firm) v Neary*. Accordingly, the litigation involves no dispute about the trusts on which the scheme property of the FMIF is held and nor does the Bellpac litigation or the Bellpac appeal involve any dispute with our clients, Trilogy or any other beneficiary of the FMIF.

In these circumstances, we are unable to see any reason why Mr Whyte would not – and, more importantly, should not – share with us any confidential legal advice on which he proposes to rely in seeking judicial advice. This is particularly so since we are of course perfectly willing to provide whatever undertakings as to confidentiality Mr Whyte might reasonably require.

We refer, in this context, to your reference to the *Macedonian Church* case. With respect, the question about the “need” to share “confidential and privileged advices” in that litigation was not decided and, as we have mentioned, in any event is radically different where, as here, the relevant parties – the trustee and our client beneficiaries – are not in dispute.

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A more informative discussion of the relevant principles is, we think, that of Justice Edelman in *Plan B Trustees Ltd v Parker* [No. 2].¹ To similar effect are the doubts expressed by Kenneth Martin J in *Wood (as co-executor and trustee of the Will of the deceased) v Wood* [No. 4].²

Moreover, because Mr Whyte is litigating on behalf of and for the benefit of our clients and the other members of the FMIF (in conformity with the order of Dalton J appointing him to this role), we do not think that the provision to our clients of any legal advice could possibly be said to amount to a waiver of the legal professional privilege that subsists in that advice. Plainly, our client, in its respective trustee capacities of each of the two feeder funds, has a common interest in the subject matter of the advice with Mr Whyte.

After all, the appellant is the same company as our client – it is just that you are instructed by one of its officers and we by another.

We therefore ask Mr Whyte to reconsider his refusal to supply the legal advice to us, in the light of what we have said above.

The liquidator has no desire to litigate the question of whether the views expressed by Justices Edelman and Kenneth Martin in the cases we have mentioned is now to be preferred in Queensland. Rather, because we each act for the same company, we think there is neither any need nor any justification for that issue to be litigated and for yet more of the funds of the beneficiaries to be wasted by unnecessary debates with Mr Whyte.

We look forward to hearing from you.

Yours faithfully



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20150298/2712450

¹ [2013] WASC 216, at [42]
² [2014] WASC 393, at [98] – [135]

RUSSELLS

8 April 2020

Our Ref: SCR:MKR:20150298

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Dear Colleagues

LM Investment Management Limited as Responsible Entity of the LM First Mortgage Income Fund (“FMIF”) v Drake & Ors – Supreme Court of Queensland Proceeding No. 1146 of 2020

We refer to our recent correspondence in respect of the above proceeding.

As you will appreciate, our clients’ affidavit material is due on 17 April 2020.

In order to properly consider the position in respect of your client’s application, it is necessary for us and our clients to review and consider:

1. Any legal advice Mr Whyte received in respect of the appeal;
2. Any commercial/economic assessment of the appeal which Mr Whyte has performed in respect of the appeal – including any assessment which demonstrates the position of the FMIF if it is successful in the appeal versus if it is unsuccessful in the appeal;
3. Mr Whyte’s estimate of his professional fees to conduct the appeal, which (we assume) he will seek to recover from the FMIF. We note that Mr Couper has provided an estimate of the legal fees to prosecute the appeal in his affidavit sworn on 31 January 2020.

We reiterate that our respective clients have the same interest, but your client, Mr Whyte – who is authorised to sue in the name of LMIM – is, in a very real sense, serving our clients and Trilogy and prosecuting the appeal to their benefit.

In our letters dated 17 February 2020 and 3 March 2020, we have clearly set out our clients’ position in respect of any claim for legal professional privilege. For the reasons set out in our previous correspondence, there is no basis on which your client can refuse to provide our client with copies of any advices (or, for that matter, the other documents now requested). The same reasoning applies to any claim for legal professional privilege your client makes in respect of the other documents sought by our clients.

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It is clear that those documents and information are necessary to allow our clients to form a considered view about the application and the appeal.

There is no basis on which the provision to our clients of the documents sought could possibly be said to amount to a waiver of the level professional privilege that subsists. Plainly, our client, in its respective trustee capacities of each of the two feeder funds, has a common interest in the subject matter of the advice with Mr Whyte and, as such, common interest privilege will apply.

Your client's position that provision of the advice would be unfair and unduly open the door for provision of the advice to other members at large is, with respect, irrelevant. Our client has a common interest in the subject matter of the advice with Mr Whyte. Other members are not in the same position as our respective clients.

In addition, our clients have offered undertakings reasonable to maintain the privilege.

We ask that your client reconsider his refusal to supply the legal advice to our clients and that he provide the other documents sought

If a review of those documents and the legal advice demonstrates that there is a reasonable basis for the appeal, both legally and commercially, our clients will not oppose your client's application for judicial advice to approve his prosecution of the appeal.

If your client does not provide the documents sought, our clients will have no choice but to oppose the application.

In circumstances where our client's material is due next Friday, 17 April 2020, we ask that your client provide the documents or advise his reconsidered position by 4:00pm on Tuesday, 14 April 2020.

Yours faithfully



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16 April 2020

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Dear Colleagues

**LM Investment Management Ltd as Responsible Entity of the LM First Mortgage Income Fund v
Drake & Ors - Supreme Court of Queensland Proceeding No 1146 of 2020**

We refer to your letter dated 8 April 2020.

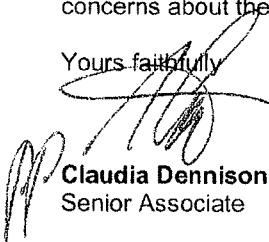
We have already set out Mr Whyte's position in relation to this issue. That position has been consistent throughout, in particular since our letter of 2 March 2020. Your clients have had ample time to decide whether to file evidence on 17 April 2020.

The central issue is that you have indicated that your clients will not oppose the application for judicial advice if there is material which demonstrates a reasonable legal and commercial basis to appeal. As to the legal basis, we refer to the written submissions relied upon by the parties at first instance, but particularly the submissions by the Plaintiff. As to the commercial basis, the key factors which influence that assessment are already in evidence.

One further issue should be noted. Your letters have referred to your client and Trilogy together accounting for 50% of the equity in the FMIF and have contended that the appeal is being conducted primarily for the benefit of your client and Trilogy. Mr Whyte understands that Trilogy does not oppose the application for judicial advice.

Please advise if any of the investors of the feeder funds have approached your client or your firm with any concerns about the proposed appeal or the application for judicial advice.

Yours faithfully



Claudia Dennison
Senior Associate

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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER **Applicants**

and

LM INVESTMENT MANAGEMENT LIMITED
and OTHERS **Respondents**

BRISBANE

10.56 AM, THURSDAY, 29 NOVEMBER 2018

DAY 1

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: So this is 3383 of 2013, Bruce & LM Investment Management Limited. Would you like to announce your appearance.

5 MR D. DE JERSEY: If it pleases the court, De Jersey, initial D.. I appear instructed by Tucker & Cowen, and I appear for Mr David White, the court appointed receiver.

HER HONOUR: And are you one of the investors?

10 MR S. ANDREWS: Sorry, your Honour, I was just filling out this form.

HER HONOUR: Yes.

MR ANDREWS: Yeah, I'm a member of LM Investments, Shane Andrews.

15 HER HONOUR: All right. So Mr Andrews – and, sorry, I know that there's a couple of different funds involved here, I think. So you're a member, is it, of the LM First Mortgage Income Fund?

20 MR ANDREWS: Yeah, I got a letter from it - - -

HER HONOUR: Yes.

MR ANDREWS: - - - saying the court – the hearing was on today.

25 HER HONOUR: Yes, no - - -

MR ANDREWS: Yep.

30 HER HONOUR: - - - well, that's why you were given a letter so to give you the opportunity - - -

MR ANDREWS: And I've just been handed this extensive document that I was told you had a copy of.

35 HER HONOUR: Yes, you want a time to read it?

MR ANDREWS: I don't think - - -

40 HER HONOUR: You can have time. I've got plenty of other matters I can do.

MR ANDREWS: Well, I don't want to hold these guys up if - - -

HER HONOUR: No, it doesn't matter. What is your opposition?

45 MR ANDREWS: Well, simply, I got a letter back in June and there was a hearing, and I was too sick to attend, and they were claiming a million dollars. And now they're claiming for the same six – another six months, it's \$2 million. And I'm

thinking, like, this has been going on for ten years. I mean, you've heard the old saying, you know, how many snouts in the trough, are there? I mean, we're down
- - -

5 HER HONOUR: So you want - - -

MR ANDREWS: Is there – is there any - - -

10 HER HONOUR: - - - to make submissions that you think that the fees that are being asked for are too high.

MR ANDREWS: Are exorbitant, yeah.

15 HER HONOUR: All right. So, Mr De Jersey, have you given a copy of your outline to - - -

MR ANDREWS: Yeah, he has.

20 HER HONOUR: - - - Mr Andrews?

MR DE JERSEY: Yes, your Honour, that's the document.

25 HER HONOUR: That's the document. All right. Well, what I'll do, the next matter that I'm going to hear - - -

MR ANDREWS: I have briefly just read through - - -

HER HONOUR: Yes.

30 MR ANDREWS: - - - and I've seen enough. There's been a lot of people asking for a lot of money, but is there any – what can members do to – well, there's a Royal Commission going on at the moment and the bank's ripping people off. To me, this is just – like, I've been in real estate for a while. I'm not any – I'm no great financial guru, but I just can't understand why 10 years on, they're charging us or
35 planning to – well - - -

HER HONOUR: Well, I think what you're going to - - -

40 MR ANDREWS: - - - \$2 million dollars for six months work.

HER HONOUR: Yes.

MR ANDREWS: That's - - -

45 HER HONOUR: I think you'll need to have a look at the material.

MR ANDREWS: Yeah.

HER HONOUR: Now, the material, was that made available on a web page for members to access?

5 MR DE JERSEY: Correct, your Honour.

HER HONOUR: Yes. So what I'm going to do is, I've got other matters that I can hear - - -

10 MR ANDREWS: Yeah.

HER HONOUR: I want you to read the submissions carefully, and I want you to speak to Mr De Jersey and his instructing solicitor and, you know, put the questions that you're raising - - -

15 MR ANDREWS: Yep.

HER HONOUR: - - - because he's better answering them than me.

20 MR ANDREWS: Yep, yep, absolutely.

HER HONOUR: And then when you come back on, I'll hear your submissions. And you're entitled. You were given notice for a purpose because you're entitled to put matters before the court in order to convince the court not to approve the remuneration at the particular level, or maybe to require some other assessment of
25 the costs. But I will tell you, you need to have regard to the actual work that's being done by the receiver and those who are engaged by him because there's a number of pieces of litigation, and you'll need to have a look at the work.

30 But I want you to have read Mr De Jersey's outline and use the opportunity to put your questions to him first before we then have the hearing. All right. Now, have you got a copy of your outline in case I get an opportunity to look at it ahead of time?

MR DE JERSEY: Your Honour, just two matters. There are some affidavits to be filed by leave. Does your Honour wish me to keep them for now?

35 HER HONOUR: Yes, keep them for now - - -

MR DE JERSEY: Just the outline.

40 HER HONOUR: - - - just give me the outline - - -

MR DE JERSEY: Yes, your Honour.

45 HER HONOUR: - - - because I've asked Mr Andrews to read it, I want to have a - - -

MR DE JERSEY: Yes, your Honour, and - - -

HER HONOUR: - - - look at it if I get an opportunity.

MR DE JERSEY: - - - Mr White is personally here, and he will also answer questions that are raised.

5

HER HONOUR: Well, there you are. Mr White's here as well, so that's even better than talking to Mr De Jersey or his solicitor. All right. Now - - -

MR ANDREWS: Thank – thank you, your Honour.

10

ADJOURNED

[11.02 am]

15 **RESUMED**

[11.31 am]

HER HONOUR: So, Mr De Jersey, is your matter ready now?

20 MR DE JERSEY: Yes, thank you, your Honour.

HER HONOUR: All right. So I'm back doing the matter of Bruce & LM Investment Management Limited. Now, come forward, Mr Andrews.

25 MR ANDREWS: Thank you, your Honour.

HER HONOUR: Now, Mr Andrews, I should tell you that I've actually looked at this file previously because I am one of the judges who have approved the remuneration in the past and that's why I could tell you something about it.

30

MR ANDREWS: Yep.

HER HONOUR: And I'm going to manage these applications in future so that Mr White, when he brings the applications, doesn't have to explain it - - -

35

MR ANDREWS: Go through [indistinct] again, yep.

HER HONOUR: - - - to a new judge every time. They'll usually be brought when I'm in applications, so if you want to continue to add some rigour to the process, I wanted to explain to you that it's not a conspiracy that I'm hearing the matter. It's been done for the efficient management of the business of the court, and, also, to reduce the amount of time the lawyers have to be here because then they don't have to - - -

40

45 MR ANDREWS: Charge us.

HER HONOUR: - - - spend the time explaining to another judge - - -

MR ANDREWS: Yep.

HER HONOUR: - - - the background. So are you right for us to start hearing the matter?

5

MR ANDREWS: Well - - -

HER HONOUR: I'm happy to. I just want to make sure you've had an opportunity to have your questions answered and look at the submissions.

10

MR ANDREWS: Yeah, quite simply, they were all very, very helpful. They gave me a copy of Mr De Jersey's one and also Dave – the other – David Schwartz has given me a copy of another document - - -

15

HER HONOUR: Yes.

MR ANDREWS: - - - and pointed out the parts to read, and I'm suitably happy with their explanations. They've been very forthcoming, and I very much appreciate you going to the trouble of giving a little one-man person just a – just been a voluntary lifesaver for forty years and – and this is all a bit much, but they were able to explain to me where they're at, why they're doing it, what's happening, and I'm very happy with their explanations, so - - -

20

HER HONOUR: Well, that's good. I'll then hear Mr De Jersey. But, you know, there will be ongoing applications in this matter - - -

25

MR ANDREWS: Yep.

HER HONOUR: - - - and you're always welcome, that's why you were given the notice.

30

MR ANDREWS: Yep.

HER HONOUR: And I have to tell you, I've done, over the years, many applications where investors and fail schemes have been very unhappy about, well the fact that the scheme failed, and then they're unhappy about how long it takes to pick up all the pieces. And I always welcome the investors to come into the court and to participate and actually express what their angst is. And even though I can't do much to address it, I think it is important that it be on the record - - -

40

MR ANDREWS: Yeah.

HER HONOUR: - - - and that it's considered. So you're always welcome to come, and you can tell fellow investors the same thing. All right.

45

MR ANDREWS: Okay.

HER HONOUR: So - - -

MR ANDREWS: Are you right for me to stay or - - -

5 HER HONOUR: Yes, no, you can stay because there might be something you want to add. So, Mr De Jersey, have you got a list of material?

MR DE JERSEY: I do, your Honour. I'll hand it up. Your Honour, in the bundle I've handed up there are three affidavits which I seek your Honour's leave and
10 they're numbers 7, 8 and 9 on the list.

HER HONOUR: All right. So I give you leave to read and file those affidavits.

MR DE JERSEY: There's also, by way of explanation, a schedule of parties served,
15 which references the evidence in the affidavits that I've handed up, and, also, court document 406.

HER HONOUR: Yes, now, the schedule of parties served, should I make that an
20 exhibit?

MR DE JERSEY: Yes, please, your Honour.

HER HONOUR: I'll make that exhibit 1, and then I'll have a look at it and you can
25 explain to me.

EXHIBIT #1 ADMITTED AND MARKED

30 HER HONOUR: All right. So did Mr White get other responses other than Mr Andrews?

MR DE JERSEY: He did, your Honour, and that's document 9 on my list. The one
35 that your Honour's just given leave for Mr White's affidavit sworn today.

HER HONOUR: Yes, I'll have a look at that. Now, should we call the matter in
case there's anybody else outside?

MR DE JERSEY: I think that would be prudent.
40

HER HONOUR: So should we call the first respondent and the second respondent?

MR DE JERSEY: That would sufficiently identify the matter, your Honour.

45 HER HONOUR: Yes, so here you are, Mr Vale. Would you do the first and second respondents and we'll see if there's any other appearances. Now, I'll just go through this schedule. So ASIC hasn't wanted to have any contribution?

MR DE JERSEY: That's right, your Honour.

HER HONOUR: So the liquidators don't want to have any contribution either.

5 MR DE JERSEY: Subject to one thing I'll take your Honour to shortly. A letter was received yesterday evening, which I'll take your Honour to.

HER HONOUR: Thank you. Now, is there anything about the schedule that you should draw my attention to?

10

MR DE JERSEY: No, your Honour, there isn't.

HER HONOUR: No, so it covers everyone who should have been notified of this remuneration application.

15

MR DE JERSEY: There is one matter - - -

HER HONOUR: Yes.

20 MR DE JERSEY: - - - and that's that during the period for which the remuneration was claimed, Mr White has issued two reports.

HER HONOUR: Yes.

25 MR DE JERSEY: The second report was the most recent one, obviously in November. His affidavit which was served in compliance with Justice Peter Lyons directions from 2015, the substituted service orders directions – his big affidavit, the main one, accidentally included two copies of the earlier report to members, rather than a copy of each report to member.

30

HER HONOUR: Okay.

MR DE JERSEY: So what was done was – of course, these reports – and Mr White's evidence is to this effect – these reports are circulated to members as they're produced - - -

35

HER HONOUR: Yes, so all the members have both reports?

MR DE JERSEY: They have, and the second report, out of an abundance of caution, was notified to members my email. Now, it wasn't served in compliance with Justice Peter Lyons order, but Mr White swears - - -

40

HER HONOUR: It has been notified.

45

MR DE JERSEY: He identifies the costs that would have been incurred in order to do it according to Justice Peter Lyons orders, again.

HER HONOUR: Yes.

MR DE JERSEY: The submission is that what he's done is sufficient.

5 HER HONOUR: All right. Yes, no, I don't have any difficulty with that.

MR DE JERSEY: And then, the letter from the liquidator's solicitors - - -

HER HONOUR: Yes, where is that?

10

MR DE JERSEY: It's exhibited to Ms Malloy's affidavit, document 8 on my list.

HER HONOUR: Okay. Yes, no, I've got that one.

15

MR DE JERSEY: And it starts at page 28 of the exhibits.

HER HONOUR: Yes. All right. So I should read that?

MR DE JERSEY: Yes, please, your Honour.

20

HER HONOUR: All right. So you've probably got to address each of those matters.

25 MR DE JERSEY: I am, and before I do, your Honour, if your Honour turns to exhibit page 30 - - -

HER HONOUR: Yes.

MR DE JERSEY: - - - your Honour will find - - -

30

HER HONOUR: This is the response.

MR DE JERSEY: - - - the response to it.

35 HER HONOUR: Okay. I'll just read that. All right. So I need to have a look at Mr White's affidavit.

MR DE JERSEY: Yes, your Honour.

40 HER HONOUR: So that's document 405, is that right, that's the one?

MR DE JERSEY: It's 401, your Honour.

45 HER HONOUR: Four-O-one. All right. I knew I needed other parts. So I'll need to look at the relevant period. Can you just tell me what the period is?

MR DE JERSEY: It begins on the 1st of May this year and it ends on the 31st of October.

5 HER HONOUR: Yes, because I looked for the definition in the first part of Mr White's affidavit. Maybe it's in the application, is it? I just couldn't see – yes, well, the period's specified in the application. I just couldn't find the definition of relevant period. It might be that I just didn't see it.

10 MR DE JERSEY: Your Honour, it's defined on page 8.

HER HONOUR: It is too. I thought I'd look in that table. Okay. Thanks. So assets is not just dealing with cash?

15 MR DE JERSEY: No, and it's the litigious matters that are presently being dealt with.

HER HONOUR: Yes, and are there trial dates?

20 MR DE JERSEY: No, but I was going to take your Honour to each of the proceedings. What Mr White does is he gives his best estimate of either when these proceedings are going to go mediation or trial. And two of them is early next year.

HER HONOUR: Okay. All right. Now, what else do you need to draw to my attention?

25 MR DE JERSEY: Your Honour - - -

30 HER HONOUR: So, I mean, numbered paragraph 1 in Russell's letter, that is a sort of criticism that's often made against, you know, one sort of insolvency practitioner - - -

MR DE JERSEY: By another.

35 HER HONOUR: - - - by another, and you say that that's answered by paragraph 1.

40 MR DE JERSEY: It is, your Honour, but what 1 in the Russell's letter loses sight of is the fact that that claim, that one that's referred to there, is a claim for \$200 million, and what the work related to in the relevant period was, in the most part, responding to a request for particulars. And the work that was required to respond to that request for particulars, which actually extended to 400 individual requests, involved analysing a loan book and loans over nine accounting periods.

45 HER HONOUR: Yes, so it wasn't actually doing a forensic exercise, it was doing a step in the litigation.

MR DE JERSEY: Exactly, in order to give particulars to counsel and solicitors in order that the proceeding could be advanced. And my submission is that by

providing those particulars – of course, not only did that satisfy the court rules, but also it advances the proceeding in the sense that it was likely it probably will promote either a better compromise at mediation for the fund members, or Mr White, in simple terms, will prove more of his claim.

5

HER HONOUR: All right. So what do you need to take me to next?

MR DE JERSEY: What the letter doesn't refer to in relation to paragraph 4 is this is a duplication point, is that in Mr White's affidavit at paragraph 44, he actually swears that there's been no duplication. He swears each task is only recorded once and the time for carrying out each task is only recorded once, so - - -

10

HER HONOUR: Yes.

MR DE JERSEY: There's some evidence referred to in the responsive letter, but not that. Perhaps the only other things I should note, in relation to paragraph 6, there's a criticism made about delegation.

15

20

HER HONOUR: Yes.

MR DE JERSEY: Paragraphs 39 to 42 of Mr White's affidavit and paragraph 47 of my outline of submissions addresses that topic. And the essence of Mr White's evidence is that yes, some work was done by partners who as a matter of common experience and consistent with the evidence charge more, that that was necessary because of their experience and expertise and knowledge in the particular areas to which the tasks were delegated.

25

So, for example, there's one partner, he's very knowledgeable about all the litigation. Mr White used his knowledge in order to avoid it being necessary for someone at a lower level to have to become familiar with the litigation, and it potentially costs more. So it's a valued judgement that was made, but in my respectful submission, it's not one that can be impeached.

30

And the only other matter in relation to the letter, I should draw to your Honour's attention, is paragraph 2. Those claims which were settled total approximately \$30 million - - -

35

HER HONOUR: Yes, I saw the response to that.

MR DE JERSEY: It's discontinued and the advantage obviously for the fund is that it's not exposed to those claims, so tangible benefits.

40

HER HONOUR: So where in Mr White's affidavit does he deal with the projected course of the administration of receivership?

45

MR DE JERSEY: Certainly, your Honour. If your Honour begins at the first claim dealt with, the auditors claim, at paragraph 64 on page 37, and at the bottom of that

page, paragraph 69, he refers to a possible mediation in the first quarter of '19. He swears if it doesn't settle at mediation, the matter is likely to take between 18 months and two years to be determined, and determined – obviously judgement, not just trial. So that's the auditor's claim as it's described.

5

And I'm reminded that the mediation has actually been set down for March of next year. And I've referred to that fact, your Honour, in paragraph 54 of my outline of submissions. It's the 4th and 5th of March.

10 HER HONOUR: Now, I think I saw it, but a table somewhere that showed what the monthly remuneration was over each of the periods in which the court approval's been sought. Yes, there it is. It was at page 9. So in the current period, what does the monthly remuneration work out as?

15 MR DE JERSEY: Sorry, is your Honour looking at page 9 of the exhibits?

HER HONOUR: No, of the affidavit.

MR DE JERSEY: Your Honour can see - - -

20

HER HONOUR: It goes over to page 10.

MR DE JERSEY: Yes, your Honour, it has increased - - -

25 HER HONOUR: Yes.

MR DE JERSEY: - - - by reason of the fact that, in particular, the auditor's claim. There was intensive work required during this relevant six-month period to satisfy the request for particulars that - - -

30

HER HONOUR: Yes, and this is one of the pieces of litigation - - -

MR DE JERSEY: Exactly.

35 HER HONOUR: - - - that's ongoing.

MR DE JERSEY: The \$200 million claim.

HER HONOUR: Yes.

40

MR DE JERSEY: And that's obviously undesirable. If it could be avoided, it would have been, but it's regrettably necessary to respond to the defendants to that litigations request. But, also, the benefit that it produces is two-fold, may promote a better settlement next year, and if the matter has to go to trial, satisfies a judge like

45 your Honour that the claim is proved, in simple terms - - -

HER HONOUR: Yes.

MR DE JERSEY: - - - so that work produces value.

HER HONOUR: All right. Now, what else should you draw to my attention?

5 MR DE JERSEY: I should just take your Honour to some of these other claims. So
the second one – I took your Honour to the auditor’s claim – the claim against the
MPF, which is one of the other funds, your Honour can see in paragraph 72 of the
affidavit at page 38, the quantum of that claim is identified at little over fifteen and a-
10 Honour turns over to 39 – trial bundles being prepared, further disclosure requests
being responded to, the trial bundle being amended to cater for those.

15 And your Honour can see if your Honour looks at page 40, paragraph (f), Justice
Jackson made directions on the 16th of August – and then on the third line – with a
view to preparing the matter for trial in early to mid 2019. And then if your Honour
looks at paragraph 76, your Honour can see that directions also cater for witness
affidavits. So your Honour can see that matter as close to trial.

20 HER HONOUR: Yes. Well, I’m sure members like Mr Andrews are anxious that
some of these matters are either resolved or get to trial, but looks as if you’re on
track then for some trials in 2019.

25 MR DE JERSEY: And the big claims, and I’ll take your Honour to one other one
that I was - - -

HER HONOUR: Yes.

MR DE JERSEY: It’s a big one, but they’re on the commercial list.

30 HER HONOUR: Yes.

MR DE JERSEY: So in order to achieve what your Honour just identified, that’s
why that was done. Page 44 - - -

35 HER HONOUR: Yes.

MR DE JERSEY: - - - that’s the feeder fund claim, and your Honour can see there
at paragraph 88, that’s a claim for approximately \$55 million.

40 HER HONOUR: And so the - - -

MR DE JERSEY: That’s settled.

HER HONOUR: That’s settled.

45

MR DE JERSEY: Your Honour can see in paragraph 91 - - -

HER HONOUR: Yes, that there was a mediation.

MR DE JERSEY: - - - there was a mediation. Now, obviously, this settlement will need to have court approval - - -

5

HER HONOUR: Yes.

MR DE JERSEY: - - - and there are some loose ends that need to be tied up. There's nothing Mr White knows of, however, to make him believe that the settlement won't proceed according to its terms.

10

HER HONOUR: Yes.

MR DE JERSEY: He swears, however, on paragraph 92 at page 45, that if against expectations the settlement falls apart, the trial would be likely to take place in late '19 or early 2020.

15

HER HONOUR: Yes.

MR DE JERSEY: And then if your Honour turns to page 47 of the affidavit, your Honour will see another claim, the LMIM claim in this court, 11560 of 16. That, as your Honour can see from paragraph 97 at page 48 is a claim in respect of loan management fees presently quantified at \$13.7 million, and, also, in relation to payments of feeder funds, quantified presently in the amount of \$12.9 million approximately.

20

25

That proceeding is presently stayed on the order of Justice Jackson following an application made by Mr White because it may not be necessary to pursue that claim because it'll be used as a set-off, if necessary. So the purpose of the stay was obviously to avoid unnecessarily occurring costs in relation to proceedings that might ultimately become unnecessary, depending on how other claims are resolved or proceed at trial.

30

HER HONOUR: Well, Mr Andrews, I mean, Mr De Jersey's submissions give me, but they also give you, I think, some idea of the - - -

35

MR ANDREWS: Yeah, I've been following very closely and - - -

HER HONOUR: Yes.

40

MR ANDREWS: - - - making lots of notes.

HER HONOUR: Yes – of the quite large litigation that the receiver's involved in on behalf - - -

45

MR ANDREWS: Yeah.

HER HONOUR: - - - of the members. So I know that the remuneration that's sought is large, but unfortunately, the fees to be spent in order to pursue the recovery of the claims.

5 MR ANDREWS: I'm reminded of the simple saying, pay peanuts, you get monkeys.

HER HONOUR: Well, I'm sure Mr White will be very happy to hear you say that. That said - - -

10

MR DE JERSEY: Yes, your Honour.

15 HER HONOUR: - - - I've seen this happen so often that – like, members don't understand what's involved, and I realise that, you know, Mr White is giving, you know, full reports. I'm just wondering whether in the whole scheme of things that there's some way of applying – to getting some sort of independent verification of the remuneration.

20 MR ANDREWS: Yep.

25 HER HONOUR: The reason I say this is that with lawyers fees, for example, you can get a cost assessor to do the costs, and I think I am one of the few judges that has actually done an assessment of receiver's fees that was very bitterly fought in that Atlantic 3 litigation. I'm just wondering whether at some stage, even though it will add another cost, whether Mr White should consider just taking a snapshot of a period and getting an independent assessment.

MR DE JERSEY: As your Honour knows, he's in court now - - -

30 HER HONOUR: I know, that's why I'm saying this.

MR DE JERSEY: Yes, he's listening to your Honour.

35 HER HONOUR: Yes. I'm just saying, and it also would be of some comfort to the court too - - -

MR DE JERSEY: Yes.

40 HER HONOUR: - - - but I realise that it would have a cost. I know from when I did it on the Atlantic 3 one, if you've read that judgement - - -

MR DE JERSEY: I haven't, no.

45 HER HONOUR: - - - you will see that very little was shaved off, despite all of the objections. When the explanations were given by the receiver, very little was shaved off. But that is, in effect, an independent verification that then stands the accounting profession in good stead for going forward in other matters.

MR DE JERSEY: Your Honour, obviously take on board completely what your Honour's put to me, and can I just make one submission that may give your Honour some comfort. Your Honour's aware of the position of the liquidators - - -

5 HER HONOUR: Yes.

MR DE JERSEY: - - - and who they're represented by, and - - -

HER HONOUR: Yes, and I know that Mr White is being scrutinised.

10

MR DE JERSEY: Yes, very intensely. Now, to the extent that their letter says they haven't reviewed everything and they couldn't because that, itself, would cost a lot of money - - -

15 HER HONOUR: Yes.

MR DE JERSEY: - - - but this particular receivership is being conducted under their very watchful eyes, and Mr White will obviously take on board exactly what your Honour said, but - - -

20

HER HONOUR: Well, I mean, it might not be feasible, but I just raise it - - -

MR DE JERSEY: Yes.

25 HER HONOUR: - - - because I know that - I'll let your instructor give you instructions.

MR DE JERSEY: And I'm reminded, as well, that in addition to the liquidators, everything is scrutinised by the DB Receivers.

30

HER HONOUR: The - - -

MR ANDREWS: If your Honour turns to Mr White's affidavit - - -

35 HER HONOUR: Yes.

MR DE JERSEY: - - - your Honour will see it referenced, page 6, the Deutsche Bank receivers, Mr Hayes and Mr Connolly.

40 HER HONOUR: Okay. So they're scrutinising it as well.

MR DE JERSEY: So there are a number of layers of - - -

45 HER HONOUR: Well, and that's true. I have to say, looking at Russell's letter, it's those sort of comments that were made in that Atlantic 3 one - - -

MR DE JERSEY: Yes.

5 HER HONOUR: - - - that ended up being the subject of going through a line item by line item of every bill that had been rendered by the receiver, I think, over a certain period, anyway. I suppose that is a level of scrutiny, the liquidators, because I suppose that's what I'm really suggesting, just having some sort of independent assessment every now and then on a, you know, just a short period of the administration.

MR DE JERSEY: Yes, your Honour.

10 HER HONOUR: It could even be done in-house. Sorry, what page was that Deutsche Bank reference on?

MR DE JERSEY: Page 6. And the explanation of who they are - - -

15 HER HONOUR: Yes, no, I saw – it's going over to paragraph - - -

MR DE JERSEY: Eleven and 12.

20 HER HONOUR: Yes. Okay. Yes. So now, anything else that you should draw my attention to?

MR DE JERSEY: No, there isn't, your Honour, and I have a draft order, if it's convenient.

25 HER HONOUR: So have you shown that to Mr Andrews?

MR DE JERSEY: Not yet, no. Your Honour, I also brought with me a copy in case your Honour might find it of assistance of your Honour's two previous judgements delivered.

30 HER HONOUR: That's okay. Yes.

MR DE JERSEY: Yes.

35 HER HONOUR: So have you seen that draft order, Mr Andrews? That reflects the application, and after having had a look at Mr De Jersey's outline and his drawing my attention to the letter from the solicitors for the liquidators, who are probably the severest critics of the receiver, even though I know you've got to look at it twice when you see what the quantum is, I can see how the receiver has incurred
40 remuneration to that extent.

MR ANDREWS: Yeah, I saw the reference to Deutsche Bank, number 11 on page 3 of the document.

45 HER HONOUR: Yes.

MR ANDREWS: So I'm – your – I think Mr De Jersey's making the point that they've got an eye on what's going on.

HER HONOUR: Going on as well.

5

MR ANDREWS: Yeah.

HER HONOUR: Yes.

10 MR ANDREWS: So - - -

HER HONOUR: I think there are a lot of people scrutinising what - - -

MR ANDREWS: Yeah.

15

HER HONOUR: - - - Mr White does, but that's - - -

MR ANDREWS: Yeah.

20 HER HONOUR: Because he is a court appointed receiver, he has to come to the court in order to get his remuneration approved.

MR ANDREWS: Yep. Well, that was my reason for being here, like, who's, you know - - -

25

HER HONOUR: Yes.

MR ANDREWS: - - - who's watching the safe.

30 HER HONOUR: Yes. All right. Now, there's nothing else you need to draw to my attention?

MR DE JERSEY: No, there isn't, your Honour.

35

TAKE IN JUDGMENT

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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER

Applicant

and

LM INVESTMENT MANAGEMENT LTD and OTHERS

Respondent

BRISBANE

10.51 AM, TUESDAY, 2 JULY 2019

DAY 1

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HER HONOUR: Now – so this is file 3383 of 2013. You’ll have to go and chase Mr Gillard, I think. B v LM Investment Management Limited. Would you like to announce your appearance?

5

MR D. DE JERSEY: If it pleases the court, de Jersey, initial D. I appear for Mr David White who is the receiver and I appear instructed by Tucker & Cowan.

HER HONOUR: Now, what I’m going to do is make as exhibit 1 the letter that came from Roslyn Barrett and I’ll just – has he gone? Good. Thank you. I’m – Ms Adams didn’t need it, yes. Now, can you – I – I’m going to have the bailiff call – Madam Bailiff, you’re going to have to go out and call the members of the LM First Mortgage Investment Fund. Have you got a – just give one of your documents to the bailiff. It’s the second respondent. Just give a document.

15

MR DE JERSEY: Yes, your Honour.

HER HONOUR: Just the outline of submissions. Just give them to the bailiff and I think if the members of the LM First Mortgage Investment Fund are called, that’ll be enough.

20

MR DE JERSEY: I think so, your Honour, yes.

HER HONOUR: And, yes, I’ll just get my Associate to hand this letter to you. Just read that letter while we’re waiting for the bailiff to come back. Sorry. Income fund. Well, no, it’s many parties. There’s thousands of them. So the members – that’s what you’re called, yes, yes. So have you no difficulty if I make that exhibit 1?

25

MR DE JERSEY: No difficulty, your Honour.

30

HER HONOUR: I mean, I’ve got sympathy with Ms Barrett. I think everybody does with the investors or in her case she’s the beneficiary of an investor, but that’s what’s happened.

35

MR DE JERSEY: Yes, your Honour.

HER HONOUR: So can you hand that back to the bailiff?

40

MR DE JERSEY: Yes, your Honour. And I haven’t handed up an appearance slip yet which I’ll hand up at the same time.

HER HONOUR: Thank you. So have you got your outline?

45

MR DE JERSEY: I do, your Honour. I’ll – if I may I’ll hand a bundle to your Honour with a list of material.

HER HONOUR: I made that exhibit 1.

MR DE JERSEY: My outline in duplicate, a draft order and a – an affidavit of Mr David White for which I seek your Honour’s leave which is listed in the list and a schedule of parties served - - -

5 HER HONOUR: Yes.

MR DE JERSEY: - - - which your Honour’s seen a document in the same form on the previous occasion in November last year and that sets out - - -

10 HER HONOUR: So I give you leave to read and file your outline.

MR DE JERSEY: Thank you.

15 HER HONOUR: Yes, the – I give you – I also give you leave to read and file Mr White’s affidavit and the schedule of parties served will be exhibit 2.

EXHIBIT #2 ADMITTED AND MARKED

20

MR DE JERSEY: Thank you, your Honour.

HER HONOUR: And I take it ASIC’s not interested in - - -

25 MR DE JERSEY: Not here. Has been served, however.

HER HONOUR: Yes, I saw that. It’s not interested.

30 MR DE JERSEY: No, your Honour.

HER HONOUR: And now I know a lot more about this matter, the liquidator’s not interested in challenging the fees.

35 MR DE JERSEY: Not interested in challenging the fees. Haven’t heard from them, your Honour.

HER HONOUR: But I’ll see that in one of the affidavits?

40 MR DE JERSEY: You will.

HER HONOUR: You might just tell – I’d better have a look at that letter. Anyway, I’ll just read the submissions.

45 MR DE JERSEY: Your Honour, if it assists you, I can just take your Honour perhaps to paragraph 38 which sets out the major benefits received so far, and then paragraph 39(a), (b), (c) and (d) summarises the major litigation matters and the time frames and the amounts claimed, where they’re at, and there’s a reference in 37 two

paragraphs back to the affidavit of Mr Jerry Collins which addresses a matter that your Honour had raised last time and that's that it might be – it is prudent for there to be an independent verification of some kind of the remuneration that's claimed.

5 HER HONOUR: That's helpful. When I had a look at the file I see that that's affidavit – document 438. That document wasn't on the file this morning. I had a look at it. So I'll just have a look at it now. No, no, that was – yes, Mr White's affidavit wasn't on the file.

10 MR DE JERSEY: Mr Collins is 440.

HER HONOUR: Yes, no, I realise that. That's – and where's the letter from the liquidator?

15 MR DE JERSEY: Well, I'm sorry, your Honour. I misled you. The evidence such as it is, is contained in the affidavit of Ms [indistinct] which is court document number 442.

HER HONOUR: Yes.

20

MR DE JERSEY: And if your Honour looks at paragraph 9(b)(ii) your Honour will see evidence of Russells Lawyers on behalf of the liquidator having been served, but there is no evidence of any response to that document which was served, but what I can offer your Honour from the bar table is that there was no response, but that's not

25

HER HONOUR: Okay, but – and – but they – well, the matter's been called and they're not here today. So when's the first distribution being made?

30 MR DE JERSEY: Well, that's dependent upon the reserve judgment of Justice Jackson for - - -

HER HONOUR: Yes, and he's on - - -

35 MR DE JERSEY: Yes.

HER HONOUR: - - - leave now.

MR DE JERSEY: So it's a slightly delicate response to your Honour's question.

40

HER HONOUR: No, no, that's all right. I wondered. So that was useful having Mr Collins' affidavit.

MR DE JERSEY: Thank you, your Honour.

45

HER HONOUR: And the application that was filed has identified for everyone the quantum of the remuneration. So they've really been on notice.

MR DE JERSEY: That's right, your Honour. Paragraph 1.

HER HONOUR: Is there anything else that you should draw my attention to?

5 MR DE JERSEY: No, your Honour. I was just going to identify the four major milestones - - -

HER HONOUR: Yes.

10 MR DE JERSEY: - - - that have been achieved. The order disclaims the claim for \$200 million. Went to mediation in March. Unfortunately didn't settle. It's anticipated that it will probably be on advice from Mr White's solicitors another 18 months before that proceeding reaches a conclusion. That's milestone 1. Milestone 2, the feeder fund claim which is a \$55 million. It was mediated in November '18.
15 Your Honour's familiar with this one.

HER HONOUR: Yes.

MR DE JERSEY: Because your Honour heard the application for advice. The third
20 milestone is the claim against the MPF which was the \$15.5 million claim. Went to trial before Justice Jackson in April for five days. Finally, the application which your Honour mentioned at the outset for the interim distribution of [indistinct] of \$40 million. That's what I've identified as milestone 4. Each of those, in my respectful submission, show that the receiver is undertaking work which is productive for the
25 members of the fund in terms of actually bringing the fund to a conclusion to winding it up, but then apart from those matters of course behind the scenes the activities of running the fund day to day continued.

So, for example, your Honour sees at paragraph 40F of my outline there was a
30 calculation of a unit price. Forty-G management accounts are being prepared and 40H – two reports – two large reports to members were produced and 40I throughout the period – Mr White receives obviously enquiries from members for information which he answers and there are at the very least 82 of them. So it's a not insubstantial amount that is claimed, but your Honour can see that it's, in my
35 respectful submission, justified.

HER HONOUR: Thank you. Can I have exhibit 1?

40 **TAKE IN JUDGMENT**

Alex Nase

From: Stephen Russell <srussell@russellslaw.com.au>
Sent: Monday, 25 May 2020 4:53 PM
To: David Schwarz
Cc: Alex Nase; Millie Russell
Subject: RE: Re LMIM - application for remuneration Matter: 20141556
Attachments: 2738895 Letter to Tucker & Cowen with draft Order.pdf; 2738853 Draft Order on Receiver's Remuneration Application 27.05.2020 V4.docx

Dear colleagues

Please find attached our letter to you and the draft order attached.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct 07 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au



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From: Stephen Russell
Sent: Monday, 25 May 2020 3:20 PM
To: dschwarz@tuckercowen.com.au
Cc: Alex Nase <anase@tuckercowen.com.au>; Millie Russell <MRussell@russellslaw.com.au>
Subject: Re LMIM - application for remuneration Matter: 20141556

Dear colleagues

Please find attached a latter requiring Mr Whyte for cross-examination.

Please note that, of course, if our client's concerns can be resolved, cross-examination and indeed any contested hearing will not be necessary. We note in that regard that we await your instructions following our letter dated 21 October 2020 and the writer's telephone call to Mr Schwarz on 22 October 2020.

Yours faithfully

RUSSELLS

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RUSSELLS

25 May 2020

Our Ref: SCR:MKR:20141556

Tucker & Cowen
Solicitors
GPO Box 345
BRISBANE 4001

By Email: anase@tuckercowen.com.au
dschwarz@tuckercowen.com.au

Dear Colleagues

**Bruce & Anor the LM Investment Management Limited (in liquidation) – BS3383 of 2013
Application by Mr Whyte for Approval of Remuneration**

We refer to our letter dated 21 May 2020 and note that the trustee has not responded to any of the concerns raised in that letter. Whilst we appreciate that the letter was written only on 21 May 2020, nonetheless, many of the matters raised in the letter have been the subject of previous correspondence over many years.

Please find accompanying this letter a draft of the order which we are instructed to seek on the return of your client's application for remuneration.

Yours faithfully



Stephen Russell
Managing Partner

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20141556/2738895

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SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND VICKI
PATRICIA BRUCE

AND

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

AND

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

AND

Third Respondent: ROGER SHOTTON

AND

Intervener: AUSTRALIAN SECURITIES &
INVESTMENTS COMMISSION

ORDER

Before: Justice Callaghan
Date: 27 May 2020
Initiating document: Application filed 11 May 2020 (CFI [459])

UPON THE UNDERTAKING OF THE APPLICANT RECEIVER DAVID WHYTE
("the Receiver") and of BDO AUSTRALIA LIMITED ACN 050 110 275, and of BDO
BUSINESS RESTRUCTURING PTY LTD ACN 134 036 507, by their counsel:-

ORDER

Filed on behalf of the Respondent, LM Investment Management
Ltd (in liq) on its own account and as responsible entity of two
members of the LM First Mortgage Income Fund

Russells
Level 18
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

1. to deposit to the bank account of the Scheme Property of the LM First Mortgage Income Fund ARSN 089 343 288 the amount (if any) by which the sum received by them as interim remuneration pursuant to the orders made hereafter exceeds the sum which in due course is fixed as the remuneration of the Receiver for the period from which remuneration is hereafter paid to them pursuant to this or any subsequent order for remuneration, such deposit to be made within 14 days after any order fixing such remuneration; and

2. that they will pay interest on the amount of any such excess at such rate or rates as may be determined by the court:

THE ORDER OF THE COURT IS THAT:-

3. The Receiver is authorised, subject to any later order, to withdraw from the Scheme Property of the LM First Mortgage Income Fund ARSN 089 343 288 the sum of \$840,967.52, (being 85% of the amount claimed in the affidavit of the Receiver filed 7 May 2020) on account of his claim for remuneration for the period from 1 November 2019 to 30 April 2020.

4. The Receiver shall, within 21 days:-

(a) file and serve on the other parties appearing today an affidavit setting out as near as reasonably possible, from the total sum of \$989,373.55 the sums sought for remuneration for the following tasks:-

(i) Each of the court proceedings referred to in the Table in para [21] of the Receiver's affidavit filed herein on 11 May 2020 (CFI [460]) ("the Receiver's Affidavit"), i.e. each proceeding separately; and

(ii) Tasks not undertaken for any such court proceedings;

(b) deliver to the other parties appearing today a report setting out his best estimate of the remuneration, legal costs and other expenses likely to be incurred in respect of each of the court proceedings referred to in the Table in para [21] of the Receiver's Affidavit, including a range if appropriate; and

-
- (i) his best estimate of the time likely needed to resolve each such proceeding, including a range if appropriate;
 - (ii) his best estimate of the likely amount of adverse costs orders in the event that each such proceeding fails; and
 - (iii) his current assessment of a realistic worst-case scenario, updated from his previous evidence referred to by Justice Jackson in *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233 at [83], [90]; and
- (c) deliver such report to the Associate to Justice Callaghan, together with an envelope marked:

“Confidential Report of David Whyte: Not to be opened save in accordance with an order of a Judge of this Honourable Court.

By order of Justice Callaghan made on 27 May 2020”;

5. The report of the Receiver shall, on determination of this Application by Justice Callaghan (or another Judge), be placed into the said envelope, sealed, placed on the court file and shall not be opened, save in accordance with an order of a Judge of this Honourable Court.
6. The parties who receive such report from the Receiver shall, subject to further order, keep the same confidential and they shall not further publish the same, save to their solicitors and counsel in this proceeding.
7. Pursuant to rule 501 of the *Uniform Civil Procedure Rules 1999* (Qld), the Court refers the questions in the Schedule to Paul James Vincent as a referee.
8. The respondent, LM Investment Management Ltd (in liq) on its own account and as responsible entity of two members of the LM First Mortgage Income Fund (“the Respondent”) shall forthwith deliver to the referee:-
- (a) this Order; and
 - (b) the Application;

-
- (c) the Receiver's Affidavit; and
- (d) the Receiver's further affidavit served pursuant to subparagraph 4(a) hereof.
9. The Receiver and the Respondent shall extend all reasonable coöperation and assistance to the referee, including to provide to him any further documents or information he may request in writing from time to time.
10. The referee shall report to the Court:-
- (a) as near as practicable in the form of an expert's report, governed by Division 3 of Part 5 of the *Uniform Civil Procedure Rules 1999* (Qld), which, to avoid doubt, shall apply to the referee's report as though it was a report made pursuant to an order under UCPR 429I;
- (b) as soon as reasonably practicable, by providing his report to the Registrar and copies to the parties who have appeared today.
11. The application is adjourned to a date to be fixed by Justice Callaghan, to be brought on by any party appearing today, after receipt of the referee's report, giving not less than seven days' notice in writing to his Honour's Associate and to the other parties.
12. The Respondent shall, in the first instance, bear and pay the costs of the referee.
13. The costs of and incidental to the Application, including the costs of the referee's report as between the parties, are reserved.

Signed:

Registrar

SCHEDULE

QUESTIONS REFERRED TO PAUL JAMES VINCENT AS REFEREE

1. Look at:-
 - (a) the affidavit of David Whyte (“the Receiver”), filed herein on 11 May 2020 (CFI [460]) (“the Receiver’s First Affidavit”); and
 - (b) the affidavit of the Receiver DAVID WHYTE, dated [*insert date*], identifying, from the total sum of \$989,373.55 the sums sought for remuneration for the following tasks:-
 - (i) Each of the court proceedings referred to in the Table in para [21] of the Receiver’s affidavit filed herein on 11 May 2020 (CFI [460]) (“the Receiver’s Affidavit”), i.e. each proceeding separately; and
 - (ii) Tasks not undertaken for any such court proceedings.
2. Of the time spent by the persons (“the BDO Personnel”) mentioned in the table at page 4 of the exhibits to the Receiver’s First Affidavit on tasks not undertaken for any court proceedings, as set out in the Receiver’s Second Affidavit:-
 - (a) What is your opinion as to the overall reasonableness of the amount of remuneration sought by Mr Whyte for such work, including the time taken for such tasks?
 - (b) If in your opinion it is efficient or convenient to do so, identify sub-categories of these tasks into which the time spent may be categorised:-
 - (i) to enable you more efficiently to assess whether the time spent by those persons was reasonable; and/or
 - (ii) to enable a reader better to understand the nature of the work that was done.



ASIC
Australian Securities &
Investments Commission

Australian insolvency statistics

Released: June 2020

Series 4A: Registered liquidators lists by region, updated to 31 May 2020

Contents

Tables

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales
Table 4A.2 - Registered liquidators list, updated to 31 May 2020 – Victoria
Table 4A.3 - Registered liquidators list, updated to 31 May 2020 – Queensland
Table 4A.4 - Registered liquidators list, updated to 31 May 2020 – South Australia
Table 4A.5 - Registered liquidators list, updated to 31 May 2020 – Western Australia
Table 4A.6 - Registered liquidators list, updated to 31 May 2020 – Tasmania
Table 4A.7 - Registered liquidators list, updated to 31 May 2020 – Northern Territory
Table 4A.8 - Registered liquidators list, updated to 31 May 2020 – Australian Capital Territory
Table 4A.9 - Registered liquidators list, updated to 31 May 2020 – Overseas

More information available from the ASIC website

Australian insolvency statistics

INFORMATION SHEET 80: How to interpret ASIC insolvency statistics

SERIES 4: Registered liquidators

ASIC Connect—Professional Registers search

Disclaimer

ASIC has prepared these composite lists of registered liquidators by region from information held on ASIC's Register of Liquidators.

ASIC updates these lists regularly to reflect changes that occur to the Register of Liquidators. The date of the last update is shown above. You should check ASIC's Register of Liquidators via ASIC Connect before acting on the information in these lists.

These lists should not be taken as ASIC endorsing or recommending any particular registered liquidator.

Section 1274B of the Corporations Act 2001 [Use, in court proceedings, of information from ASIC's national database] does not apply to these lists.

Inquiries

For further information about these and related statistics, email insolvencystatistics@asic.gov.au.



Australian insolvency statistics

Released: June 2020

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
ADAMS, MATT JOHN	316769		AS ADVISORY , L 32, 101 MILLER ST, NORTH SYDNEY NSW 2060	NSW
ALBARRAN, RICHARD	190669		HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
AMIRBEAGGI, SHABNAM	291917	304485	CROUCH AMIRBEAGGI, SE 403, 55 LIME ST, SYDNEY NSW 2000	NSW
AMOS, PETER ANDREW	300719	300798	AMOS INSOLVENCY , U 25, 185-187 AIRDS RD, LEUMEAH NSW 2560	NSW
ARMENIS, HUGH	334632	339129	BENTLEYS CORPORATE RECOVERY, L 9, 1-7 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
ARNAUTOVIC, SULE	273322	289189	JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
AYRES, MARCUS WILLIAM	337982	340113	DUFF & PHELPS, L 32, 85 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
BAILEY, LIAM THOMAS	492243		O'BRIEN PALMER, SE 1, L9, 66 CLARENCE ST, SYDNEY NSW 2000	NSW
BALL, MITCHELL WARREN	291739	314810	BPS RECOVERY, L 18, 201 KENT ST, SYDNEY NSW 2000	NSW
BANERJEE, SHUMIT	477104		SV PARTNERS, L 7, 151 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
BARNDEN, ANDREW JAMES	318903	318904	RODGERS REIDY, THE UNIVERSITY CENTRE L 12, 210 CLARENCE ST, SYDNEY NSW 2000	NSW
BARNET, KATHERINE ELIZABETH	281382	303703	BENTLEYS CORPORATE RECOVERY, L 9, 1-7 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
BAXENDALE, GUY ANTHONY	404223		BAXENDALE & ASSOCIATES, SE 34 L 8, 66 GOULBURN ST, SYDNEY NSW 2000	NSW
BEATTIE, GRAEME ROBERT	317239	333412	WORRELLS, SE 601B L 6, 91 PHILLIP ST, PARRAMATTA NSW 2150	NSW
BILLINGSLEY, MICHAEL JAMES	483437	485563	DELOITTE, L 19, 60 STATION ST E, PARRAMATTA NSW 2150	NSW
BLUNDELL, ANDREW THOMAS	517075		WORRELLS, SE 1 L 15, 9-13 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
BOARDMAN, JOHN RICHARD	84294		GOVERNOR PHILLIP TOWER, SE 1D L 23, 1 FARRER PL, SYDNEY NSW 2000	NSW
BOWCHER, ANDREW JOHN	312368	320125	RSM AUSTRALIA PARTNERS, 55 BERRY ST, WAGGA WAGGA NSW 2650	NSW
BRADBURY, RYAN JOHN	495360		NICOLS + BRIEN, L 2, 350 KENT ST, SYDNEY NSW 2000	NSW
BRAILEY, ASHTON JOHN	4701		ASHTON BRAILEY & CO., SE 8, 14 FRENCHS FOREST RD E, FRENCHS FOREST NSW 2086	NSW
BRENNAN, ROBERT MICHAEL	195416		RT HOSPITALITY SOLUTIONS, SE 72 L 3, 14 NARABANG WAY, BELROSE NSW 2085	NSW
BRERETON, MICHAEL CRAIG	285744		WILLIAM BUCK, L 29, 66 GOULBURN ST, SYDNEY NSW 2000	NSW
CALABRETTA, DOMENICO ALESSANDRO	336268	336552	MACKAY GOODWIN, SE 1 L 2, 10 BRIDGE ST, SYDNEY NSW 2000	NSW
CAMPBELL, CHRISTOPHER ROBERT	16435		CHRIS CAMPBELL, L 2, 50 MARGARET ST, SYDNEY NSW 2000	NSW
CAMPBELL-WILSON, PHILIP	319617	320832	GRANT THORNTON, L 17, 383 KENT ST, SYDNEY NSW 2000	NSW
CARSON, BENJAMIN MICHAEL	480627	480628	FARNSWORTH CARSON, L 1, 135 VICTORIA RD, DRUMMOYNE NSW 2047	NSW
CARTER, PHILIP PATRICK	67603		PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
CATHRO, SIMON JOHN	278428		WORRELLS, SE 1, L 15, 9-13 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
CHAMBERLAIN, CHRISTOPHER MEL	68923	164916	CHAMBERLAINS S.B.R, SE 103 L 1, 63 JOHNSTON ST, WAGGA WAGGA NSW 2650	NSW
CHIN, KONG YAO	437790		EAGLE INSOLVENCY AND ADVISORY , SUITE ONE, L 7, 234-242 GEORGE ST, SYDNEY NSW 2000	NSW
CHUBB, MORGAN JAMES	168657	230160	CLOUT & ASSOCIATES, U 2, 92 MARINE PDE, KINGSCLIFF NSW 2487	NSW
CIVIL, DANIEL JEAN	434196		JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
CLUBB, DUNCAN EDWARD	488055		BDO, L 11, 1 MARGARET ST, SYDNEY NSW 2000	NSW
COLLIS, BRYAN PATRICK	56026		HAYES ADVISORY , L 16, 55 CLARENCE ST, SYDNEY NSW 2000	NSW
CONDON, SCHON GREGORY	4905	16181	CONDON ASSOCIATES, L 6, 87 MARSDEN ST, PARRAMATTA NSW 2150	NSW

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
CONNEYWORTH, AMANDA GONI	514640		KPMG, TOWER THREE INTERNATIONAL TOWERS, L38, 300 BARANGAROO AVE, , SYDNEY NSW 2000	NSW
CONNELLY, CATHERINE MARGARET	521312		KORDAMENTHA , CHIFLEY TOWER, L5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
COOK, BARRY RAYMOND	4795		BARRY COOK, 54 BEECHWOOD AVE, GREYSTANES NSW 2145	NSW
COOK, TIMOTHY JAMES	480624	480626	BALANCE INSOLVENCY, 6 05', 50 CLARENCE ST, SYDNEY NSW 2000	NSW
COPELAND, BRENDAN JAMES	421144		HOGANS PROWLES , L 9, 60 PITT ST, SYDNEY NSW 2000	NSW
CROUCH, NICHOLAS JAMES DAVID	206515	297025	CROUCH AMIRBEAGGI, SE 403, 55 LIME ST, SYDNEY NSW 2000	NSW
CROWE-MAXWELL, ATLE	275986		OMNIWEALTH, AUSTRALIA SQUARE' L 22, 264-278 GEORGE ST, SYDNEY NSW 2000	NSW
CUMMINS, ANDREW JOHN	169877	336379	BRI FERRIER, AUSTRALIA SQUARE' L 30, 264-278 GEORGE ST, SYDNEY NSW 2000	NSW
CUSSEN, NEIL ROBERT	59346	186180	DELOITTE, ECLIPSE TOWER' L 19, 60 STATION ST E, PARRAMATTA NSW 2150	NSW
CVITANOVIC, DANIEL IVAN	16404		WORRELLS, SE 1, 151 TONGARRARD, ALBION PARK NSW 2527	NSW
DAMPNEY, JAMES DOUGLAS	498510		KPMG, TOWER THREE INTERNATIONAL TOWERS, L38, 300 BARANGAROO AVE, , SYDNEY NSW 2000	NSW
DARIN, CHRISTOPHER DAMIEN	160016	329855	WORRELLS, SE 1 L 15, 9-13 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
DAVIS, GEOFFREY ROBERT	345489	418502	JONES PARTNERS, L 13, 189-197 KENT ST, SYDNEY NSW 2000	NSW
DAWSON, THOMAS JAMES	441313		DCL ADVISORY, L 11, 66 CLARENCE ST, SYDNEY NSW 2000	NSW
DE ROOY, MICHAEL JONATHAN	487295		FTI CONSULTING, L 15, 50 PITT ST, SYDNEY NSW 2000	NSW
DE VRIES, ANTONY ANNE	86462		DE VRIES TAYEH, 110 HARRIS ST, HARRIS PARK NSW 2150	NSW
DEAN-WILLCOCKS, RONALD JOHN	4864	16179	DW ADVISORY, L 2, 32 MARTIN PL, SYDNEY NSW 2000	NSW
DEVINE, TRENT ANDREW	345616	345617	JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
DICKERSON, GAYLE	390469		KPMG, TOWER THREE', 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
DONNELLY, MAX CHRISTOPHER	4591	4994	KPMG, TOWER THREE INTERNATIONAL TOWERS, L38, 300 BARANGAROO AVE, , SYDNEY NSW 2000	NSW
DUGGAN, ROBYN LOUISE	217322	364269	KPMG, TOWER THREE INTERNATIONAL TOWERS, L38, 300 BARANGAROO AVE, , SYDNEY NSW 2000	NSW
EAGLE, RYAN REGINALD	389543		KPMG, TOWER THREE INTERNATIONAL TOWERS, L38, 300 BARANGAROO AVE, , SYDNEY NSW 2000	NSW
EDDS, STEPHEN WILLIAM	495041		DELOITTE, GROSVENOR PLACE, 225 GEORGE ST, SYDNEY NSW 2000	NSW
ELKERTON, ANTHONY WAYNE	224309	295204	DW ADVISORY, L 2, 32 MARTIN PL, SYDNEY NSW 2000	NSW
ELLIOTT, ROBERT WILLIAM JOSEPH	4844		HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
ENGLAND, IAN ROBERT	190300		PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
EVANS, KATHRYN JANE	507744		DELOITTE, GROSVENOR PLACE' L 4, 225 GEORGE ST, SYDNEY NSW 2000	NSW
FARNSWORTH, ADAM EDWARD PATRICK	288527	339731	FARNSWORTH CARSON, L 1, 135 VICTORIA RD, DRUMMOYNE NSW 2047	NSW
FRASER, SHAUN ROBERT	275605		MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
FREE, STEWART WILLIAM	275434	296759	JIRSCH SUTHERLAND, L 1, 14 WATT ST, NEWCASTLE NSW 2300	NSW
FRISKEN, DANIEL JOHN	493926		O'BRIEN PALMER, SE 1, L9, 66 CLARENCE ST, SYDNEY NSW 2000	NSW
GAMMEL, TODD ANDREW	415679		HLB MANN JUDD, L 19, 207 KENT ST, SYDNEY NSW 2000	NSW
GIBBONS, JOHN RAYMOND	4917		RESTRUCTURING WORKS, L 8, 76-80 CLARENCE ST, SYDNEY NSW 2000	NSW
GIDLEY, PAUL WILLIAM	172870	192759	SHAW GIDLEY, L 1, 160 PACIFIC HWY, CHARLESTOWN NSW 2290	NSW
GLADMAN, STEVEN ARTHUR	328487	377389	HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
GLEESON, BRUCE	223358	299530	JONES PARTNERS, L 13, 189 KENT ST, SYDNEY NSW 2001	NSW
GORDON, ANGUS CARNEGIE	299947	322603	MACQUARIE GORDON & CO, SE 820 L 8, 185 ELIZABETH ST, SYDNEY NSW 2000	NSW
GOTHARD, PETER JAMES	324021	329413	KPMG, THREE INTERNATIONAL TOWERS, L 38, 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
GOYAL, RAHUL	323696	323697	KORDAMENTHA, CHIFLEY TOWER' L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
GRANGER, GEOFFREY PETER	398478	403144	BRI FERRIER, L 30, 264-278 GEORGE ST, SYDNEY NSW 2000	NSW
GRAY, CAMERON HAMISH	486228		DW ADVISORY, L 2, 32 MARTIN PL, SYDNEY NSW 2000	NSW

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
GRIFFITHS, MITCHELL RICHMOND	414171		RAPSEY GRIFFITHS, L 5, 55 HUNTER ST, NEWCASTLE NSW 2300	NSW
GUMBLETON, TIMOTHY ROBERT	313688	317762	RSM AUSTRALIA PARTNERS, 55 BERRY ST, WAGGA WAGGA NSW 2650	NSW
HALL, GREGORY WINFIELD	4942		PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
HAMILTON, WILLIAM JAMES	4616	4948	WJ HAMILTON & CO, SE 508, 147 KING ST, SYDNEY NSW 2000	NSW
HANCOCK, GEOFFREY TRENT	65306	164798	PKF, L 8, 1 O'CONNELL ST, SYDNEY NSW 2000	NSW
HANSELL, JOSEPH RONALD	479192		FTI CONSULTING, L 15, 50 PITT ST, SYDNEY NSW 2000	NSW
HATHWAY, STEPHEN WESLEY	312168	316215	HELM ADVISORY, SE 2 L 16, 60 CARRINGTON ST, SYDNEY NSW 2000	NSW
HAYES, JOSEPH DAVID	219954		WEXTED ADVISORS, L 12, 28-34 O'CONNELL ST, SYDNEY NSW 2000	NSW
HAYES, ALAN JOHN	284145	434242	HAYES ADVISORY, L 16, 55 CLARENCE ST, SYDNEY NSW 2000	NSW
HEALEY, LIAM JOHN	503546		ANKURA CONSULTING, L 36, 1 MACQUARIE PL, SYDNEY NSW 2000	NSW
HEDGE, PETER JAMES	4932		HEDGE & ASSOCIATES, SE 1206, L 12, 14 MARTIN PL, SYDNEY NSW 2000	NSW
HEESH, TIMOTHY PAUL	309873		TPH ADVISORY, 133 MACQUARIE ST, SYDNEY NSW 2000	NSW
HENRY, JONATHAN PHILIP	515968		MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
HICKEY, TRUDY-LEE	437736		PKF, 755 HUNTER ST, NEWCASTLE WEST NSW 2302	NSW
HILL, CHRISTOPHER CLARKE	297834		PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
HILLIG, PETER	172662	295395	SMITH HANCOCK, L 4, 88 PHILLIP ST, PARRAMATTA NSW 2150	NSW
HODGKINSON, DAMIEN MARK	282581		DEM AUSTRALASIA, L 4, 249 PITT ST, SYDNEY NSW 2000	NSW
HOGAN, MICHAEL ANDREW	473873		HOGANSPROWLES, L 9, 60 PITT ST, SYDNEY NSW 2000	NSW
HOLDEN, TIMOTHY MARK SHUTTLEWORTH	284673		CROUCH AMIRBEAGGI, SE 403, 55 LIME STREET KING STREET WHRF, SYDNEY NSW 2000	NSW
HOLZMAN, JUSTIN	407103		DW ADVISORY, L 2, 32 MARTIN PL, SYDNEY NSW 2000	NSW
HONNER, WILLIAM ANTHONY	442229		PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
HOSKING, PHILIP RAYMOND	363165		HELM ADVISORY, SUITE2' L 16, 60 CARRINGTON ST, SYDNEY NSW 2000	NSW
HURST, DAVID ANTHONY	172863	296796	BPS RECOVERY, L 18, 201-217 KENT ST, SYDNEY NSW 2000	NSW
HUTCHINS, MARK RAYMOND	439999		COR CORDIS, ONE WHARF LANE' L 20, 171 SUSSEX ST, SYDNEY NSW 2000	NSW
INGRAM, DAVID ALLAN	368278	422143	HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
IRELAND, JASON CRAIG	522407		MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
ISMAY, BENJAMIN JOSHUA	483949		SHAW GIDLEY, L 1, 65 LORD ST, PORT MACQUARIE NSW 2444	NSW
JAHANI, SAID	317271		GRANT THORNTON, L 17, 383 KENT ST, SYDNEY NSW 2000	NSW
JONES, MICHAEL GREGORY	4916	5007	JONES PARTNERS, L 13, 189 KENT ST, SYDNEY NSW 2000	NSW
KASSEM, OZEM AZZAM	161449	241200	COR CORDIS, ONE WHARF LANE' L 20, 171 SUSSEX ST, SYDNEY NSW 2000	NSW
KEATING, JOANNE MONICA	471849		HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
KELLY, MORGAN JOHN	281983	300933	FERRIER HODGSON, TOWER THREE INTERNATIONAL TOWERS, 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
KERR, DAVID JOHN	165984	223695	RSM AUSTRALIA PARTNERS, L 13, 60 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
KERSHAW, SCOTT BRADLEY	81933		KORDAMENTHA, CHIFLEY TOWER' L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
KIJURINA, BRENT TREVOR-ALEX	286289	294731	HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
KITE, ROBERT JOHN	333351		SMITH HANCOCK, L 4, 88 PHILLIP ST, PARRAMATTANSW 2150	NSW
KOGAN, BARRY FREDERIC	384878	390488	MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
KREJCI, PETER PAUL	223004	302588	BRI FERRIER, AUSTRALIA SQUARE' L 30, 264-278 GEORGE ST, SYDNEY NSW 2000	NSW
KUGEL, STEVEN	296215		THE INSOLVENCY EXPERTS, SE 101, 788A PACIFIC HWY, GORDON NSW 2072	NSW
KWOK, HENRY HO LEUNG	494572		PATHWAY INSOLVENCY AND ADVISORY, TOWER 2 DARLING PARK' L 20, 201 SUSSEX ST, SYDNEY NSW 2000	NSW
LAKOMY, ANDRE LEON	484188		COR CORDIS, ONE WHARF LANE' L 20, 171 SUSSEX ST, SYDNEY NSW 2000	NSW
LANDREY, NATHAN VANCE	421607		FTI CONSULTING, L 15, 50 PITT ST, SYDNEY NSW 2000	NSW

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
LANGDON, SCOTT DAVID HARRY	414793		KORDAMENTHA, CHIFLEY TOWER' L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
LEVI, DAVID JOSEPH	69121		LEVI CONSULTING, L 1,84 PITT ST, SYDNEY NSW 2000	NSW
LIVINGSTONE, GLENN IAN	491691		KPMG, TOWER THREE' L 38, 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
LJUBIC, DRAGAN	433409		TRIBECA ADVISORY , U 13, 83 GEORGE ST, PARRAMATTA NSW 2150	NSW
LOI, PATRICK	456372		GREENGATE ADVISORY, SE 5 L 4, 124-130 PITT ST, SYDNEY NSW 2000	NSW
LOMBE, DAVID JOHN FRANK	15697	67082	DELOITTE, 225 GEORGE ST, SYDNEY NSW 2000	NSW
LORD, BRETT STEPHEN	324696	430065	DUFF & PHELPS, L 32, 85 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
LOTT, AMANDA CAROLINE	472137		TPH ADVISORY, SUITE 101', 167B THE ENTRANCE RD, ERINA NSW 2250	NSW
LOUTTIT, JAMIESON ANDRE	185323		JLA INSOLVENCY & ADVISORY, SE 72, L 15, 88 PITT ST, SYDNEY NSW 2000	NSW
LUCAN, AARON KEVIN	447253		WORRELLS, SE 601B L 6, 91 PHILLIP ST, PARRAMATTA NSW 2150	NSW
MACDONNELL, CHRISTOPHER JOHN	156279		RESTRUCTURING SOLUTIONS, L 12, 28-34 O'CONNELL ST, SYDNEY NSW 2000	NSW
MADDEN, MARTIN	4939	16171	KORDAMENTHA, CHIFLEY TOWER' L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
MALANOS, NICHOLAS CRAIG	193872		WORRELLS, SE 1 L 15, 9-13 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
MALONE, PETER EDWARD	494423		CRS INSOLVENCY, L 5, 379 KENT ST, SYDNEY NSW 2000	NSW
MANSFIELD, DAVID IAN	231231	294921	DELOITTE, L 19, 60 STATION ST E, PARRAMATTANSW 2150	NSW
MARSDEN, SAM ANDREW	437274		DELOITTE, GROSVENOR PLACE', 225 GEORGE ST, SYDNEY NSW 2000	NSW
MATHEWS, CASSANDRA ELYSIUM	434313		KORDAMENTHA, CHIFLEY TOWER' L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
MCCABE, ANDREW JOHN	506498		WEXTED ADVISORS, L 12, 28-34 O'CONNELL ST, SYDNEY NSW 2000	NSW
MCCALLUM, SUELEN	478503		DE VRIES TAYEH, 110 HARRIS ST, HARRIS PARK NSW 2150	NSW
MCGRATH, ANTHONY GREGORY	67403	165987	MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
MCINERNEY, JOHN EDGAR	473113		GRANT THORNTON, L 17, 383 KENT ST, SYDNEY NSW 2000	NSW
MCKENNA, HENRY PETER	463932		VINCENTS, MLC CENTRE' L 14, 19-29 MARTIN PL, SYDNEY NSW 2000	NSW
MCMILLEN, TRENT AARON	484449		MAC INSOLVENCY, L 7, 91 PHILLIP ST, PARRAMATTA NSW 2150	NSW
MELLUISH, JOHN	515161		PCI PARTNERS , SE L 2, 66 CLARENCE ST, SYDNEY NSW 2000	NSW
MERRYWEATHER, DAVID PAUL	207472		PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
MOORE, PETER JOHN	491882		JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
MORELLI, BRADD WILLIAM	306390	307753	JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
MORGAN, JOHN MAXWELL	16110	182785	BCR ADVISORY, 14, 60 MARGARET ST, SYDNEY NSW 2000	NSW
MORGAN, DAVID MICHAEL	293780	325727	CLOUT & ASSOCIATES, SE 7, 26-28 ORLANDO ST, COFFS HARBOUR NSW 2450	NSW
MOS, EMMA MARIE	511197		JIRSCH SUTHERLAND, L 1, 14 WATT ST, NEWCASTLE NSW 2300	NSW
MOSS, GAVIN	296668	322605	CHIFLEY ADVISORY, SE 1903 L 19, 31 MARKET ST, SYDNEY NSW 2000	NSW
NAIDENOV, STEVEN	317812	343355	ASTON CHACE GROUP , SE 2 L 5, 123 PITT ST, SYDNEY NSW 2000	NSW
NATKUNARAJAH, NICARSON	491900		ROGERS & CARSON, U 4, 16 WOLSELEY ST, DRUMMOYNE NSW 2047	NSW
NEEDHAM, ANDREW FLETCHER	298814	298828	ANEQUITY, L 7, 167 MACQUARIE ST, SYDNEY NSW 2000	NSW
NETTLETON, JENNIFER ANNE	207240		KORDAMENTHA, CHIFLEY TOWER' L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
NEWTON, SCOTT ANTHONY	307041		SHAW GIDLEY, SE 1 L 1, 65 LORD ST, PORT MACQUARIE NSW 2444	NSW
NGAN, PETER	164927		BAXENDALE & ASSOCIATES, SE 401, 88 PHILLIP ST, PARRAMATTA NSW 2150	NSW
NICCOL, IAN MALCOLM	488623		ASTON CHACE GROUP , SE 2 L 5, 123 PITT ST, SYDNEY NSW 2000	NSW
NICODEMOU, COSTAS ANDREW	458518		NEWPOINT ADVISORY, 03 MLC SE 14, 19-29 MARTIN PL, SYDNEY NSW 2000	NSW

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
NICOLS, STEVEN	53003	182732	NICOLS + BRIEN, L 2, 350 KENT ST, SYDNEY NSW 2000	NSW
O'BRIEN, DANIEL JOHN	495362		DV RECOVERY MANAGEMENT, L 1, 76-78 MARKET ST, WOLLONGONG NSW 2500	NSW
OLDE, QUENTIN JAMES	277099		ANKURA CONSULTING, GATEWAY TOWER' L 36, 1 MACQUARIE PL, SYDNEY NSW 2000	NSW
PAINE, DARRIN EDWARD	437354		TI GROUP, SE 610, 12 CENTURY CCT, BAULKHAM HILLS NSW 2153	NSW
PALMER, CHRISTOPHER JOHN	4757	4981	O'BRIEN PALMER, SE 1, L 9, 66 CLARENCE ST, SYDNEY NSW 2000	NSW
PARBERY, STEPHEN JAMES	4660	4990	KPMG, TOWER THREE' L 38, 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
PARKER, GREGORY JAY	172866	291332	PARKER INSOLVENCY, SE 466, 311-315 CASTLEREAGH ST, HAYMARKET NSW 2000	NSW
PASCOE, SCOTT DARREN	166870	197270	PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
PEILE, ROBERT KENNETH	4913		MAINBRACE, 3 JOHN DAVEY AVE, CRONULLA NSW 2230	NSW
PIRINA, VINCENT JOSEPH	495364		ASTON CHACE GROUP, SE 2 L 5, 123 PITT ST, SYDNEY NSW 2000	NSW
PLEASH, BLAIR ALEXANDER	286087	329545	HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
POGROSKE, TREVOR MARK	255777		CRS INSOLVENCY, L 5, 379 KENT ST, SYDNEY NSW 2000	NSW
PORTER, JASON LLOYD	411715	411717	SV PARTNERS, L 7, 151 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
PREINER, ADAM BERNARD	484323		INTEGRA RESTRUCTURING & INSOLVENCY, L 17, 9-13 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
PRENTICE, MAXWELL WILLIAM	4619	4954	BPS RECOVERY, L 18, 201 KENT ST, SYDNEY NSW 2000	NSW
PRESTON, JASON	338011	344177	MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
PRIEST, STEVEN JOHN	328662		CHAMBERLAINS S.B.R, SUITE', 103 1ST FLOOR WOLLUNDRY CHAMBERS JOHNSTON ST, WAGGA WAGGA NSW 2650	NSW
PURCHAS, IAN JAMES	210943		SV PARTNERS, L 7, 151 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
QUINLAN, PHILIP ALEXANDER	500470		KPMG, TOWER THREE' L 38, 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
QUINN, DANIEL JON	429520	434028	SV PARTNERS, SE 2 L 1, 1 MARKET ST, SYDNEY NSW 2000	NSW
QUINN, GREGORY MICHAEL	437029		PWC, ONE INTERNATIONAL TOWERS SYDNEY WATERMANS QY, BARANGAROO NSW 2000	NSW
RAPSEY, CHAD ROBERT	404406		RAPSEY GRIFFITHS, L 5, 55 HUNTER ST, NEWCASTLE NSW 2300	NSW
REIDY, GEOFFREY PHILIP	193405	240671	RODGERS REIDY, THE UNIVERSITY CENTRE' L 12, 210 CLARENCE ST, SYDNEY NSW 2000	NSW
RESNICK, ANTONY	432261		DE VRIES TAYEH, L 2, 151 MACQUARIE ST, SYDNEY NSW 2000	NSW
ROBB, JOSHUA-LEE	494575		SV PARTNERS, SE 2 L 1, 1 MARKET ST, SYDNEY NSW 2000	NSW
ROBINSON, MARK JULIAN	212300		DE VRIES TAYEH, L 2, 151 MACQUARIE ST, SYDNEY NSW 2000	NSW
ROUFEIL, MARK DAMIAN CHARLES	71359	176118	PKF, L 8, 1 O'CONNELL ST, SYDNEY NSW 2000	NSW
ROWLEY, RICHARD JAMES	453850		ROWLEY CONSULTING, 86 AUSTRALIA AVE, MATRIVILLE NSW 2036	NSW
RUBINSTEIN, NEVILLE RALPH	14988		JOUBERT RUBINSTEIN, SE 206 L 2, 410 ELIZABETH ST, SURRY HILLS NSW 2010	NSW
RUSSELL, GREGORY ALEXANDER	15528		RUSSELL CORPORATE ADVISORY, SE 302, L3, 53 WALKER ST, NORTH SYDNEY NSW 2060	NSW
SALLWAY, ANDREW THOMAS	391968		BDO, BDO' L 11, 1 MARGARET ST, SYDNEY NSW 2000	NSW
SAMPSON, DAVID HENRY	449482	449483	BPS RECOVERY, L 18, 201-217 KENT ST, SYDNEY NSW 2000	NSW
SANDERSON, CLIFFORD JOHN	155400	174003	DISSOLVE, L 8, 76-80 CLARENCE ST, SYDNEY NSW 2000	NSW
SARANTINOS, JIM	409700		JIM SARANTINOS, 8 WALLAMI ST, CARINGBAH SOUTH NSW 2229	NSW
SCOTT, ANDREW JOHN	450451	450452	PWC, TOWER ONE INTERNATIONAL TOWERS, L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
SHAW, JAMES ALEXANDER	172869	206278	SHAW GIDLEY, L 1, 160 PACIFIC HWY, CHARLESTOWN NSW 2290	NSW
SHEAHAN, JOHN	5735	5769	SHEAHAN LOCK PARTNERS, L 2, 234-242 GEORGE ST, SYDNEY NSW 2000	NSW
SHEPARD, ADAM	212426		SETTER SHEPARD, L 2, 117 CLARENCE ST, SYDNEY NSW 2000	NSW
SHUTE, JEFFREY ALLAN	434639		SHAW GIDLEY, L 1, 160 PACIFIC HWY, CHARLESTOWN NSW 2290	NSW
SIJABAT, LOUISA MENG LI	479547	479551	VINCENTS, MLC CENTRE' L 14, 19-29 MARTIN PL, SYDNEY NSW 2000	NSW
SILVIA, BRIAN RAYMOND	4614	4957	BRI FERRIER, L 30, 264-278 GEORGE ST, SYDNEY NSW 2000	NSW

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
SKINNER, DANE	521204		BCR ADVISORY, 14, 60 MARGARET ST, SYDNEY NSW 2000	NSW
SLEIMAN, JOSEPH	461377		SLEIMAN & CO, 29 PENROSE ST, LANE COVE NSW 2066	NSW
SMITH, MICHAEL JOHN MORRIS	4934	16437	SMITH HANCOCK, L 4, 88 PHILLIP ST, PARRAMATTA NSW 2150	NSW
SMITH, ANDREW LESLIE	212710		SMITH ADVISORY, 8 NULLA NULLA ST, TURRAMURRA NSW 2074	NSW
SOIRE, DANIEL ROBERT	413531	413532	JONES PARTNERS, L13, 189-197 KENT ST, SYDNEY NSW 2000	NSW
SOLOMONS, DAVID	333196	333197	DE VRIES TAYEH, L 2, 151 MACQUARIE ST, SYDNEY NSW 2000	NSW
SOWAID, AHMED	441143		COR CORDIS, ONE WHARF LANE L 20, 171 SUSSEX ST, SYDNEY NSW 2000	NSW
SOZOU, KATHERINE	502559		MCGRATHNICOL, L 12, 20 MARTIN PL, SYDNEY NSW 2000	NSW
SPRING, ANDREW JOHN	401168	401169	JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
SPROWLES, CHRISTIAN	440736		HOGANSPROWLES, L 9, 60 PITT ST, SYDNEY NSW 2000	NSW
STEPHENSON, GRAHAM KELVIN	304129		G K STEPHENSON & ASSOCIATES, 48 BAY VIEW AVE, EAST GOSFORD NSW 2250	NSW
STONE, RICHARD	326052	326053	RSM AUSTRALIA PARTNERS, L 13, 60 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
STRAWBRIDGE, VAUGHAN NEIL	322301		DELOITTE, GROSVENOR PLACE L 2, 225 GEORGE ST, SYDNEY NSW 2000	NSW
TANG, JASON BING-FAI	423462	423464	COR CORDIS, ONE WHARF LANE L 20, 171 SUSSEX ST, SYDNEY NSW 2000	NSW
TAYEH, RIAD	16521	297232	DE VRIES TAYEH, 110 HARRIS ST, HARRIS PARK NSW 2150	NSW
TAYLOR, BARRY ANTHONY	477	487	HLB MANN JUDD, L 19, 207 KENT ST, SYDNEY NSW 2000	NSW
TAYLOR, JOHN FREDERICK	4798		CROWE HORWATH, L 15, 1 O'CONNELL ST, SYDNEY NSW 2000	NSW
TAYLOR, JOSHUA PHILIP	489753		TAYLOR INSOLVENCY, U 13U, 175 LOWER GIBBES ST, ROSEVILLE NSW 2069	NSW
TENG, DESMOND WEI LIANG	513701		CHIFLEY ADVISORY, SE 1903 L 19, 31 MARKET ST, SYDNEY NSW 2000	NSW
THAGGARD, MALI AGNES KAINONA	480615		AUSTRALIA BUSINESS RESCUE, U G14, 1-15 BARR ST, BALMAIN NSW 2041	NSW
THORN, SIMON JOHN	448360		PKF, 755 HUNTER ST, NEWCASTLE WEST NSW 2302	NSW
TONKS, BRADLEY JOHN	315132	315133	PKF, L 8, 1 O'CONNELL ST, SYDNEY NSW 2000	NSW
TOOHEY, JOHN JAMES	16455		JOHN JAMES TOOHEY, 33 THE SERPENTINE, BILGOLA BEACH NSW 2107	NSW
TOPP, ALAN GODFREY	297502	333370	JONES PARTNERS, L 13, 189-197 KENT ST, SYDNEY NSW 2000	NSW
TRACY, JASON MARK	429179	448869	DELOITTE, GROSVENOR PLACE L 1, 225 GEORGE ST, SYDNEY NSW 2000	NSW
TRAFFORD-JONES, THYGE	458321		MACKAY GOODWIN, L 2, 10 BRIDGE ST, SYDNEY NSW 2000	NSW
TURNER, GEOFFREY RUSSELL	159439		G.R. TURNER & CO., 118 PALM AVE, LEETON NSW 2705	NSW
TURNER, SCOTT CAMERON	194485		SCOTT TURNER, SE 1206 L 12, 14 MARTIN PL, SYDNEY NSW 2000	NSW
VARDY, DARREN JOHN	364898	409698	SV PARTNERS, SE 201, 16 WURROOK CCT, CARINGBAH NSW 2229	NSW
VAUGHAN, STEPHEN ERNEST	435718		KPMG, TOWER 3 INTERNATIONAL TOWERS, 300 BARANGAROO AVE, SYDNEY NSW 2000	NSW
VOURIS, JOHN	4931		HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
VOURIS, KATHLEEN ELIZABETH	455318	455319	HALL CHADWICK, L 40, 2-26 PARK ST, SYDNEY NSW 2000	NSW
VRKIC, DANNY TONY	199594	475224	DV RECOVERY MANAGEMENT, L 1, 76-78 MARKET ST, WOLLONGONG NSW 2500	NSW
WALKER, ALAN LEE	420880		COR CORDIS, ONE WHARF LANE L 20, 171 SUSSEX ST, SYDNEY NSW 2000	NSW
WALLEY, DANIEL AUSTIN	398308	430858	PWC, TOWER ONE INTERNATIONAL TOWERS SYDNEY L 17, 100 BARANGAROO AVE, BARANGAROO NSW 2000	NSW
WALSH, MARTIN GREGORY	480975	481617	WALSH & ASSOCIATES, L 10, 53 WALKER ST, NORTH SYDNEY NSW 2060	NSW
WARD, GRAHAME ROBERT	351104		MACKAY GOODWIN, L 2, 10 BRIDGE ST, SYDNEY NSW 2000	NSW
WARNER, ANTHONY JOHN	226457		CRS INSOLVENCY, L 5, 379 KENT ST, SYDNEY NSW 2000	NSW
WEBB, DAVID MICHAEL	407817	407819	DUFF & PHELPS, L 32, 85 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
WENGEL, SEAN MAGNUS	418501		WILLIAM BUCK, L 29, 66 GOULBURN ST, SYDNEY NSW 2000	NSW
WESTON, PAUL GERARD	68746	225523	DW ADVISORY, L 2, 32 MARTIN PL, SYDNEY NSW 2000	NSW

Table 4A.1 - Registered liquidators list, updated to 31 May 2020 – New South Wales

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
WHITTINGHAM, KENNETH MICHAEL	4928		DUFF & PHELPS, L 32, 85 CASTLEREAGH ST, SYDNEY NSW 2000	NSW
WHITTON, ROBERT WILLIAM	16241	66335	WILLIAM BUCK, L 29, 66-84 GOULBURN ST, SYDNEY NSW 2000	NSW
WINTERBOTTOM, DAVID JOHN	156266		KORDAMENTHA, L 5, 2 CHIFLEY SQ, SYDNEY NSW 2000	NSW
WOODGATE, GILES GEOFFREY	4937	340178	WOODGATE & CO, L 8, 6-10 OCONNELL ST, SYDNEY NSW 2000	NSW
YOUNG, AMANDA	446460		JIRSCH SUTHERLAND, L 27, 259 GEORGE ST, SYDNEY NSW 2000	NSW
ZEIDAN, AHMAD	436635		AZZ INSOLVENCY SOLUTIONS, L 5, 154 ELIZABETH ST, SYDNEY NSW2000	NSW

Disclaimer

ASIC has prepared these composite lists of registered liquidators by region from information held on ASIC's Register of Liquidators.

ASIC updates these lists regularly to reflect changes that occur to the Register of Liquidators. The date of the last update is shown above. You should check ASIC's Register of Liquidators via ASIC Connect before acting on the information in these lists.

These lists should not be taken as ASIC endorsing or recommending any particular registered liquidator.

Section 1274B of the Corporations Act 2001 [Use, in court proceedings, of information from ASIC's national database] does not apply to these lists.

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Australian insolvency statistics

Released: June 2020

Table 4A.3 - Registered liquidators list, updated to 31 May 2020 – Queensland

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
ARCHER, JARVIS LEE	494804		REVIVE FINANCIAL, SHOP 1, 16 LANYANA WAY, NOOSA HEADS QLD 4567	QLD
BARLEY, ANNE-MARIE JANE	465164	465165	AMB INSOLVENCY , G SE 9, 3 CLUNIES ROSS CT, EIGHT MILE PLAINS QLD 4113	QLD
BASKERVILLE, CHRISTOPHER JOHN	466951	471851	JIRSCH SUTHERLAND, L 9, 120 EDWARD ST, BRISBANE QLD 4000	QLD
BETTLES, JASON WALTER	223088	294675	WORRELLS, L 5, 58 RIVERWALK AVE, , ROBINA QLD 4226	QLD
BIRNIE, CLARE ALEXIS	483193		GERVASE CONSULTING , L 6, 82 EAGLE ST, BRISBANE QLD 4000	QLD
BOOKLESS, MATTHEW JOHN	462141		SV PARTNERS, L 3, 12 SHORT ST, SOUTHPORT QLD 4215	QLD
BRENNAN, MICHAEL JOSEPH	325507	334747	OFFERMANS PARTNERS, SE 3B, 41-49 STURT ST, TOWNSVILLE CITY QLD 4810	QLD
CAMPBELL, BENJAMIN PETER	513815		PWC, 480 QUEEN ST, BRISBANE QLD 4000	QLD
CARTER, MOIRA KATHLEEN	288735	315147	BRI FERRIER, L 1, 211 STURT ST, TOWNSVILLE QLD 4810	QLD
CASPANEY, MICHAEL JOHN	485110		MENZIES ADVISORY , SE 31011, 9 LAWSON ST, SOUTHPORT QLD 4215	QLD
CASTLEY, ANTHONY MICHAEL	449836	466028	WILLIAM BUCK, L 21, 307 QUEEN ST, BRISBANE QLD 4000	QLD
CHAMBAL, ABDUL REMANE REMTULA	519839		ROBSON COTTER, U 1, 78 LOGAN RD, WOOLLOONGABBA QLD 4102	QLD
CHUA, KAILY LYN	518446		RODGERS REIDY, RIVER QUARTER L 9, 46 EDWARD ST, BRISBANE QLD 4000	QLD
CLOUT, DAVID LEWIS	4592		DAVID CLOUT & ASSOCIATES, L 3, 26 WHARF ST, BRISBANE QLD 4000	QLD
COLLINS, GERALD THOMAS	167538	195006	BDO, L 10, 12 CREEKST, BRISBANE QLD 4000	QLD
COLWELL, WILLIAM MARTIN	211986	274918	KPMG, RIPARIAN PLAZA', 71 EAGLE ST, BRISBANE QLD 4000	QLD
COMBIS, NICK	179844	200825	VINCENTS, L 34, 32 TURBOT ST, BRISBANE QLD 4000	QLD
CONNELLY, ANTHONY NORMAN	410893	441129	MCGRATHNICOL, L 7, 175 EAGLE ST, BRISBANE QLD 4000	QLD
COOK, CHRISTOPHER RICHARD	307258	308696	WORRELLS, L 8, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD
COTTER, WILLIAM PAUL	426644	429177	ROBSON COTTER, U 1, 78 LOGAN RD, WOOLLOONGABBA QLD 4102	QLD
CRICHTON, CAMERON ALEXANDER	455542	470103	GRANT THORNTON, L 18, 145 ANN ST, BRISBANE QLD 4000	QLD
CROSTHWAITE, LEE ANDREW	493699		WORRELLS, L 8, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD
CURRIE, IAN ALEXANDER	206136	287569	BRI FERRIER, L 4, 307 QUEEN ST, BRISBANE QLD 4000	QLD
DOPKING, STEFAN	192668		BRI FERRIER, L 4, 307 QUEEN ST, BRISBANE QLD 4000	QLD
DULLAWAY, MICHAEL	417339	419270	PEARCE & HEERS, 12, 127 CREEK ST, BRISBANE QLD 4000	QLD
DUNN, JOANNE EMILY	335366		FTI CONSULTING, L 20, 345 QUEEN ST, BRISBANE QLD 4000	QLD
FIELDING, ANDREW PETER	52586	88277	BDO, L 10, 12 CREEKST, BRISBANE QLD 4000	QLD
FLETCHER, WILLIAM JOHN	7012	15088	BENTLEYS, L 9, 123 ALBERT ST, BRISBANE QLD 4000	QLD
FORDYCE, ANN	178130	230274	PILOT PARTNERS, L 10, 1 EAGLE ST, BRISBANE QLD 4000	QLD
GIDDENS, JOHN CHRISTIAN	447968		KPMG, RIPARIAN PLAZA', 71 EAGLE ST, BRISBANE QLD 4000	QLD
GOGGIN, JOHN JOSEPH	441142	448126	WORRELLS, SHOP 12, 36 GRAFTON ST, CAIRNS QLD 4870	QLD
GREIG, JOHN LETHBRIDGE	55418	88302	DELOITTE, RIVERSIDE CENTRE' L 23, 123 EAGLE ST, BRISBANE QLD 4000	QLD
GRIFFIN, MICHAEL JOHN	176823	205654	WORRELLS, L 8 RESERVE BANK BUILDING, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD
HALL, IAN RICHARD	54774		KPMG, RIPARIAN PLAZA, L16, 71 EAGLE ST, BRISBANE QLD 4000	QLD
HAMBLETON, DAVID JAMES	289882	309068	RODGERS REIDY, RIVER QUARTER' L 9, 46 EDWARD ST, BRISBANE QLD 4000	QLD
HAMMOND, DANE ARTHUR	495042		WORRELLS, BRYANT HOUSE' SE 4 L 3, 26 DUPORTH AVE, MAROOCHYDORE QLD 4558	QLD
HARRIS, WILLIAM JAMES	276402	296750	MCGRATHNICOL, L 7, 175 EAGLE ST, BRISBANE QLD 4000	QLD
HEENAN, TIMOTHY JOSEPH	478622	482295	DELOITTE, RIVERSIDE CENTRE' L 23, 123 EAGLE ST, BRISBANE QLD 4000	QLD
HELLEN, BRADLEY VINCENT	72493	156261	PILOT PARTNERS, L 10, 1 EAGLE ST, BRISBANE QLD 4000	QLD
HERRETT, MITCHELL MACKENZIE	384744	384745	RSM AUSTRALIA PARTNERS, L 6, 340 ADELAIDE ST, BRISBANE QLD 4000	QLD
HILL, MICHAEL JOHN	206836		MCGRATHNICOL, L 7, 175 EAGLE ST, BRISBANE QLD 4000	QLD
HUGHES, RICHARD JOHN	326810	329087	DELOITTE, RIVERSIDE CENTRE' L 23, 123 EAGLE ST, BRISBANE QLD 4000	QLD
HUMPHREYS, ROBERT COLIN	419872	423877	BRI FERRIER, L 1, 211 STURT ST, TOWNSVILLE QLD 4810	QLD

Table 4A.3 - Registered liquidators list, updated to 31 May 2020 – Queensland

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
HUSSAIN, MOHAMMED SHAHIN	443814		H&H ADVISORY, L 18, 324 QUEEN ST, BRISBANE QLD 4000	QLD
HUTSON, ROBERT WILLIAM	208511		KORDAMENTHA, L 14, 12 CREEK ST, BRISBANE QLD 4000	QLD
IMRAY, JAMES MARC	215933	416521	RODGERS REIDY, RIVER QUARTER' L 9, 46 EDWARD ST, BRISBANE QLD 4000	QLD
JOINER, MATTHEW LESLIE	203318	296299	COR CORDIS, WATERFRONT PLACE' L 19, 1 EAGLE ST, BRISBANE QLD 4000	QLD
JONSSON, ANTHONY JAMES	177613	226239	GRANT THORNTON, CAIRNS CORPORATE TOWER' L 13, 15LAKE ST, CAIRNS QLD 4870	QLD
KARAGEOZIS, BILL	482410		MCLEOD & PARTNERS, MCLEOD & PARTNERS' L 9, 300 ADELAIDE ST, BRISBANE QLD 4000	QLD
KELLY, TODD WILLIAM	197992	313810	BDO, L 1, 15 LAKE ST, CAIRNS QLD 4870	QLD
KERSEY, ADAM PETER	509801		SV PARTNERS, 22 MARKET ST, BRISBANE QLD 4000	QLD
KHATRI, RAJENDRA KUMAR	65281	153093	WORRELLS, L 8, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD
KHATRI, NIKHIL	508167		WORRELLS, L 8, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD
KILLER, GRAHAM ROBERT	319199	407726	GRANT THORNTON, KING GEORGE CENTRAL' L 18, 145-147 ANN ST, BRISBANE QLD 4000	QLD
KIRK, DARRYL EDWARD	341257	345409	COR CORDIS, WATERFRONT PLACE' L 19, 1 EAGLE ST, BRISBANE QLD 4000	QLD
KNIGHT, TRACY LEE	421475		BENTLEYS, L 9, 123 ALBERT ST, BRISBANE QLD 4000	QLD
LANE, MORGAN GERARD	206155	273319	WORRELLS, L 8, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD
LAU, DAMIEN LEE HOU	493494		BENTLEYS, L 9, 123 ALBERT ST, BRISBANE QLD 4000	QLD
LAU, MELISSA POH BEE	416683		JIRSCH SUTHERLAND, L 9, 120 EDWARD ST, HONG KONG	QLD
LEE, LEON	490191		MORTON & LEE INSOLVENCY, L 10, 388 QUEEN ST, BRISBANE QLD 4000	QLD
LESLIE, ASHLEY JADE	471759	471760	VINCENTS, L 34, 32 TURBOT ST, BRISBANE QLD 4000	QLD
LUCAS, PETER ANTHONY	87416	179848	P.A. LUCAS & CO, L 4, 232 ADELAIDE ST, BRISBANE QLD 4000	QLD
MARKEY, NIGEL ROBERT	212234	289883	PILOT PARTNERS, L 10, 1 EAGLE ST, BRISBANE QLD 4000	QLD
MCCANN, MICHAEL GERARD	182386	215529	GRANT THORNTON, KING GEORGE CENTRAL' L 18, 145-147 ANN ST, BRISBANE QLD 4000	QLD
MCKINNON, SHAUN CHRISTOPHER	344636		BDO, L 10, 12 CREEKST, BRISBANE QLD 4000	QLD
MCLEOD, JONATHAN PAUL	185187	289190	MCLEOD & PARTNERS, L 9, 300 ADELAIDE ST, BRISBANE QLD 4000	QLD
MEAGHER, ANNE	383871	383872	SV PARTNERS, 22 MARKET ST, BRISBANE QLD 4000	QLD
MICHAEL, TIMOTHY JAMES	290515	297712	KPMG, RIPARIAN PLAZA', 71 EAGLE ST, BRISBANE QLD 4000	QLD
MILLER, GLENN LESLIE	326584		BRI FERRIER, 14-16 MCLEOD ST, CAIRNS QLD 4870	QLD
MISKIEWICZ, ANTHONY JAY EDWARD	286982		KORDAMENTHA , L 6, 75 DENHAM ST, TOWNSVILLE QLD 4810	QLD
MOORE, DANIEL PETER	384586		BCR ADVISORY, L 14, 167 EAGLE ST, BRISBANE QLD 4000	QLD
MORTON, GAVIN CHARLES	297335	298151	MORTON & LEE INSOLVENCY, L 10, 388 QUEEN ST, BRISBANE QLD 4000	QLD
MULLER, GINETTE DAWN	215648		HALL CHADWICK, L 4, 240 QUEEN ST, BRISBANE QLD 4000	QLD
NEWMAN, HELEN	432812	432813	BDO, L 10, 12 CREEK ST, BRISBANE QLD 4000	QLD
NIXON, BRENDAN JOSEPH	435393	445608	SM SOLVENCY ACCOUNTANTS, U 10, 144 EDWARD ST, BRISBANE QLD 4000	QLD
NOGUEIRA, PAUL ERIC	302556	304794	WORRELLS, BRYANT HOUSE' SE 4 L 3, 26 DUPORTH AVE, MAROOCHYDORE QLD 4558	QLD
O'KEARNEY, GLENN THOMAS	488159	488161	GT ADVISORY & CONSULTING , L 3, 140 BUNDALL RD, BUNDALL QLD 4217	QLD
OFFERMANS, DENNIS	165257	279645	OFFERMANS PARTNERS, SE 3B, 41-49 STURT ST, TOWNSVILLE CITY QLD 4810	QLD
OLDHAM, GLEN PETER	411762		OLDHAMS ADVISORY , L 20, 300 QUEEN ST, BRISBANE QLD 4000	QLD
ONEILL, FRANCIS JUDE	505606		SV PARTNERS, LEVEL 1, CNR SYDNEY & GORDON ST, MACKAY QLD 4740	QLD
ORR, DAVID MICHAEL	480292	482591	DELOITTE, RIVERSIDE CENTRE, L 23, 123 EAGLE ST, BRISBANEQLD 4000	QLD
OWEN, MICHAEL ANDREW	206306	295134	PWC, 480 QUEEN ST, BRISBANE QLD 4000	QLD
PARK, JOHN RICHARD	196558	229765	FTI CONSULTING, L 20, 345 QUEEN ST, BRISBANE QLD 4000	QLD
PEARCE, MARK WILLIAM	194346	240967	PEARCE & HEERS, L 12, 127 CREEK ST, BRISBANE QLD 4000	QLD
PULLEN, TRAVIS JAY	433641		B&T ADVISORY , L 4, 26 WHARF ST, BRISBANE QLD 4000	QLD
ROBSON, WILLIAM ROLAND	351222	377235	ROBSON COTTER, U 1, 78 LOGAN RD, WOOLLOONGABBA QLD 4102	QLD
ROSE, TERRENCE JOHN	316087	317302	SV PARTNERS, 22 MARKET ST, BRISBANE QLD 4000	QLD
RUHE, ALICE FAY	439994	442438	SELLERS MULDOON BENTON, L 18, 324 QUEEN ST, BRISBANE QLD 4000	QLD
SHANAHAN, JOHN GERVASE	309872	331123	GERVASE CONSULTING , L 6, 82 EAGLE ST, BRISBANE QLD 4000	QLD

Table 4A.3 - Registered liquidators list, updated to 31 May 2020 – Queensland

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
SHANNON, GLENN MICHAEL	285941		HALL CHADWICK, L 4, 240 QUEEN ST, BRISBANE QLD 4000	QLD
SPARKS, GRANT DENE	166884		DELOITTE, GRANT SPARKS, U 9, 58 TRISTANIA DR, BARDON	QLD
STAATZ, STEVEN NEVILLE	442228	450504	VINCENTS, L 34, 32 TURBOT ST, BRISBANE QLD 4000	QLD
STIMPSON, DAVID MICHAEL	236579	297252	SV PARTNERS, 22 MARKET ST, BRISBANE QLD 4000	QLD
TAPLIN, JAMES LEONARD EATON	509802		BRI FERRIER, L 4, 307 QUEEN ST, BRISBANE QLD 4000	QLD
TAY, LIYAN	412404		VINCENTS, L 34, 32 TURBOT ST, BRISBANE QLD 4000	QLD
TRENFIELD, KELLY-ANNE LAVINA	310779	328379	FTI CONSULTING, L 20, 345 QUEEN ST, BRISBANE QLD 4000	QLD
VAN DER VELDE, TERRY GRANT	56818	159701	SV PARTNERS, 22 MARKET ST, BRISBANE QLD 4000	QLD
VICKERS, DERRICK CRAIG	277491	297780	PWC, L 20, 480 QUEEN ST, BRISBANE QLD 4000	QLD
VILLANI, JARROD LEE	473872		KORDAMENTHA, L 14, 12 CREEK ST, BRISBANE QLD 4001	QLD
WALSH, JUSTIN DENIS	217320	280506	ERNST & YOUNG, L 48, 111 EAGLE ST, BRISBANE CITY QLD 4000	QLD
WARD, ADAM FRANCIS	354142		WORRELLS, L 1, 160-162 BRISBANE ST, IPSWICH QLD 4305	QLD
WATTERS, MARCUS JON	493492		HALL CHADWICK, L 4, 240 QUEEN ST, BRISBANE QLD 4000	QLD
WEATHERLEY, ANDREW BRIAN	457865		WCT ADVISORY, WCT ADVISORY L 14 SE 1, 110 EAGLE ST, BRISBANE QLD 4000	QLD
WHYTE, DAVID	285940	305276	BDO, L 10, 12 CREEK ST, BRISBANE QLD 4000	QLD
WILLIAMS, JULIE ANN	230012	295207	INSOLVENCY AND TURNAROUND SOLUTIONS, SUITE, 1-492 CHRISTINE AVE, ROBINA QLD 4226	QLD
WORRELL, IVOR	6640	7152	WORRELLS, L 8 RESERVE BANK BUILDING, 102 ADELAIDE ST, BRISBANE QLD 4000	QLD

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Australian insolvency statistics

Released: June 2020

Table 4A.4 - Registered liquidators list, updated to 31 May 2020 – South Australia

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
AURICHT, RICHARD ERNEST	158385		AURICHT CHARTERED ACCOUNTANTS, 33 FULLARTON RD, KENT TOWN SA 5067	SA
BASEDOW, MICHAEL OSCAR	212231	294728	PITCHER PARTNERS, L 1, 100 HUTT ST, ADELAIDE SA 5000	SA
BURFORD, IAN WAYNE	194181		MACKS ADVISORY, WEST WING L 8, 50 GRENFELL ST, ADELAIDE SA 5000	SA
CANTONE, DOMINIC	495046		WORRELLS, SE 1104 L 11, 147 PIRIE ST, ADELAIDE SA 5000	SA
CLIFTON, TIMOTHY JAMES	221237	295125	CLIFTON HALL, L 3, 431 KING WILLIAM ST, ADELAIDE SA 5000	SA
COOPER, NICHOLAS DAVID	218261	279429	WORRELLS, SE 1104, 147 PIRIE ST, ADELAIDE SA 5000	SA
DIVITKOS, GEORGE	16321		SV PARTNERS, L 4, 12 PIRIE ST, ADELAIDE SA 5000	SA
DUNCAN, STEPHEN JAMES	15047	57695	DUNCAN POWELL, L 4, 70 PIRIE ST, ADELAIDE SA 5000	SA
FERGUSON, ROBERT ANTHONY	5692		FERGUSON HANNAM, L 2, 70 HINDMARSH SQ, ADELAIDE SA 5000	SA
FRYER, NICHOLAS LEWIS	325634		SHEAHAN LOCK PARTNERS, L 8, 26 FLINDERS ST, ADELAIDE SA 5000	SA
GYSS, NICHOLAS DAVID	56185	425604	DUNCAN POWELL, L 4, 70 PIRIE ST, ADELAIDE SA 5000	SA
HALL, MARK CHRISTOPHER	161555	178498	CLIFTON HALL, L 3, 431 KING WILLIAM ST, ADELAIDE SA 5000	SA
HANNAM, CRAIG WILLIAM	341349		FERGUSON HANNAM, L 2, 70 HINDMARSH SQ, ADELAIDE SA 5000	SA
HART, JOHN RONALD	170587		KPMG, L 7, 151 PIRIE ST, ADELAIDE SA 5000	SA
HEARD, ANDREW JAMES	192640	245541	HEARD PHILLIPS LIEBERENZ, L 12, 50 PIRIE ST, ADELAIDE SA 5000	SA
JAMES, STEPHEN GLEN	374865	376527	BCR ADVISORY, L 5, 63 PIRIE ST, ADELAIDE SA 5000	SA
JOHNSON, GREGG ROBERTSON	467595		BCR ADVISORY, L 5, 63 PIRIE ST, ADELAIDE SA 5000	SA
KIDMAN, DAVID WILLIAM	284454	300760	KPMG, L 7, 151 PIRIE ST, ADELAIDE SA 5000	SA
KOCH, TARQUIN RAOUL	280256	307572	TARQUIN KOCH, U 2, 25 BEULAH RD, NORWOOD SA 5067	SA
LANGSHAW, ANDREW GEORGE ASHBROOK	494735		DUNCAN POWELL, L 4, 70 PIRIE ST, ADELAIDE SA 5000	SA
LANTHOIS, PETER JAMES	163463	182499	DUNCAN POWELL, L 4, 70 PIRIE ST, ADELAIDE SA 5000	SA
LEWIS, MARTIN DAVID	209678	286317	KPMG, L 7, 151 PIRIE ST, ADELAIDE SA 5000	SA
LIEBERENZ, MARK RUDOLPH	441137		HEARD PHILLIPS LIEBERENZ, L 12, 50 PIRIE ST, ADELAIDE SA 5000	SA
LOCK, IAN RUSSELL	192831	224642	SHEAHAN LOCK PARTNERS, L 8, 26 FLINDERS ST, ADELAIDE SA 5000	SA
LOPRESTI, DANIEL	450441	455426	CLIFTON HALL, L 3, 431 KING WILLIAM ST, ADELAIDE SA 5000	SA
MABLESON, TIMOTHY DAVID	382492	382493	KPMG, L 7, 151 PIRIE ST, ADELAIDE SA 5000	SA
MACKS, PETER IVAN	15116	54557	MACKS ADVISORY, WEST WING' L 8, 50 GRENFELL ST, ADELAIDE SA 5000	SA
MANSFIELD, MITCHELL WAYNE	499863		BORRELLI WALSH, L 23, 25 GRENFELL ST, ADELAIDE SA 5000	SA
MARTIN, HUGH SUTCLIFFE	192287	273551	BERNARDI MARTIN, G, 195 VICTORIA SQ, ADELAIDE SA 5000	SA
MATTHEWS, ANTHONY CHRISTOPHER	5716	295130	ANTHONY MATTHEWS & ASSOCIATES, 46 FULLARTON RD, NORWOOD SA 5067	SA
MCPHARLIN, HUGH LACHLAN	154263		EDWARDS MARSHALL, L 3, 153 FLINDERS ST, ADELAIDE SA 5000	SA
MCPHERSON, JAMES STUART	471757		MEERTENS, GDH HOUSE L 10, 68 GRENFELL ST, ADELAIDE SA 5000	SA
MILLER, SIMON RICHARD	450442	455228	CLIFTON HALL, L 3, 431 KING WILLIAM ST, ADELAIDE SA 5000	SA
NAUDI, ROBERT WILLIAM	415146		RODGERS REIDY, L 3, 50 GRENFELL ST, ADELAIDE SA 5000	SA
ORFANOS, NICHOLAS	5722		ORFANOS CORPORATE SERVICES, 46 KINGFISHER CCT, FLAGSTAFF HILL SA 5159	SA
OTWAY, THOMAS STUART	448746	448747	SV PARTNERS, L 4, 12 PIRIE ST, ADELAIDE SA 5000	SA
PHILLIPS, ANTHONY JOHN ARTHUR	315416	319007	HEARD PHILLIPS LIEBERENZ, L 12, 50 PIRIE ST, ADELAIDE SA 5000	SA
POWELL, CHRISTOPHER ROBERT	165181	193745	DUNCAN POWELL, L 4, 70 PIRIE ST, ADELAIDE SA 5000	SA
PRIOR, LEIGH DEVERON	423915		AGILE BUSINESS ADVISORY, SE 414, 147 PIRIE ST, ADELAIDE SA 5000	SA
RUDAKS, MARIS ANDRIS	56883	158223	BRI FERRIER, L 4, 12 PIRIE ST, ADELAIDE SA 5000	SA
SCHWARZ, NATHAN KARL	514218		WORRELLS, SE 1104 L 11, 147 PIRIE ST, ADELAIDE SA 5000	SA
SCOTT, ALAN GEOFFREY	15856	159898	SV PARTNERS, L 4, 12 PIRIE ST, ADELAIDE SA 5000	SA

Table 4A.4 - Registered liquidators list, updated to 31 May 2020 – South Australia

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
SMITH, ANTHONY STEVENS	16372	71735	ERNST & YOUNG, L 12, 121 KING WILLIAM ST, ADELAIDE SA 5000	SA
STRAZDINS, ANDREJS JANIS	199876	309454	BRI FERRIER, L 4, 12 PIRIE ST, ADELAIDE SA 5000	SA
TAYLOR, AUSTIN R.M.	5742	15499	MEERTENS, L 10, 68 GRENFELL ST, ADELAIDE SA 5000	SA
VAN DISSEL, MICHAEL DIRK HAWKER	454592		BERNARDI MARTIN, G, 195 VICTORIA SQ, ADELAIDE SA 5000	SA

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Table 4A.5 - Registered liquidators list, updated to 31 May 2020 – Western Australia

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
ANDERSON, GARY JOHN	15578		WA INSOLVENCY SOLUTIONS, L 6, 109 ST GEORGES TCE, PERTH WA 6000	WA
BIRCH, THOMAS DONALD	519260		KPMG, L 7, 235 ST GEORGES TCE, PERTH WA 6000	WA
BOYLE, SHAUN WILLIAM	487101	487102	BRI FERRIER, U 3, 99-101 FRANCIS ST, NORTHBRIDGE WA 6003	WA
BRAUER, ROBERT CONRY	494513		MCGRATHNICOL, L 19, 2 THE ESPLANADE, PERTH WA 6000	WA
BREDENKAMP, DANIEL JOHANNES	449186	451892	PITCHER PARTNERS, L 11, 12-14 THE ESPLANADE, PERTH WA 6000	WA
BUMBAK, JOHN ALLAN	422223		KORDAMENTHA, L 10, 40 ST GEORGES TCE, PERTH WA 6000	WA
CARRELLO, GIOVANNI MAURIZIO	82334	165762	BRI FERRIER, MR G M CARRELLO, 'U 3, 101 FRANCIS ST, NORTHBRIDGE WA 6003	WA
COAD, SIMON ROGER	15767		TICCIDEW, 463 SCARBOROUGH BEACH RD, OSBORNE PARK WA 6017	WA
COATES, DAVID JOHN	4907		DELOITTE, 2 BROOKFIELD PLA, 123 ST GEORGES TCE, , PERTH WA 6000	WA
CRIBB, NEIL RAYMOND	84221	213578	RSM AUSTRALIA PARTNERS, EXCHANGE TOWER' L 32, 2 THE ESPLANADE, PERTH WA 6000	WA
DONNELLY, MATTHEW JAMES	328136		DELOITTE, L 7, 123 STGEORGES TCE, PERTH WA 6000	WA
DUDLEY, GREGORY BRUCE	326371	331453	RSM AUSTRALIA PARTNERS, EXCHANGE TOWER' L 32, 2 THE ESPLANADE, PERTH WA 6000	WA
EISENMANN, ERIC JOSEPH	286512		MR E J EISENMANN, 40 ELIZABETH ST, SOUTH PERTH WA 6151	WA
FIELD, MALCOLM	424090		SV PARTNERS, L 8, 68 ST GEORGES TCE, PERTH WA 6000	WA
FRANCIS, IAN CHARLES	78263	169163	FTI CONSULTING, L 47, 152-158 ST GEORGES TCE, PERTH WA6000	WA
FREEMAN, SAMUEL JOHN	417293	461162	ERNST & YOUNG, L 5, 11 MOUNTS BAY RD, PERTH WA 6000	WA
GIBSON, MARK ANDREW	417233		COR CORDIS, M LEVEL, 28 THE ESPLANADE, PERTH WA 6000	WA
GROHOVAZ, MELANIE SAMANTHA	413779		EMJ CONSULTING, 16 ALLENBY RD, DALKEITH WA 6009	WA
HODGSON, DAVID MARK	454751	478920	GRANT THORNTON, L 43, 152-158 ST GEORGES TCE, PERTH WA 6000	WA
HUGHES, BRYAN KEVIN	181417	224627	PITCHER PARTNERS, L 11, 12-14 THE ESPLANADE, PERTH WA 6000	WA
HURT, DAVID ASHLEY NORMAN	14831	15553	WA INSOLVENCY SOLUTIONS, L 6, 109 ST GEORGES TCE, PERTH WA 6000	WA
HUXTABLE, CARL ALAN LOUIS	290898	321975	HALL CHADWICK, L 11, 77 ST GEORGES TCE, PERTH WA 6000	WA
JACOBS, ROBERT ALLAN	172661		AUXILIUM PARTNERS, L 2, 949-951 WELLINGTON ST, WEST PERTH WA 6005	WA
JAMES, JACK ROBERT	218262	314859	RODGERS REIDY, 22 LINDSAY ST, PERTH WA 6000	WA
JONES, MARTIN BRUCE	15239	16349	KPMG, L 7, 235 ST GEORGES TCE, PERTH WA 6000	WA
JOSEPH, CLINT PETER	477610		KPMG, L 8, 235 ST GEORGES TCE, PERTH WA 6000	WA
KIRMAN, ROBERT MICHAEL	336852	395673	MCGRATHNICOL, L 19, 2 THE ESPLANADE, PERTH WA 6000	WA
KITAY, MERVYN JONATHAN	55372	184695	WORRELLS, L 4, 15 OGILVIE RD, MOUNT PLEASANT WA 6153	WA
KUKURA, TRAVIS	429239		RSM AUSTRALIA PARTNERS, EXCHANGE TOWER' L 32, 2 THE ESPLANADE, PERTH WA 6000	WA
LEDGER, ALAN EDSON	14845		AE LEDGER, L 3, 46 ORD ST, WEST PERTH WA 6005	WA
LOPEZ, GEORGE AUBREY	72295	163274	MELSOM ROBSON, 75A BREWER ST, PERTH WA 6000	WA
LOW, JENNIFER ELIZABETH	67947		SHERIDANS ACCOUNTANTS, L 9, 40 ST GEORGES TCE, PERTH WA 6000	WA
MCLAY, DOUGAL JOHN	160503		DOUGAL MCLAY & ASSOCIATES, U 18, 145 STIRLING HWY, NEDLANDS WA 6009	WA
MCMASTER, BRIAN KEITH	199258		RODGERS REIDY, 22 LINDSAY ST, PERTH WA 6000	WA
MCVEIGH, DERMOTT JOSEPH	342611	349692	AVIOR CONSULTING, SE 2 L 1, 1156-1160 HAY ST, WEST PERTH WA 6005	WA
MOHEN, JEROME HALL	514551		RSM AUSTRALIA PARTNERS, EXCHANGE TOWER L 32, 2 THE ESPLANADE, PERTH WA 6000	WA
MORGAN, RUSSELL HARRY	14186	473290	MORGAN CORPORATE RECOVERY, L 14, 197 ST GEORGES TCE, PERTH WA 6000	WA

Table 4A.5 - Registered liquidators list, updated to 31 May 2020 – Western Australia

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
NIPPS, JEREMY JOSEPH	485565	485566	COR CORDIS, M LEVEL, 28 THE ESPLANADE, PERTH WA 6000	WA
PROUT, GREGORY MATHEW	504278		WA INSOLVENCY SOLUTIONS, L 6, 109 ST GEORGES TCE, PERTH WA 6000	WA
QUIGLEY, PETER REYMOND	14905		QUIGLEY & CO , L 5, 231 ADELAIDE TCE, PERTH WA 6000	WA
READ, SIMON ANDREW	89949	191188	MCGRATHNICOL, L 17, 37 ST GEORGES TCE, PERTH WA 6000	WA
ROCKE, CLIFFORD STUART	157073		COR CORDIS, M LEVEL, 28 THE ESPLANADE, PERTH WA 6000	WA
RUSHTON, WAYNE ANTHONY	482601		KPMG, L 7, 235 ST GEORGES TCE, PERTH WA 6000	WA
RYAN, MICHAEL JOSEPH	56688	170510	FTI CONSULTING, L 47, 152-158 ST GEORGES TCE, PERTH WA 6000	WA
SHAW, CAMERON HUGH	430749	430750	HALL CHADWICK, L 11, 77 ST GEORGES TCE, PERTH WA 6000	WA
SMITH, VINCENT ANTHONY	183154		ERNST & YOUNG, L 5, 11 MOUNTS BAY RD, PERTH WA 6000	WA
SMITH, ANDREW MICHAEL	482014		KPMG, 235 ST GEORGES TCE, PERTH WA 6000	WA
SMITH, PAULA LAUREN	495363		RODGERS REIDY, 22 LINDSAY ST, PERTH WA 6000	WA
SPENCER, DAVID RAYMOND	172969	474340	BUSINESS & INSOLVENCY SOLUTIONS , L 1, 15 ADELAIDE ST, FREMANTLE WA 6160	WA
STRICKLAND, KIMBERLEY ANDREW	163723	185888	WA INSOLVENCY SOLUTIONS, L 6, 109 ST GEORGES TCE, PERTH WA 6000	WA
STUBING, NATHAN THOMAS KIRKHAM	519037		FTI CONSULTING, L 47, 152-158 ST GEORGES TCE, PERTH WA 6000	WA
THACKRAY, JAMES GERARD	308015		HQ ADVISORY, 5 MITFORD ST, SWANBOURNE WA 6010	WA
THEOBALD, SIMON GUY	305769		PWC, BROOKFIELD PLACE, 125 ST GEORGES TCE, PERTH WA 6000	WA
THOMSON, ROSS STEPHEN	333905		PIGGOTT PARTNERS , 237 ADELAIDE TCE, PERTH WA 6000	WA
TRAVAGLINI, DINO	14182		TRAVAGLINI CORPORATE ADVISORY, THE PARK BUSINESS CENTRE, 45 VENTNOR AVE, WEST PERTH WA 6005	WA
TREVOR, GARRY JOHN	14896	14897	AUSTRALIAN FINANCIAL SOLUTIONS AUSTRALIAN, 85 MAIN ST, OSBORNE PARK WA 6017	WA
TRIBUT, MATHIEU	457558	457559	GTS ADVISORY, SE 145 L 1, 580 HAY ST, PERTH WA 6000	WA
TRPCEVSKI, JIMMY	486374	486375	WA INSOLVENCY SOLUTIONS, L 6, 109 ST GEORGES TCE, PERTH WA 6000	WA
TUCKER, RICHARD SCOTT	475963		KORDAMENTHA, L 10, 40 ST GEORGES TCE, PERTH WA 6000	WA
WALLMAN, KIMBERLEY STUART	14183		HLB MANN JUDD, L 3, 35 OUTRAM ST, WEST PERTH WA 6005	WA
WHITE, HAYDEN LEIGH	409041	409042	KPMG, L 8, 235 ST GEORGES TCE, PERTH WA 6000	WA
WOODHOUSE, DANIEL HILLSTON	500854		FTI CONSULTING, L 47, 152-158 ST GEORGES TCE, PERTH WA 6000	WA
WOODINGS, ANTONY LESLIE JOHN	14180	14915	A.L.J.WOODINGS, 33 COLIN ST, WEST PERTH WA 6005	WA
WOODS, MATTHEW DAVID	448144	448146	KPMG, L 8, 235 ST GEORGES TCE, PERTH WA 6000	WA

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Table 4A.6 - Registered liquidators list, updated to 31 May 2020 – Tasmania

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
ANDERSON, TRAVIS ADRIAN	495171		DELOITTE, L 1, 117 CIMITIERE ST, LAUNCESTON TAS 7250	TAS
BROOKS, SHELLEY-MAREE	405635	425030	RODGERS REIDY, L 2, 15 VICTORIA ST, HOBART TAS 7000	TAS
COOK, PAUL JOHN	317	16339	PAUL COOK & ASSOCIATES, 105 MACQUARIE ST, HOBART TAS 7000	TAS
COOPER, MARK FRASER	220390	297711	FRASERS INSOLVENCY ADVISORY, L 2, 162 MACQUARIE ST, HOBART TAS 7000	TAS
HAMILTON, BARRY KENNETH	166358	295189	BARRY HAMILTON & ASSOCIATES, L 3, 63 SALAMANCA PLACE-(OFF WOOPY'S LANE), HOBART TAS 7000	TAS
HERNYK, STEVEN ALLAN	15609	76810	DELOITTE, L 1, 117 CIMITIERE ST, LAUNCESTON TAS 7250	TAS
MURRELL, JOHNATHAN ROBERT	212714	285850	PAUL COOK & ASSOCIATES, 105 MACQUARIE ST, HOBART TAS 7000	TAS
TENBENSEL, ROBERT EDWARD JOHN	313		BENTLEYS, L 2, 39 SANDY BAY RD, HOBART TAS 7000	TAS

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Table 4A.7 - Registered liquidators list, updated to 31 May 2020 – Northern Territory

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
ANGUS, TREVOR ALAN	5674		ANGUS AND ASSOCIATES, L 1, 40 PARAP RD, PARAP NT 0820	NT
REID, STUART GEORGE	338595		RODGERS REIDY, U 13, 16 CHARLTON CT, WOOLNER NT 0820	NT

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Table 4A.8 - Registered liquidators list, updated to 31 May 2020 – Australian Capital Territory

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
ABBOTT, LACHLAN CHARLES MACARTHUR	480116		ERNST & YOUNG, 121 MARCUS CLARKE ST, CANBERRA ACT 2600	ACT
COLBRAN, JONATHON KINGSLEY	419577	419578	RSM AUSTRALIA PARTNERS, EQUINOX BUILDING 4' L 2, 70 KENT ST, DEAKIN ACT 2600	ACT
HUNDY, STEPHEN JOHN	296240	297670	WORRELLS, L 2,1 HOBART PL, CANBERRA ACT 2601	ACT
KAZAR, HENRY JOSEPH	15503	86362	ERNST & YOUNG, L 11, 121 MARCUS CLARKE ST, CANBERRA ACT 2601	ACT
LANE, ANTHONY GRAEME	480629	480630	VINCENTS, L 2, 14 MOORE ST, CANBERRA ACT 2601	ACT
LO PILATO, FRANK	16380	165187	RSM BIRD CAMERON PARTNERS, EQUINOX BUILDING 4' L 2, 70 KENT ST, DEAKIN ACT 2600	ACT
O'KEEFE, SHANE NORMAN	341369		MCGRATHNICOL, L 9, 60 MARCUS CLARKE ST, CANBERRA ACT 2600	ACT
SENATORE, EZIO MARCO	15904	171288	EDDIE SENATORE ADVISORY, U 2, 16 BOUGAINVILLE ST, GRIFFITHACT 2603	ACT
SLAVEN, MICHAEL EDWARD	165873	275680	SLAVEN TORLINE, 243 NORTHBOURNE AVE, LYNEHAM ACT 2602	ACT
TORLINE, AARON BOYD	462455		SLAVEN TORLINE, 243 NORTHBOURNE AVE, LYNEHAM ACT 2602	ACT

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Australian insolvency statistics

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Table 4A.9 - Registered liquidators list, updated to 31 May 2020 – Overseas

Name	Registered liquidator no.	Official liquidator no.	Principal place of practice	Region
DUNCAN, CAMERON LINDSAY	333690		KORDAMENTHA PTE LTD, 16 COLLYER QUAY, #30-01, SINGAPORE 049318	O/S
HUTCHISON, KEIRAN WILLIAM	211665		ERNST & YOUNG , 62 FORUM LANE,, GRAND CAYMAN, CAYMEN ISLANDS KY1-1106	O/S

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