

**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**

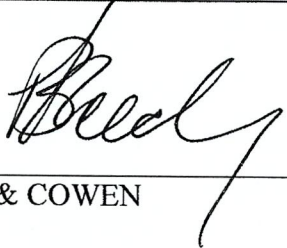
I, **DAVID WHYTE** of Level 10, 12 Creek Street, Brisbane in the State of Queensland,  
Registered Liquidator, state on oath:-

1. I am a Registered Liquidator and a Consultant in the employ of the firm BDO.  
I am an affiliate member of the Chartered Accountants Australia and New

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Page 1

Signed: 

Witnessed by: 

**AFFIDAVIT:**  
Form 46, R.431



Filed on behalf of the Applicant

TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
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Zealand and a professional member of the Australian Restructuring, Insolvency and Turnaround Association (“ARITA”).


2. Now produced and shown to me and marked “DW-124 is an indexed paginated bundle of the documents referred to in this Affidavit (“the Bundle”).

### **Appointments**

#### *Receivership*

3. By Order of this Honourable Court made on 8 August 2013 and later embodied in an Order dated 21 August 2013, I was appointed:
  - (a) pursuant to section 601NF(1) of the Corporations Act 2001 (Cth) (“the Act”) to take responsibility for ensuring that the LM First Mortgage Income Fund ARSN 089 343 288 (“the FMIF”) is wound up in accordance with its constitution; and
  - (b) pursuant to section 601NF(2) of the Act, as the receiver of the property of the FMIF.
4. I refer to my affidavit sworn and filed on 7 November 2014 (“November 2014 Affidavit”). The background to my appointment is relevantly explained by me at paragraphs 12 to 37 of my November 2014 Affidavit.
5. By Order of this Honourable Court made on 17 December 2015 in proceeding 3508/15 (“Residual Powers Orders”), I was:-
  - (a) Empowered subject to the balance of orders therein, to determine the extent LM Investment Management Ltd (receivers and managers appointed) (in liquidation) (“LMIM”) is entitled to be indemnified from the property of the FMIF, in respect of any expense or liability, or claim against, LMIM, in acting as Responsible Entity (“RE”) of the FMIF;
  - (b) Authorised, and empowered, to exercise the powers of, and am responsible for, the functions of the RE of the FMIF as set out in Clauses 9, 10 and 22 of the Constitution of the FMIF, in respect of:-


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- (i) The transfer, registration and suspension of units in the FMIF (Clause 9);
  - (ii) Transmission of units (Clause 10); and
  - (iii) Maintaining the Register of Members of the FMIF (Clause 22).
- (c) Directed to apply to the Australian Securities and Investments Commission (“ASIC”) to obtain relief from financial reporting and audit obligations of the FMIF under Part 2M.3 of the Act, herein referred to as the “Residual Powers Orders”.
6. By order of this Honourable Court made on 18 July 2018 in proceeding 3508/15, it was directed that the Liquidators are entitled to claim their further reasonable costs and expenses of carrying out the work they or LMIM are required to do by and under the Residual Powers Orders in connection with the FMIF, not being the subject of a claim already made under the Residual Powers Orders, and to be paid therefore out of the assets of the FMIF, in such amounts as are approved by the Court from time to time.
7. By order of this Honourable Court made on 2 October 2019 in proceeding 3508/15, I was authorised and empowered to make an interim distribution from the property of the FMIF, to members of the FMIF, of up to \$40 million.

*Controllership*

8. On 25 September 2014, Andrew Fielding and I were appointed as agents of The Trust Company (PTAL) Ltd (“PTAL”), in lieu of LMIM, in respect of the securities it holds from the following companies:-
- (a) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296 (“Cameo”);
  - (b) Bridgewater Lake Estate Pty Limited ACN 086 203 787 (“Bridgewater”);
  - (c) OVST Pty Ltd ACN 103 216 771 (“OVST”);

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- (d) Redland Bay Leisure Life Pty Ltd ACN 109 932 916 (“**R BLL**”);
- (e) Redland Bay Leisure Life Development Pty Ltd ACN 112 002 383 (“**R BLLD**”);
- (f) Pinevale Villas Morayfield Pty Ltd ACN 116 192 780 (“**Pinevale**”),

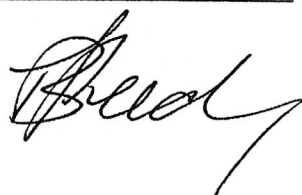
together, referred to in this Affidavit as the “**Controllership Companies**”. In August 2018, PTAL issued notices revoking the appointments of Mr Fielding and I as controllers of Cameo, Bridgewater, OVST, R BLL, R BLLD, and in September of 2018, PTAL issued notices revoking the appointment of Mr Fielding and I as controllers of Pinevale. Each of the Controllership Companies (save for Cameo) is now deregistered.

*References*

- 9. Throughout this Affidavit, where I refer to:-
  - (a) “BDO”, I am referring in a ‘short-hand’ way to staff at BDO under my supervision
  - (b) “my appointment”, I am referring to my role as the person appointed under section 601NF(1) of the Act as person responsible for ensuring the FMIF is wound up in accordance with its constitution;
  - (c) “BRI” or “BR” I am referring to BDO Business Recovery & Insolvency (Qld) Pty Ltd. On 16 August 2016, BDO Business Recovery and Insolvency (Qld) Pty Ltd changed its name to BDO Business Restructuring Pty Ltd.
- 10. For ease of reference, I use the following defined terms throughout this Affidavit:-

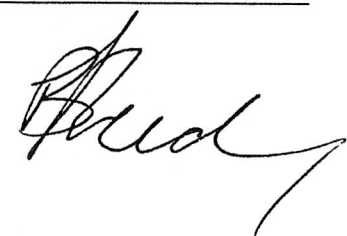
<b>Defined Term</b>	<b>Definition</b>
the Act	the <i>Corporations Act 2001</i> (Cth)

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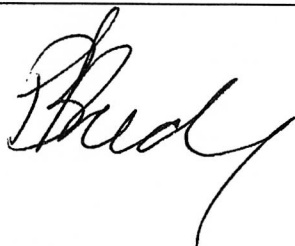
Defined Term	Definition
AIIS	Supreme Court of Queensland Proceeding No. 12716/15 commenced by KordaMentha against LMIM, in relation to a loan made by LMIM as trustee for the MPF to AIIS, for equitable compensation against LMIM, and for a constructive trust and other proprietary relief against assets of the FMIF, which is now discontinued.
ARITA	the Australian Restructuring, Insolvency and Turnaround Association
ASIC	Australian Securities and Investments Commission
Auditors Claim	Supreme Court of Queensland proceeding number 2166 of 2015 against the former auditors of the FMIF
Bellpac	Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation)
Bellpac Expenses Application	The application filed by the Liquidator on 24 January 2020 in proceeding 3508/15 seeking orders of the Court approving payment of the sum of \$157,107.81 to the Liquidator from property of the FMIF, for legal costs incurred by LMIM in relation to the claim against the MPF. The application was subsequently amended to increase the amount claimed to \$289,285.77.
Bellpac Liquidator	The Liquidator of Bellpac
BR	BDO Business Restructuring Pty Ltd
Claim against the MPF	Supreme Court of Queensland proceeding number 12317 of 2014 against LMIM, certain former directors of LMIM and the trustees of the MPF
DB	Deutsche Bank AG
DB Receivers	Joseph Hayes and Anthony Connelly
EY	EY also known as Ernst and Young
Feeder Funds	the LM Currency Protected Australian Income Fund, the LM Institutional Currency Protected Australian Income Fund and the LM Wholesale First Mortgage Income Fund

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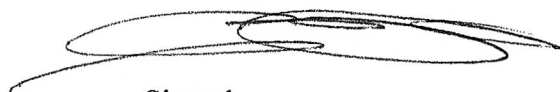
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<b>Defined Term</b>	<b>Definition</b>
FMIF	the LM First Mortgage Income Fund ARSN 089 343 288
FTI Remuneration Proceeding	Supreme Court of Queensland Proceeding No 3508 of 2015. Various applications have been made in this proceeding including applications by the Liquidator and/or LMIM for approval of remuneration or expenses, and applications seeking declarations or orders in relation to the extent of the powers or functions of the Liquidator and/or Mr Whyte in the winding up of the FMIF
FTI	FTI Consulting
Fund	the LM First Mortgage Income Fund ARSN 089 343 288
June 2016 Affidavit	Affidavit of David Whyte filed 8 June 2016 in this proceeding
June 2017 Affidavit	Affidavit of David Whyte filed 14 June 2017 in this proceeding
June 2018 Affidavit	Affidavit of David Whyte filed 1 June 2018 in this proceeding
June 2019 Affidavit	Affidavit of David Whyte filed 6 June 2019 in this proceeding
KordaMentha	Trustees of the MPF
Liquidator	John Park as Liquidator of LMIM
Liquidators	John Park and Ginnette Muller, as Liquidators of LMIM. Ms Muller ceased to a Liquidator of LMIM on 17 May 2017.
LMA	LM Administration Pty Ltd (in liquidation)
LMIM	LM Investment Management Ltd (receiver appointed) (in liquidation)
LMIM claim	Supreme Court of Queensland proceeding no.11560/16
May 2020 Affidavit	Affidavit of David Whyte filed 11 May 2020 in this proceeding
MPF	LM Managed Performance Fund
MPF Proceedings	Supreme Court of Queensland Proceedings 8032/14 and 8034/14 commenced by KordaMentha which sought equitable

  
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Defined Term	Definition
	compensation against LMIM and relief over assets of the FMIF by way of subrogation to LMIM's alleged right of indemnity out of assets of the FMIF, but are now discontinued
November 2015 Affidavit	Affidavit of David Whyte filed 24 November 2015 in this proceeding
November 2016 Affidavit	Affidavit of David Whyte filed 18 November 2016 in this proceeding
November 2017 Affidavit	Affidavit of David Whyte filed 10 November 2017 in this proceeding
November 2018 Affidavit	Affidavit of David Whyte filed 14 November 2018 in this proceeding
November 2019 Affidavit	Affidavit of David Whyte filed 21 November 2019 in this proceeding
PEs	Public Examinations
PTAL	The Trust Company (PTAL) Ltd, the custodian of the FMIF
RE	Responsible Entity
Relevant Period	from 1 May 2020 to 31 October 2020
Residual Powers Orders	Orders made by Jackson J on 17 December 2015, as varied or supplemented by orders made by Jackson J on 18 July 2018 and 2 October 2019
Second FTI Remuneration Application	The application filed by Mr Park on 17 July 2018, in Supreme Court of Queensland Proceeding 3508/15 seeking remuneration as liquidator and administrator of the Responsible Entity LMIM
the Schedule	a schedule of work performed by staff of the Brisbane office of BDO during the Relevant Period in relation to my appointment (in connection with the winding up of the FMIF).
WCL	Wollongong Coal Ltd
\$2M proceeding	Supreme Court of New South Wales proceeding no.2014/332566
\$8M proceeding	Federal Court of Australia at New South Wales proceeding No. 2016/00120239


  
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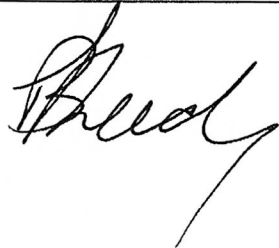
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*Previous Remuneration*

11. I have made thirteen previous applications for approval of my remuneration:-

<b>Remuneration Period</b>	<b>Remuneration Order</b>	<b>Amount of remuneration approved (incl. of GST)</b>	<b>Approximate remuneration per month</b>
8 August 2013 to 31 March 2014	McMurdo J on 28 August 2014	\$702,480.35	\$88,000
1 April 2014 to 30 September 2014	Mullins J on 27 November 2014	\$1,005,948.35 (receivership) \$7,000.95 (controllership)	\$169,000
1 October 2014 to 30 April 2015	Jackson J on 23 June 2015	\$1,761,911.25 (receivership) \$442,214.30 (controllership)	\$315,000
1 May 2015 to 31 October 2015	Martin J on 11 December 2015	\$2,279,205.50 (receivership) \$194,052.10 (controllership)	\$412,000
1 November 2015 to 30 April 2016	Douglas J on 26 June 2016	\$1,405,155.40 (receivership) \$36,510.65 (controllership)	\$240,000
1 May 2016 to 31 October 2016	Daubney J on 2 December 2016	\$1,119,991.40 (receivership) \$13,385.35 (controllership)	\$189,000
1 November 2016 to 30 April 2017	Mullins J on 30 June 2017	\$897,580.20 (receivership) \$12,314.50 (controllership)	\$152,000


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Remuneration Period	Remuneration Order	Amount of remuneration approved (incl. of GST)	Approximate remuneration per month
1 May 2017 to 31 October 2017	Applegarth J on 30 November 2017	\$1,280,897.20 (receivership) \$26,155.25 (controllership)	\$218,000
1 November 2017 to 30 April 2018	Boddice J on 21 June 2018	\$1,041,907.90 (receivership) \$22,306.90 (controllership)	\$177,000
1 May 2018 to 31 October 2018	Mullins J on 29 November 2018	\$1,946,635.35 (receivership) \$20,902.75 (controllership)	\$328,000
1 November 2018 to 30 April 2019	Mullins J on 2 July 2019	\$1,248,853.10 (receivership)	\$208,000
1 May 2019 to 31 October 2019	Mullins J on 17 December 2019	\$652,328.05 (receivership)	\$109,000
1 November 2019 to 30 April 2020	Callaghan J on 15 October 2020	\$989,373.55 (receivership)	\$165,000

12. I now make an application for approval of my remuneration for work performed in the period from 1 May 2020 to 31 October 2020 (“**Relevant Period**”) for acting as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution in the amount of \$1,104,433.00 (inclusive of GST).

  
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Witnessed by: 

## Executive Summary

### *Winding up and asset realisation progress*

13. Cash at bank as at 30 June 2020 was approximately \$34.32 million.
14. The remuneration sought in this application for the Relevant Period equates to about \$184,000 per month (inclusive of GST) for the Relevant Period.
15. On or about 29 September 2020, I informed members, in a report to members, of an estimated unit price of 5.6 cents per unit as at 30 June 2020. This estimate does not take into account or include any allowance for future recoveries from legal proceedings, any allowance for claims against the assets of the Fund and the costs to finalise the winding up of the FMIF. Depending on the results of those claims, the cents in the dollar returnable to members is likely to improve.
16. Between 16 and 23 October 2019, an interim distribution of 6.5 cents per unit in the FMIF (approximately \$32 million in total, before taking into account amounts withheld from distributions to the Feeder Funds), was paid to members of the FMIF.
17. Following the making of the interim distribution, the FMIF's cash at bank was \$38,906,794.92 as at 31 October 2019.
18. The total estimated return to members as at 30 June 2020 (including the interim distribution paid in October 2019) is 12.1 cents per unit.

### *Summary of Benefits to FMIF*

19. The benefits obtained, or received by the FMIF to date as a result of work undertaken by BDO include (but are not limited to) the following:-

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Witnessed by:



Description of benefit	Approximate or estimated quantum of benefit, gross of fees or expenses of my receivership (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)	Reference
Net Proceeds of sale of retirement village assets held by FMIF as security for loans to borrowers, which were sold by BDO	Approximately \$40 million – see note 1 below.	Paragraphs 58 to 61 of June 2019 Affidavit
Discontinuance of MPF proceedings in which I was joined as Second Defendant to defend claims made against FMIF assets	Amount claimed by plaintiff against FMIF assets approximately \$24 million plus interest and costs	Paragraphs 200 to 204 of May 2020 Affidavit
Discontinuance of AIFS proceeding	Amount claimed by plaintiff against FMIF assets approximately \$3.9 million plus interest and costs	Paragraphs 205 to 209 of May 2020 Affidavit
Amount of remuneration sought from FMIF but not approved on First remuneration application by the Liquidators, which was opposed by Mr Whyte	Approximately \$1.3 million (excluding any GST) – See Note 2 below	Paragraphs 146 to 153 of May 2020 Affidavit
Recovery of funds from a borrower to whom the FMIF had advanced funds, as a result of negotiations undertaken by BDO	\$7.5 million	N/A
Recovery received by FMIF from proceedings against quantity surveyor, conducted by BDO alleging professional negligence in respect of certifying works on a	\$2.39 million plus costs	Paragraphs 17(a), 92 to 94 of June 2016 Affidavit

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Description of benefit	Approximate or estimated quantum of benefit, gross of fees or expenses of my receivership (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)	Reference
completed commercial development		
Amount of expenses sought but not approved on FTI Indemnity Application which was opposed by Mr Whyte	\$366,536 – See Note 3 below.	Paragraph 166 of May 2020 Affidavit
Estimated costs savings to the FMIF to date as a result of successful applications by Mr Whyte to ASIC for financial reporting and audit relief	Costs savings in auditor's fees alone estimate to be about \$140,000 - \$343,000 plus FTI's remuneration and expenses had they been involved in the process - See Note 4 below	Paragraph 144 of May 2020 Affidavit
Total Amounts paid to FMIF by AIF ASPF, CPAIF and ICPAIF, as a result of Terms of Agreement between Mr Whyte, the Liquidators and LMIM	\$389,063.95	Paragraph 153 of May 2020 Affidavit, and paragraph 129 of this Affidavit
Amount of remuneration sought from FMIF but not approved on Second FTI Remuneration application by the Liquidator, which was opposed by Mr Whyte in part	\$348,692.87 – see Note 5 below	Paragraph 155 of May 2020 Affidavit
Recoveries to date in relation to the proceedings against the Feeder Funds	\$4,131,535.74 withheld from the interim distribution to the Feeder Funds of 6.5 cents per unit – see Note 6 below.	98 to 111 of May 2020 Affidavit

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<b>Description of benefit</b>	<b>Approximate or estimated quantum of benefit, gross of fees or expenses of my receivership (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)</b>	<b>Reference</b>
Distribution received from the Bellpac Liquidator from the proceeds of the \$2M proceeding	\$1 million	Paragraph 90 of this Affidavit


Note 1 – The amount received from the sale of the retirement village assets was about \$10 million above the value of the retirement village assets, as assessed in professional valuations obtained by BDO prior to the sales.


Note 2 – this figure does not take into account additional remuneration or legal costs incurred by me as a result of opposing the application, nor any future costs savings on future remuneration applications by the Liquidator that may result from His Honour approving the apportionment of work referable to all of the funds (category 2 remuneration), as between the various funds that LMIM is or was responsible entity or trustee of, in a manner more favourable to the FMIF than was proposed by the Liquidators. The Liquidator's costs fixed in the sum of \$230,889.50 were ordered to be paid out of the FMIF.

Note 3 – this figure does not take into account additional remuneration or legal costs incurred by me as a result of opposing the application. The Liquidator's costs fixed in the sum of \$266,084.31 were ordered to be paid out of the FMIF.

Note 4 - this figure does not take into account costs savings in relation to the additional Liquidators or Receivers remuneration that would be associated with complying with the relevant financial reporting and audit obligations

Note 5 - this figure does not take into account additional remuneration or legal costs incurred by me, or any additional costs incurred by the Liquidator and paid out of the FMIF, as a result of my opposing part of the Application, nor

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any future costs savings to FMIF members as a result of His Honour ruling that corporate remuneration is not recoverable from the FMIF.

Note 6 – the settlement of the Feeder Fund Proceeding is expected to affect the return to the Feeder Funds (negatively) and other members of the FMIF (positively).

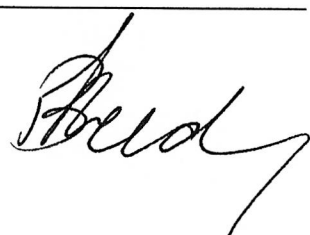
20. The total of my remuneration approved to date is \$17,107,110.35 (inclusive of controllership remuneration and GST). The expenses (primarily legal expenses) incurred by me in carrying out the terms of my appointment, are included in the receipts and payments accounts and financial statements referred to in paragraphs 184 to 190 herein.

*All Court Proceedings*

21. A summary of all court proceedings (including those substantial matters mentioned above) in which the FMIF has had an interest during the Relevant Period, or in respect of which work was performed during the Relevant Period (either to advance the proceeding or matters arising as a consequence of the proceeding), is set out in the table below:-

Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
Bruce v LM Investment Management Ltd (in liq.) in its capacity as responsible entity of the LM First Mortgage Income Fund & Ors.  Supreme Court of Queensland Proceeding No. 3383/13 (" <b>Bruce Proceeding</b> ")	This is the proceeding in which I was appointed and winding up orders made.  Various interlocutory applications have been made in the proceeding including applications for approval of my remuneration, and applications for judicial advice.	Trade On and Administration

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Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
<p>LM Investment Management Ltd (in liq.) in its capacity as responsible entity for the LM First Mortgage Income Fund (Receivers &amp; Managers Appointed) (Receiver Appointed) v EY (formerly known as Ernst &amp; Young) (a firm) &amp; Ors., (“<b>Auditors Claim</b>”)</p> <p>Supreme Court of Queensland Proceeding No. 2166/15</p>	<p>Claim by LMIM as RE of the FMIF against the auditors (EY) and two partners of EY for misleading and deceptive conduct and professional negligence</p>	<p>Assets</p>
<p>John Richard Park and Ginette Dawn Muller as liquidators of LM Investment Management Ltd (in liq.) (Receivers and Managers Appointed) the responsible entity of the LM First Mortgage Income Fund &amp; Anor. v David Whyte as the person appointed to supervise the winding up of the LM First Mortgage Income Fund</p> <p>Supreme Court of Queensland Proceeding No. 3508/2015</p> <p>(“<b>FTI Remuneration Proceeding</b>”)</p>	<p>Application by Mr Park, Ms Muller, and LMIM for directions as to how the FMIF is to be wound up and as to the extent of their powers, functions, and duties.</p> <p>By Further Amended Originating Application filed on 16 December 2015, Mr Park and Ms Muller sought remuneration and expenses as the liquidators (and as administrators) of the Responsible Entity LMIM.</p> <p>By further Application filed 20 May 2016 pursuant to the Orders of Jackson J made 12 December 2015, Mr Park and</p>	<p>Trade On and Investigations</p>



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Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
	<p>Ms Muller sought an indemnity from the FMIF for expenses incurred by the Responsible Entity (Indemnity Proceedings).</p> <p>By application filed 19 December 2017, Mr Park and Ms Muller sought further orders against me for payment of the amounts ordered on 22 November 2017.</p> <p>By application filed on 17 July 2018, Mr Park sought approval of remuneration as liquidator and as administrator, of the Responsible Entity LMIM.</p> <p>By application filed on 10 October 2018, Mr Park sought directions in relation to the dual appointments of Mr Park and I in relation to the winding up of the FMIF ("<b>Dual Appointment Application</b>").</p> <p>By application filed on 1 February 2019, I sought orders authorising me to make an interim distribution to FMIF members of up to \$40 million and declarations as to the proper entitlements of members holding "Class C"</p>	

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Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
	<p>units in the FMIF (“<b>Authority Application</b>”).</p> <p>By applications filed 24 January 2020, the Liquidator and LMIM sought approval of LMIM’s legal costs relating to the Auditor’s Claim and considering a proof of debt lodged by EY (“<b>EY Expenses Application</b>”), and LMIM’s legal costs relating to the Claim against the MPF (“<b>Bellpac Expenses Application</b>”).</p>	
<p>LM Investment Management Ltd v Drake &amp; Ors.</p> <p>Supreme Court of Queensland Proceeding No. 12317/14 (first instance proceeding), 14258/19 (appeal proceeding) and 1146/20 (judicial advice proceeding)</p> <p>(“<b>Claim against the MPF</b>”)</p>	<p>Claim against the MPF Trustee, LMIM and certain former directors in respect of a loss suffered by the FMIF as a result of an amount paid to the MPF in the Bellpac litigation matter. In November 2019 Justice Jackson delivered judgment dismissing this claim. I filed a notice of appeal and sought judicial advice (which was declined) regarding whether to pursue the appeal. The appeal has been discontinued.</p>	<p>Assets</p>
<p>Supreme Court of New South Wales Proceeding No. 2014/332566</p>	<p>Claim with respect to \$2 million of bonds issued by Wollongong Coal Ltd to Bellpac, where the FMIF holds</p>	<p>Assets</p>

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Title, Court & No.	Description of proceeding	Remuneration category in the Relevant Period
("\$2m proceeding")	a first ranking security over the assets of Bellpac.	
Federal Court of Australia at New South Wales Proceeding No. 2016/00120239  ("\$8m proceeding")	Claim against Wollongong Coal by Bellpac Pty Ltd Liquidator with respect to non-conversion of \$8 million of bonds to shares, where the FMIF holds a first ranking security over the assets of Bellpac.	Assets
PTAL and LM Investment Management Ltd v Coulter Developments Pty Ltd & Ors  Supreme Court of Western Australia Proceeding No. 2403/2014	Claim against Borrowers and Guarantors for \$13.8 million plus interest and costs.	Assets
The Trust Company (PTAL) Ltd v Ross Lamb  Federal Circuit Court SYG2097/2016 (claim against guarantor)  Federal Court Proceeding No NSD643/2019 (public examination)	Creditors Petition against Guarantor. The Guarantor has been made bankrupt. PTAL as custodian of the FMIF has funded the bankruptcy Trustees to undertake a public examination and any agreed recovery proceedings. A mediation between the Trustee and the relevant parties has been adjourned with settlement discussions ongoing.	Assets
LM Investment Management Ltd (Receivers	Claim against LMIM in relation to payments LMIM	Assets

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<b>Title, Court &amp; No.</b>	<b>Description of proceeding</b>	<b>Remuneration category in the Relevant Period</b>
and Managers appointed) (in Liquidation) as responsible entity for the LM First Mortgage Income Fund (Receiver Appointed) v LM Investment Management Ltd (Receivers and Managers appointed)(in Liquidation)  Supreme Court of Queensland Proceeding No.11560/16  ("LMIM claim")	caused to be made from the property of the FMIF which were not authorised by the constitution or the Act and material losses suffered by the FMIF by reason of breaches of duty by LMIM. This claim is stayed until further order.	


*Summary of work in the Relevant Period*

22. By way of short summary, I have undertaken the following work in the Relevant Period, that I considered necessary for the winding up of the FMIF

(a) In relation to Supreme Court of Queensland proceeding numbered 2166/15 against the former auditors of the FMIF, the significant work included, the following:

- (i) reviewing and providing instructions in relation to the preparation of the Seventh Further Amended Statement of Claim and correspondence in relation to same;
- (ii) reviewing and providing instructions in relation to the Document Plan and Document Exchange Protocol, as required by the Court, and correspondence in relation to same;
- (iii) reviewing and providing instructions in relation to conferring with the defendants on a without-prejudice basis, as required by the Court, in regard to the questions to be posed to expert witnesses, and correspondence in relation to same;


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Witnessed by: 

- (iv) reviewing and providing instructions in relation to the privilege schedule required by the Court to be provided to the Associate to her Honour Justice Dalton;
- (v) providing instructions to loss, financial audit and compliance plan audit experts engaged to provide expert opinions in the proceeding;
- (vi) attending a conference with the financial audit expert engaged in respect of the proceeding;
- (vii) attending a conference with my solicitors and Counsel to discuss briefing of further experts in the proceeding;
- (viii) attending conferences with compliance plan experts;
- (ix) attending conference with loss experts;
- (x) attending to providing information as requested to brief experts;
- (xi) reviewing and providing instructions in relation to the preparation of the Eight Further Amended Statement of Claim and correspondence in relation to same;
- (xii) reviewing and providing instructions regarding the Judgement of Dalton J dated 20 October 2020;
- (xiii) reviewing and providing instructions regarding an application to be released from an undertaking given by me in proceedings 3383 of 2013;
- (xiv) reviewing various correspondence and advices received from my solicitors; and
- (xv) reviewing correspondence received from the solicitors for the defendants' and the third parties.

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Witnessed by: 

The quantum of the claim in this proceeding is for in excess of \$200 million (“**Auditors Claim**”).

- (b) In relation to Supreme Court of Queensland proceeding numbered 12317/14 against the trustees of the LM Managed Performance Fund (“**MPF**”), the significant work included the following:
- (i) providing instructions and assisting my solicitors in the on-going conduct of my Application for Judicial Advice filed in the Supreme Court of Queensland on 31 January 2020 as proceeding numbered 1146 of 2020;
  - (ii) reviewing correspondence received from the solicitors of the liquidator of LMIM and solicitors for the respondents to the application and instructing my solicitors in relation to responding to same;
  - (iii) liaising with and receiving advice from solicitors and counsel in respect of the application;
  - (iv) liaising with and receiving advice from solicitors and counsel in respect of and providing instructions in respect of the outline of submissions in the application;
  - (v) Reviewing and providing instructions in relation to outline of submissions filed by the liquidator in the application;
  - (vi) liaising with and receiving advice from solicitors and counsel in respect of and providing instructions in respect of the outline of submissions in the application;
  - (vii) reviewing and considering the Judgement in the application, liaising with and receiving advice from solicitors and counsel in respect of and providing instructions in respect of the Judgement;

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Witnessed by: 

- (viii) liaising with and receiving advice from solicitors and counsel in respect of and providing instructions in respect of the costs of the application; and
- (ix) liaising with and receiving advice from solicitors and counsel in respect of and providing instructions in respect of the discontinuance of the Appeal as a result of the Judgement in the application.

The claim was for approximately \$15.5 million plus interest (“**Claim against the MPF**”).

- (c) In relation to Supreme Court of Queensland Proceeding BS3508/15 (“**FTI Remuneration Proceeding**”), the significant work has included reviewing a proposed further application by the Liquidator for payment of remuneration from the FMIF, in the sum of \$194,180.25 for the period 1 July 2018 to 29 February 2020, and supporting Affidavits, and instructing my solicitors regarding correspondence with the Liquidator’s solicitors as to the proposed application.
- (d) In relation to Supreme Court of Queensland Proceeding 3383/13 (“**Bruce Proceeding**”), work to progress my 13<sup>th</sup> application for approval of remuneration relating to the period 1 November 2019 to 30 April 2020, including reviewing and swearing a number of detailed Affidavits in support of the application, providing instructions to my solicitors as to responses to issues raised by LMIM, providing instructions to my solicitors in relation to the conduct of the application, attending hearing of the application on 2 July 2020, reviewing and considering His Honour’s reasons for judgment with respect to the application and providing instructions to my solicitors as to costs submissions, and procedural orders for future applications by me for approval of remuneration;
- (e) Liaising with the Bellpac liquidator in relation to the proposed settlement of the \$8m proceeding, including satisfaction of the remaining condition precedent to the settlement;

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Witnessed by:



- (f) Liaising with the Bellpac liquidator in relation to the entering into of a revised Heads of Agreement with Wollongong Coal Ltd (“WCL”) extending time for satisfaction of the remaining condition precedent to 31 October 2020;
- (g) Complying with the conditions of the ASIC relief from financial reporting and audit requirements;
- (h) Corresponding with investors and reprocessing returned interim capital distributions paid in October 2019 in the amount of 6.5 cents per unit to FMIF members;
- (i) Preparation of unit price calculation as at 30 June 2020;
- (j) Preparation of management accounts for the year ending 30 June 2020;
- (k) Preparation of reports to members issued in June 2020 and September 2020; and
- (l) Work undertaking the investor management function for over 4,600 members, including answering queries on the winding up of the FMIF and maintaining the investor database, including any change in details or transfer of units.

23. The above, very brief, summary of work undertaken by my staff and me is detailed further in my Affidavit below.

*Status of the FMIF assets*

- 24. All real property assets have now been sold.
- 25. There remain a number of legal proceedings on foot that must be determined or resolved, before the winding up can be completed.
- 26. I am working towards resolving the main issues in the winding up, as soon as is reasonably possible.

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Witnessed by:



*Status of the DB Receivers*

27. I refer to paragraphs 21 and 22 of my June 2018 Affidavit for background in relation to this issue.
28. On 10 December 2018, Joseph Hayes and Anthony Connelly, (the “**DB Receivers**”) retired.

*Distribution*

29. Following the retirement of the DB Receivers, on 1 February 2019, I applied to Court for authority to make an interim distribution to FMIF members of up to \$40 million (“**Authority Application**”), and in a separate application, for judicial advice that I am justified entering into and performing, the deed of settlement entered into with respect to the Feeder Fund Proceeding (“**Judicial Advice Application**”).
30. On 22 May 2019, the Court directed that I am justified in making an interim distribution of 6.5 cents per unit in the FMIF, if I am authorised to do so in on the Authority Application.
31. On 2 October 2018, the Court authorised me to make an interim distribution of up to \$40 million.
32. Between 16 October 2019 and 23 October 2019, an interim distribution of 6.5 cents per unit in the FMIF, was paid to members.

**Reduction in costs**

33. As part of the winding up process, I have reduced the costs of managing the FMIF.
34. Prior to the appointment of Mr Park and Ms Muller as administrators in March 2013, the management fees charged by LMIM as RE of the FMIF averaged \$14 million per annum, for the five years ended 30 June 2012.

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Witnessed by:





35. The current and ongoing costs of managing the FMIF are the remuneration and expenses of myself and my staff, and amounts to be paid to the liquidator of LMIM for remuneration or expenses.


**Complexities**

36. Some of the overarching factors which have contributed to the complexity of the winding up of the FMIF include:-
- (a) the fact that there are over 4,600 members of the FMIF, both in Australia and internationally, and the responsibility to communicate with each of those members as to the progress of the winding up, to respond to member queries and maintain and update the register of members;
  - (b) the number and type of properties held as security for the various loans made by the FMIF;
  - (c) the complexity of litigation, including claims made to recover funds for the benefit of members of the FMIF and claims made against assets of the FMIF;
  - (d) risk of personal liability being incurred under agreements entered into with residents of the retirement villages;
  - (e) the number and complexity of issues in the period from 2008 to 2013 requiring my various investigations;
  - (f) the complex inter-relationship between LMIM, LMIM as RE of the FMIF, and LM Administration Pty Ltd (in liquidation) ("LMA");
  - (g) the complex inter-relationship between the FMIF and other funds of which LMIM is RE, including claims against the FMIF by KordaMentha (which were discontinued in 2018); and
  - (h) the need to liaise with a number of other appointees, including the DB Receivers, the liquidators of LMIM, the liquidator of LMA, the Receivers of the LM Currency Protected Australian Income Fund and

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Witnessed by:




the LM Institutional Currency Protected Australian Income Fund and the RE of the LM Wholesale First Mortgage Income Fund.

37. In addition to the overall complexities, certain other issues have arisen or continued to require attention, in the Relevant Period which have added to the complexity of the winding up, and contributed to the time taken, and remuneration sought, including:-

- (a) The extensive, detailed and complex work required in this relevant period in relation to the Auditors Claim and other litigation matters including the Claim against the MPF, the application for judicial advice in relation to the Appeal, the discontinuance of the Appeal and the FTI Remuneration Proceeding, as detailed in paragraph 22 above;
- (b) Work relating to the interim distribution to over 4,600 investors and 5,200 investment accounts paid in October 2019, which included:
  - (i) Corresponding with investors regarding the distribution paid in October 2019;
  - (ii) Updating investors bank account details in the Fund's database to reprocess the distributions that returned;
  - (iii) Reprocessing the distributions for any returned distributions from inactive bank account details;
  - (iv) Providing instructions and information to PTAL to reprocess distributions;
  - (v) Creating payment files to reprocess the distributions to the member's nominated bank account.

38. Given the complexity of many of the litigation matters, and particularly the technical expertise required for prosecuting the Auditors Claim, it has been necessary to maintain the engagement of staff at a senior level with higher charge out rates. Two audit partners, Mr Clark Jarrold and Mr Craig Jenkins

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Witnessed by: 

together with other senior personnel (Ms Julie Pagcu and Mr Arthur Taylor) have been involved in the litigation matters.

**Time recording**

39. My staff and I record our time on a daily basis. We enter our time in six minute units, and we enter the details of the time spent and the description of the tasks undertaken in an electronic system. My staff and I review these time entries on a periodic basis and, when necessary, entries are written off.
40. The partners of BDO Business Restructuring Pty Ltd (“BR”) are members of ARITA, and follow the ARITA Statement of Best Practice – Remuneration.
41. Each task and the time for carrying out each task, is only recorded once.


**Teams assisting**


42. Staff from other practice areas of BDO, in addition to members of the BR practice area, assist me in my receivership role. During the Relevant Period, the Audit division has assisted me. I set out generally below, the function of the Audit division and their assistance to me in the Relevant Period.
43. Given the complexities and nuances of this particular winding up, I considered that it was necessary to involve the assistance of these persons, given the specialist knowledge they possess with regard to particular areas. For example, I sought specialist knowledge regarding the audit and accounting issues arising in preparation of the Auditors Claim. The assistance of these teams was necessary for the purposes of the winding up.

At pages 1-2 of the Bundle are copies of the hourly charge out rate schedules of the BDO practice groups that applied during the Relevant Period. I note that, as the person appointed by the Court (as explained in paragraphs 3 to 7 above) my time has been charged at the rate of a Partner/Appointee.

*Audit*

44. During the Relevant Period, the Audit team at BDO has assisted me by:-

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Witnessed by: 


- (a) responding to queries from my solicitors and Counsel regarding the auditor's duties to comply with applicable legislation in financial and compliance plan audits to assist with the prosecution of the Auditors Claim;
- (b) attending and preparing for conferences with the auditing experts being considered or already appointed to prepare expert evidence in relation to financial audits and audits of compliance plans and loss and damage to assist with the prosecution of the Auditors Claim;
- (c) attending conferences with solicitors and counsel in relation to the appointment of experts in the Auditors Claim proceeding;
- (d) providing assistance in relation to loss calculations and documents recovered from EY to be considered by experts in the Auditors Claim proceeding;
- (e) attending and preparing for conferences with the valuation experts and providing information for briefing same;
- (f) Assisting with the review and completion of the management accounts for the year ended 30 June 2020.

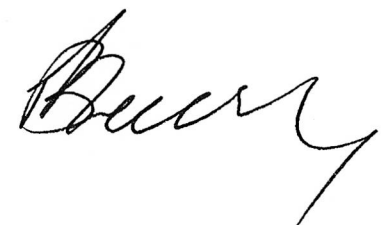
45. Given the expertise required to perform this work, I believe it was necessary for the Audit team to assist me with the above matters.

**Categories of work**

46. During the Relevant Period, my staff and I have undertaken tasks which broadly fall within the following five categories:-


- (a) Assets;
- (b) Trade on;
- (c) Creditors;


Signed: 

Witnessed by: 

- (d) Dividend; and
  - (e) Administration.
47. While my staff and I used the above categories to record time, certain items of work could have fallen within more than one of the categories, so that, for example, communicating with members of the FMIF could be recorded under either Administration or Creditors. However, each task is only recorded once, and the time for carrying out each task is only recorded once.
48. At pages 3-4 of the Bundle is a breakdown of time charged by BDO employees pursuant to my appointment (in connection with the winding up of the FMIF) and a table in respect of "Disbursements" charged against my appointment. These disbursements are office expenses that BDO has incurred. I do not seek approval in this application for these expenses.
49. At pages 5-121 of the Bundle is a schedule of work performed by staff of BDO during the Relevant Period ("the **Schedule**") in relation to my appointment (in connection with the winding up of the FMIF). The charges in the Schedule exclude GST.
50. The Schedule shows a description of each task undertaken, the name and position of the person who performed the task, the date the task was undertaken, the length of time it took and the amount charged. A summary of the tasks undertaken, time taken and amount charged is detailed below:-


Category/area	Total hours	Amount (\$)
Assets	1,348.7	535,518.50
Trade on	185.8	59,059.50
Creditors	1,222.1	310,442.00
Dividend	19	7,719.00


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Witnessed by: 

Category/area	Total hours	Amount (\$)
Administration	230	91,291.00
Total (exclusive of GST)	3,005.6	1,004,030.00
GST		100,403.00
<b>Total claim (inclusive of GST)</b>		<b>1,104,433.00</b>

51. The Schedule reflects the fact that I delegated to members of my staff the performance of a number of tasks and activities in the winding up. This is in accordance with my usual practices. I delegated work so that the level of experience of the person responsible for particular work reflected, and was appropriate to, the nature of the work. For example, throughout the winding up, I have endeavoured to ensure that the least complex of the required work is done by junior members of my staff at lower charge-out rates than senior members of my staff and I.
52. I refer in particular to the average hourly rates for work undertaken in the Relevant Period, as set out within the breakdown of time (the Remuneration Report appearing at pages 3-4 of the Bundle) and I note that the level of efficiency of delegation of work is illustrated by the following:
- (a) The average hourly rate charged for all work performed during the Relevant Period was \$334 per hour (excluding GST);
  - (b) Work performed in categories with higher average hourly rates was work that involved issues of complexity and high importance; for example, the work relating to Assets (which included the complex litigation mentioned above) was undertaken by staff with an average rate of \$397 per hour (excluding GST);

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Witnessed by: 

- (c) Tasks of somewhat less complexity were delegated to junior staff members, such as work relating to Creditors, which had an average rate of \$254 per hour (excluding GST);
  - (d) Each of the average rates referred to above is significantly less than the rates charged by Partners of BDO, being \$615 per hour (excluding GST).
53. The entries in the Schedule reflect BDO's scale of insolvency and other hourly charge out rates.
54. From my knowledge of the work carried out in relation to the winding up and my supervision of the tasks undertaken, I am satisfied that the time recorded for each of the tasks is commensurate with what was required to be undertaken and that the records are accurate.
55. In order to further assist the Court, I set out below explanations as to why the tasks detailed in the Schedule were undertaken, and why these tasks were necessary for the proper administration of the winding up of the FMIF.
56. The tasks detailed in the Schedule were carried out in furtherance of my appointment under s 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution.

*Breakdown of remuneration by proceeding*

57. 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.
58. A summary of each of the relevant legal proceedings, and the approximate amount of Remuneration attributable to that proceeding in the Relevant Period, is as follows:

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	Assets (\$) exc GST	Administration (\$) exc GST	Trade On (\$) exc GST	Creditors (\$) exc GST	Dividend (\$) exc GST	Total (\$) exc GST
Auditors Claim	507,544.50	61.50	61.50	11,272.50	-	518,940.00
Bellpac Bonds	1,168.50	-	-	-	-	1,168.50
Ross Lamb	5,229.00	-	-	-	-	5,229.00
Drake Proceeding /Appeal	19,872.00	-	246.00	1,276.50	-	21,394.50
<b>Total</b>	<b>533,814.00</b>	<b>61.50</b>	<b>307.50</b>	<b>12,549.00</b>	<b>0.00</b>	<b>546,732.00</b>

59. 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 the Relevant Period:

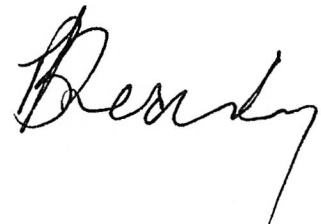
- (a) At pages 122-219 – the Auditor’s Claim - \$518,940.00 (ex GST);
- (b) At page 220– The Bellpac Proceedings (the \$2m proceeding and/or the \$8m proceeding) - \$1,168.50 (ex GST);
- (c) At pages 221-222 – the Ross Lamb bankruptcy - \$5,229.00 (ex GST);
- (d) At pages 223-226 – the Appeal/the Drake Proceeding - \$21,394.50 (ex GST)

60. The balance of my remuneration for the Relevant Period, relates to administrative and non-litigious aspects of the winding up. At pages 227-393 of the Bundle is a copy of the schedule setting out the remaining work performed.



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Witnessed by:







*Assets*

61. In the Relevant Period, my staff and I have undertaken various tasks and activities that can be described as falling within the category "Assets".
62. Generally, work attributed to this category includes tasks in respect of:-
- (a) Advancing claims against guarantors; and
  - (b) Court proceedings, including:-
    - (i) The Judicial Advice Application;
    - (ii) Pursuing the Auditors Claim;
    - (iii) The litigation associated with the realisation of bonds held in WCL by Bellpac;
63. In total, \$535,518.50 (exclusive of GST) of remuneration is sought for approval in the Relevant Period in respect of the "Assets" category.
64. I set out below the extent of work undertaken in respect of "Assets".

*Court Proceedings*


65. Generally, work in respect of court proceedings that have been initiated by me is now attributed to the "Assets" category, having formerly been charged to the "Investigations" category of work. The reason for this move is to reflect that the investigation aspect of the work has for the most part come to an end and that the court proceedings filed are treated as what is considered to be an asset of the FMIF.
66. In this Affidavit, where estimated timeframes for the resolution or determination of legal proceedings are given, it is important to note that the actual timeframes may vary depending upon a range of factors usual for litigation matters, some of which are not within my control, for example, the conduct of the other parties to the litigation.


Signed: 

Witnessed by: 

*Auditors Claim - Supreme Court of Queensland Proceeding 2166/15*

67. Paragraphs 158 to 168 of my November 2015 Affidavit, set out the background to the Public Examinations (“PEs”), and paragraphs 104 to 111 of my June 2016 Affidavit, paragraph 74 of my November 2016 Affidavit, paragraph 70 of my June 2017 Affidavit, paragraph 68 of my November 2017 Affidavit, paragraphs 66 and 68 of my June 2018 Affidavit, paragraphs 67 to 70 of my November 2018 Affidavit, paragraphs 67 to 72 of my June 2019 Affidavit, and paragraphs 65 to 79 of my November 2019 Affidavit and paragraphs 67 to 77 of my May 2020 Affidavit, set out the steps in the proceeding to the period ending 30 April 2020.
68. The quantum of the loss claimed in the Auditors Claim is at its highest in excess of \$200 million.
69. This matter is on the commercial list before Justice Dalton.
70. Her Honour delivered judgment on 20 October 2020, with respect to my application to strike out paragraphs of the Defence that made claims of privilege against self-incrimination and penalties, striking out various paragraphs of the Defence and making directions as to the last point in time at which the Defendants may elect to waive privilege against self-incrimination and the steps which must be taken by the Defendants in the event that they make such an election: *LM Investment Management Limited (In Liq) v EY & Ors* [2020] QSC 264.
71. I have instructed and assisted my solicitors to brief, or take steps to brief, various necessary expert witnesses and to take steps to progress disclosure, including agreeing upon a document plan. At pages 394-426 of the Bundle is a copy of the Orders made by Justice Dalton on 23 July 2020, dispensing with the duty of disclosure under the Uniform Civil Procedure Rules 1999 (Qld) and requiring that disclosure be undertaken with the Document Plan and Protocol attached to those Orders.
72. The matter was reviewed by Justice Dalton on 20 October 2020. At that review Her Honour made directions (*inter alia*):


  
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Witnessed by: 

- (a) Granting the Plaintiff leave to file a Seventh Further Amended Statement of Claim;
- (b) In relation to the making of the applications referred to in paragraph 74 below;
- (c) Setting dates later this year for completion of disclosure by the Plaintiff and the Defendants;
- (d) Setting dates for delivery of expert reports by the Plaintiff later this year and early next year;
- (e) Listing the matter for further review on 9 November 2020.

At pages 427-430 of the Bundle is a copy of the Orders made by Justice Dalton on 20 October 2020.

- 73. On 21 October 2020, a Seventh Further Amended Statement of Claim was filed.
- 74. On 2 November 2020, I caused the Plaintiff to file:
  - (a) An application for leave to file an Eighth Further Amended Statement of Claim;
  - (b) An application to release me, and BDO employees, from certain undertakings provided to the Court, pursuant to orders made by Justice Daubney in this proceeding on 29 January 2015, to enable disclosure in the Auditor's Claim to be undertaken in a more efficient, timely, and cost-effective manner.
- 75. On 20 November 2020, I caused the Plaintiff to serve a copy of its Disclosure Statement setting out the process undertaken on behalf of the Plaintiff to comply with its duty of disclosure set out in the orders of Justice Dalton dated

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Witnessed by: 


23 July 2020 and 20 October 2020. At pages 431-462 of the Bundle is a copy of the Disclosure Statement.

76. Orders were made providing leave to file an Eighth Further Amended Statement of Claim and releasing me, and BDO employees, from certain undertakings provided to the Court, pursuant to orders made by Justice Daubney in this proceeding on 29 January 2015,
77. I presently anticipate that the Auditor's Claim will go to trial in the latter part of 2021.
78. My legal representatives presently estimate that the trial will take around eight weeks.
79. During the Relevant Period, the work of my staff and I included the following:-
- (a) The work with respect to the Auditors Claim detailed in paragraph 22(a) of this Affidavit;
  - (b) The provision of relevant information for briefing audit experts, which due to the EY laptop malfunctioning, required my staff to undertake extensive sorting, collating and categorisation of the voluminous, uncategorised EY hard copy records, provided prior to the PEs in 2015, into the nine audit periods the subject of the proceedings, and the scanning of these records;
  - (c) Liaising, providing instructions and assisting my solicitors in briefing experts in the Auditor's Claim proceeding, including financial audit experts, compliance plan audit experts, banking and finance experts and valuation experts;
  - (d) Liaising with experts briefed and providing instructions and material as produced by the audit team;
  - (e) Reviewing the defence filed in the proceeding and liaising and providing instructions in relation to same;

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Signed: 

Witnessed by: 

- (f) Reviewing the submissions of both parties in relation to the Privilege Application and the *Sadie Ville* decision;
- (g) Liaising with defendants and my solicitors regarding the repair and replacement of the laptop provided by the defendants which contains the GAMx audit files in regard to the loans the subject of the proceeding.

*Claim against the MPF – Queensland Supreme Court proceeding 12317 of 2014, Judicial Advice Application proceeding 1146 of 2020 and Appeal numbered 14258 of 2019 in the Court of Appeal, Queensland*

- 80. A proportion of the “Assets” work has been in respect of the claim I have filed in Supreme Court of Queensland proceeding numbered 12317 of 2014; the Notice of Appeal numbered 14258 of 2019 in the Court of Appeal and the associated application for Judicial Advice in Supreme Court of Queensland proceeding numbered 1146 of 2020.
- 81. The Claim against LMIM, various former directors of LMIM and the MPF, as filed, sought \$15,546,147.85, plus interest (calculated from 2011). Whilst the claim was brought in the name of LMIM, pursuant to the orders of Justice Jackson on 21 July 2015, the interests of LMIM as the responsible entity of the FMIF are being represented by me.
- 82. The background to the Claim against the MPF is set out in my November 2015 Affidavit at paragraphs 102 to 105, and details of steps taken in the proceedings appear at paragraphs 106 to 119 therein, paragraph 80 of my June 2016 Affidavit, paragraph 81 of my November 2016 Affidavit, paragraph 77 of my June 2017 Affidavit, paragraph 75 of my November 2017 Affidavit, paragraph 73 of my June 2018 Affidavit, paragraph 74 of my November 2018 Affidavit, paragraphs 80 to 81 of my June 2019 Affidavit, paragraph 84 of my November 2019 Affidavit and paragraphs 84 to 89 of my May 2020 Affidavit.
- 83. Only BDO staff in the BR practice group have worked (on my instruction) on the Claim against the MPF.


Signed:




Witnessed by:



84. On 28 August 2020, Callaghan J delivered judgment in *LM Investment Management Ltd v Drake & Ors* [2020] QSC 265 refusing my application for judicial advice that I would be justified pursuing an appeal against the judgment of Jackson J dismissing this claim.
85. The appeal has been discontinued.
86. During the Relevant Period, the work of my staff and I included:
- (a) the work related to the application for judicial advice as detailed in paragraph 22 of this Affidavit;
  - (b) conferences with my solicitors and Counsel in relation to the application for judicial advice;
  - (c) liaising, instructing and assisting my solicitors and my counsel in relation to the application for judicial advice;
  - (d) liaising, instructing and assisting my solicitors and my counsel in relation to outlines of submissions for the application for judicial advice;
  - (e) liaising, instructing and assisting my solicitors and my counsel in relation to correspondence received from the solicitors for the liquidator of LMIM in respect of the application for judicial advice.
  - (f) liaising, instructing and assisting my solicitors and my counsel in relation to the Judgement in the application;
  - (g) liaising and instructing my solicitors and my counsel in relation to the costs of the application; and
  - (h) liaising and instructing my solicitors and my counsel in relation to the discontinuance of the Appeal.


  
Signed:


Witnessed by:



*\$2 million of WCL convertible bonds - Federal Court of Australia at New South Wales proceeding 2014/332566*

87. Paragraphs 126 to 133 of my November 2015 Affidavit set out the background in Federal Court of Australia at New South Wales proceeding 2014/332566 (“**\$2M proceeding**”). Reference to this proceeding is also made at paragraph 88 of my June 2016 Affidavit, paragraph 87 of my November 2016 Affidavit, paragraph 83 of my June 2017 Affidavit, paragraph 81 of my November 2017 Affidavit, paragraphs 76 to 79 of my June 2018 Affidavit and paragraphs 83 to 86 of my June 2019 Affidavit.
88. The claim was successfully prosecuted by the Bellpac Liquidator for whom judgment was given. I consider that the FMIF is entitled as first ranking secured creditor to the funds ultimately recovered by the Bellpac Liquidator from these actions (after costs).
89. The net proceeds of the \$2 million bonds settlement were received by the Bellpac liquidator, and part of these funds have been utilised to fund the recovery of the \$8 million of WCL convertible bonds.
90. A distribution of \$1 million was received by the FMIF from the Bellpac liquidator in November of 2019.
91. During the Relevant Period, the work of my staff and I has included ongoing liaising with the Liquidator regarding requests for payment of the Liquidator’s fees and legal fees from the bond proceeds.
92. On 18 November 2020, creditors approved a revised Deed of Settlement resulting in a further distribution of \$2.5 million to the FMIF on 27 November 2020, which, for the purposes of this application, falls outside of the Relevant Period. Pursuant to the Deed of Settlement, a further distribution of \$250,000 will also be made to the FMIF in January 2021, following the maturity of a term deposit.

Signed: 

Witnessed by: 

*\$8 million of WCL convertible bonds - Federal Court of Australia at New South Wales proceeding no. NSD1488/2015*

93. Paragraph 135 of my November 2015 Affidavit sets out the background to the Federal Court of Australia at New South Wales Proceeding No. NSD1488/2015 (“**\$8M proceeding**”). Reference to this proceeding is also made at paragraph 90 of my June 2016 Affidavit, paragraphs 90 and 91 of my November 2016 Affidavit paragraph 85 of my June 2017 Affidavit, paragraph 86 of my November 2017 Affidavit and paragraphs 80 to 84 of my June 2018 Affidavit.
94. In summary, judgment in these proceedings was given in favour of the Liquidator of Bellpac and the defendant’s appeal and application to the High Court for special leave were not successful.

*Federal Court of New South New Wales Proceeding 2016/00120239*

95. This proceeding concerns a claim brought by the Bellpac Liquidator against WCL seeking orders requiring WCL to convert the bonds to shares. I consider that the FMIF, as first ranking creditor, will be entitled to the funds received from this proceeding (after costs).
96. The Bellpac Liquidator entered into a Heads of Agreement (“**HOA**”) with WCL to settle this proceeding. The remaining condition precedent to be satisfied is WCL obtaining shareholder approval of the settlement. The sunset date to complete the conditions precedent in the HOA has been extended on a number of occasions and the Bellpac Liquidator was successful in negotiating, as part of the agreement to extend the Sunset Date, that WCL will pay interest at 3% per annum from 2 October 2017, until settlement. To date WCL paid approximately \$3 million towards the settlement into their solicitors’ trust account, which is to be released upon receiving shareholder approval of the settlement. The Bellpac Liquidator entered into a revised heads of agreement on 9 June 2020 extending the time for satisfaction of the remaining condition precedent to 31 October 2020.
97. During the Relevant Period, the work of my staff and I has included:-

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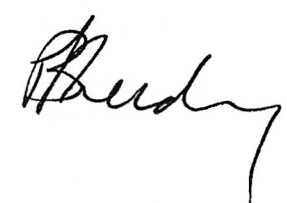


- (a) Reviewing updates and reports to creditors from the Bellpac Liquidator from time to time;
- (b) Liaising with the Bellpac Liquidator on an ongoing basis in relation to WCL's progression towards satisfying the remaining condition precedent, namely shareholder approval of the settlement; and
- (c) Reviewing correspondence from the Bellpac Liquidator relation to WCL's requests to extend the Sunset Date and the entering into of a revised Heads of Agreement on 9 June 2020.

*LMIM Claim Supreme Court of Queensland proceeding no.11560/16*

98. The background in relation to investigations in regard to the claim is relevantly set out in the Investigation sections at paragraphs 96 and 97 of my June 2017 Affidavit, paragraphs 152 to 156 of my November 2017 Affidavit and paragraphs 90 to 95 of my June 2018 Affidavit.
99. The LMIM Claim was commenced by Claim filed on 9 November 2016. It makes allegations of breach of trust and duty against LMIM by:
- (a) causing to be paid, at its direction, management fees from the assets of the FMIF in advance of performing its duties to the FMIF, and did not pay interest to the FMIF in respect of the management fees which were prepaid;
  - (b) causing to be paid, at its direction, loan management fees out of property of the FMIF which were not authorised by the Constitution of the FMIF;
  - (c) causing to be paid, at its direction, management fees from the assets of the FMIF in amounts which exceeded its entitlement, given the true net fund value for the periods referable to those management fees; and
  - (d) directing payments from the MPF to the FMIF to be paid to the Feeder Funds, in the absence of any liability due and payable or any other basis.

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100. An Amended Claim and Statement of Claim and Consolidated Particulars have been filed and served.
101. The quantum of each of the above claims have not yet been finally determined, although:
  - (a) in relation to the claims pertaining to the loan management fees (including in respect of periods prior to the administration of LMIM) the amount claimed is presently up to \$13,720,167 plus interest; and
  - (b) in relation to the claims pertaining to the payments to the Feeder Funds the claim has been quantified in the amount of \$12,931,836 plus interest.
102. Subject to any directions that may be made by the Court, if the claims made in this proceeding are successful they may be able to be relied upon as a set-off against claims made by LMIM for indemnity out of assets of the FMIF, including those claims identified through the proof of debt process or claims made by other parties, seeking to subrogate to LMIM's alleged rights of indemnity.
103. I applied to the Court for directions under section 59 of the *Trusts Act 1973* (Qld) in relation to how the differing interests of the parties (LMIM as RE of the FMIF, and LMIM in its personal capacity) are to be represented in the proceeding, for leave to proceed under Section 500 of the Act and a stay of the proceeding until further order.
104. A stay was sought because, following the discontinuance of the claims brought by the MPF Trustee, the creditors of the FMIF had not been identified by the Liquidator as the Liquidator had not called for proofs, there was no one identified as willing and able to fund a defence of the Claim and it was unclear whether there would be a practical need for the claims made in the proceeding to be fully litigated.
105. I do not want to incur the costs of proceeding with parts of this claim that it may not ultimately be necessary or beneficial to the FMIF Members to pursue, in order to establish claims of sufficient quantum to set-off (by operation of

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the clear accounts rule) against claims made against the Fund by LMIM, or by creditors seeking to subrogate to LMIM's alleged rights of indemnity.

106. On 25 July 2018, the Court directed that I represent the interests of LMIM as RE of the FMIF, the Liquidator represent the interests of LMIM in its own capacity, granted leave to proceed with this claim and ordered that the claim be stayed until further order.
107. I am informed by Alex Nase, of Tucker and Cowen, my solicitors in this proceeding, and believe that, he estimates that, from when any order is made lifting the stay, if only the claims made in relation to pre-paid management fees and loan management fees were proceeded with, and if the claim is defended, it is likely to take about 18 months for this proceeding to be resolved or determined.
108. During the Relevant Period, the work of my staff and I has included reviewing advices from my solicitors, and corresponding with my solicitors in relation to whether to take steps to progress this proceeding at the present time.

*The Trust Company (PTAL) Ltd v Ross Lamb*

109. PTAL obtained a default judgment against Mr Lamb in the Supreme Court of New South Wales for approximately \$3 million, plus interest and costs. Prior to the hearing of the creditors petition, Mr Lamb filed a debtor's petition and was declared bankrupt.
110. The bankrupt and his wife were parties to a Development Agreement. The proceeds of sale of 11 lots owned by the bankrupt and his wife (in some cases, with another party) that were developed and sold are held in a solicitor's trust account. There is presently approximately \$12.404 million, plus further interest accrued since 30 November 2018, in the solicitor's trust account. The former trustee had been liaising with other parties involved in the development and investigating whether the bankrupt may have an entitlement in respect of the funds held in the solicitor's trust account.
111. The former trustee in bankruptcy issued a request to PTAL for funding of recovery action for the benefit of creditors of the bankrupt estate of which

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PTAL as custodian of the FMIF is a major creditor. The former trustee was replaced with new trustees on 14 May 2018, who are continuing investigations and requested funding from PTAL as custodian of the FMIF.

112. On my instructions, in December of 2018, PTAL as custodian of the FMIF entered into a Deed of Indemnity to fund a public examination under the Bankruptcy Act 1966 (Cth) to further investigate the claims available to the Trustee and any relevant recovery proceedings.
113. The Trustee of the bankrupt estate is Mr David Clout of David Clout and Associates. I am informed by Mr Clout, and believe that:
- (a) The examinations were held in the Federal Court on 7, 12, 13, 18 and 19 November 2019;
  - (b) Following the examinations, the Trustee issued letters of demand to various parties and has received requests from those parties to mediate the Trustee's claims; and
  - (c) mediations with relevant parties were held in May and September of 2020 and the mediation has been adjourned with settlement discussions ongoing.
114. During the Relevant Period, the work of my staff and I in relation to this matter has included:
- (a) Reviewing reports from the Trustee, and the Trustee's reports to creditors issued from time to time, and advices obtained by the Trustee;
  - (b) Meetings and discussions with the Trustee in relation to the matter;
  - (c) Reviewing and assessing monthly claims made by the Trustees under the Deed of Indemnity and issuing instructions to PTAL with respect to such claims;
  - (d) Liaising with the Trustee in relation to the mediations and settlement offers; and

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Witnessed by:



- (e) Liaising with my solicitors, and PTAL in relation to further variations to the Deed of Indemnity.

*Trade on*

115. Generally, work is considered to be “*Trade-on*” if the work is considered to be incidental to the winding up.

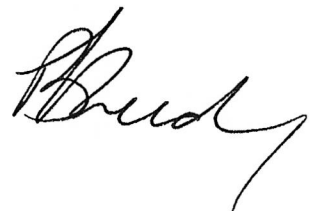
116. Work undertaken in relation to trade-on may be recorded in more than one category, however, the work undertaken is only recorded once.

117. During the Relevant Period, work attributed to this category included:-

- (a) Preparation of unaudited management accounts for the financial year ended 30 June 2020;
- (b) Reviewing and processing payments of expenses;
- (c) Maintenance of the Microsoft AX investor database. This involved accounting for receipts and payments, reconciling bank accounts and processing month end cash and year-end adjustments;
- (d) Maintenance of the Microsoft AX loan management database, including accounting for payments, reconciling statements and processing month end and year-end adjustments;
- (e) Conducting internal meetings to discuss job management issues including:-
  - (i) Maintenance of accounts and preparation of the management accounts for the financial year ended 30 June 2020;
  - (ii) Status of litigation matters and work to be done to progress same; and
  - (iii) Investor issues including content for my regular reports to members, status of investigations, creditor claims and my application for approval of remuneration.

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Witnessed by:




- (f) Meeting with members of the BDO Audit practice group regarding the preparation of the management accounts for the financial year ended 30 June 2020;


118. In total, \$59,059.50 (exclusive of GST) of remuneration is sought for approval in respect of the "Trade on" category.

*Management Accounts*


119. During the Relevant Period, my staff and I have undertaken the following tasks in respect of completing the management accounts for the financial year ended 30 June 2020:-

- (a) Reviewing work papers to verify the accuracy of the management accounts;
- (b) ascertaining amounts that are outstanding at 30 June 2020;
- (c) Preparing a summary of loan reductions to calculate the movement in loans in default;
- (d) Calculating the net assets attributable to unitholders, movement in default loans, receivables and related party transactions;
- (e) Preparing a summary of payable invoices:-
  - (i) either paid after the year end; or
  - (ii) remaining to be paid, which relate to work incurred during the financial year ending 30 June 2020.
- (f) to determine the accrued expenses;
- (g) Calculating provisions for the remaining loan accounts or receivable balances and updating the loan spreadsheet;
- (h) Preparing a trial balance, and processing the:-
  - (i) Accrued expense journals;

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Witnessed by: 

- (ii) Impairments journals;
  - (iii) Bank transaction journals;
  - (iv) Write off journals; and
  - (v) Relevant expenses and income journals.
- (i) Preparing work papers to support the notes to the accounts, including, but not limited to, the movement in impairments as between the periods 30 June 2019 and 30 June 2020;
  - (j) Preparing the management accounts for distribution to members, which includes:-
    - (i) A statement of comprehensive income;
    - (ii) A statement of financial position;
    - (iii) A statement of changes in net assets attributable to unitholders; and
    - (iv) Notes to the accounts.
  - (k) Liaising with the BDO Audit practice group regarding movements in asset values, provisions and default loans between 30 June 2019 and 30 June 2020;
  - (l) Reviewing and amending the trial balance in respect to changes required by the BDO Audit practice group;
  - (m) Reviewing and amending financial statements in respect to changes required by the BDO Audit practice group;
  - (n) Reviewing and considering disclosure requirements with reference to Australian Accounting Standards; and

  
Signed:

Witnessed by:



(o) Reviewing and amending the management accounts and notes in accordance with Australian Accounting Standards and recommendations by my solicitors.

120. This work was, in my opinion, necessary for the winding up of the FMIF in accordance with its constitution. By undertaking this work, I am able to provide ongoing financial accounts to members and avoid incurring ongoing audit fees during the winding up.

*Application to ASIC for financial reporting and audit relief*

121. Under the Residual Powers Orders, I was directed to apply on behalf of the FMIF to ASIC for relief from compliance with financial reporting and audit obligations in Part 2M.3 and s 601HG of the Corporations Act.

122. I made such an application, and on 29 September 2016, ASIC issued ASIC Instrument 16-0959, granting the FMIF a deferral of its obligations to comply with the relevant financial reporting and audit obligations until 16 May 2018, subject to compliance with certain conditions of the relief.

123. I have applied to extend this relief, and ASIC has extended this relief, on two occasions. Most recently, on 3 March 2020, ASIC issued ASIC Instrument 20-0166, extending the deferral of the FMIF's financial reporting and audit obligations to 16 March 2022.

124. At pages 463-464 of the Bundle is a copy of this Instrument of Relief.

125. There have been considerable costs savings to the FMIF, as a result of the financial reporting and audit relief granted by ASIC, as detailed in paragraph 144 of my May 2020 Affidavit.

126. The work performed in the Relevant Period with respect to the ASIC relief, included complying with the conditions of the relief, including by ensuring that every second report to investors contains the financial and other information required by the conditions of the relief.

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Witnessed by:





*Supreme Court of Queensland proceeding 3508 of 2015*

127. On 16 December 2015, the liquidators of LMIM, Mr Park and Ms Muller, filed a Further Amended Originating Application in Supreme Court Proceeding No. 3508 of 2015 (“**FTI Remuneration Proceeding**”).
128. In this proceeding, the Liquidator/s or LMIM have made, and I have been the respondent to, various applications for payment of remuneration or expenses from the FMIF, and two applications for directions as to the respective functions or powers of the Liquidator/s and I in relation to the winding up of the FMIF, including the applications referred to in paragraphs 146 to 172 of my May 2020 Affidavit.
129. As is referred to in paragraph 153 of my May 2020 Affidavit, in June 2018, a Terms of Agreement was entered into between the Liquidators, LMIM and myself, to resolve certain outstanding issues. During the Relevant Period, in accordance with that Agreement, the sum of \$130,846.66 was paid to the FMIF by the LM Currency Protected Australian Income Fund (CPAIF), and the sum of \$45,516.46 was paid to the FMIF by the LM Institutional Currency Protected Australian Income Fund (ICPAIF), to reimburse the FMIF for amounts paid from the FMIF, at LMIM’s request, to LMA for services rendered and operating expenses incurred for the period from 26 July 2013 to 23 December 2014 for the benefit of LMIM in its capacity as responsible entity of the CPAIF, and ICPAIF.

*Second FTI Remuneration Application*

130. On 17 July 2018, Mr Park of FTI, who is now the sole Liquidator of LMIM, filed an application in the Court seeking payment of remuneration of \$743,889.89 inclusive of GST from property of the FMIF, relating to various periods between 19 March 2013 and 30 June 2018 (“**Second FTI Remuneration Application**”). The Court’s judgment is summarised at paragraph 155 of my May 2020 Affidavit.
131. On 17 October 2019, the Court ordered that the Liquidator’s costs of the application be assessed on the indemnity basis and paid out of the property of

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Witnessed by:



the AIF, FMIF and ASPF in equal shares. The quantum of the Liquidator's costs payable out of the FMIF was agreed in the sum of \$122,044.34 and that sum has been paid to the Liquidator.

132. During the Relevant Period, the work of my staff and I has included reviewing and instructing my solicitors to respond to a request by the Liquidator's solicitors to increase the quantum of costs payable to the Liquidator under the costs order, as a result of the omission of certain invoices from the Liquidator's Counsel from the amount claimed.

*FTI Indemnity Proceeding – Supreme Court of Queensland proceeding 3508 of 2015*

133. Pursuant to the Residual Powers Orders, I was directed to take certain steps to review, and decide on, claims by LMIM with respect to expenses sought to be paid from the assets of the FMIF.
134. The background to this proceeding is detailed in paragraphs 112 to 124 of my November 2017 Affidavit. The expenses applications made by the Liquidator to date are summarised in paragraphs 160 to 171 of my May 2020 Affidavit.
135. During the Relevant Period, the work of my staff and I has included reviewing correspondence from my solicitors with respect to orders fixing the quantum of the Liquidator's costs of the Bellpac Expenses Application and related issues, and arranging payment of the costs.
136. I expect to receive, or be given notice of, further claims by the Liquidator for indemnity for expenses during the course of my appointment.

**Creditor Indemnity Claims**

137. Under the Residual Powers Orders:-
- (a) The Liquidator was directed to ascertain the debts payable by and the claims against LMIM and to identify any debts or claims in respect of which LMIM has a claim for indemnity from the FMIF ("**Creditor Indemnity Claims**"), and certain other types of claims for indemnity from the FMIF and to notify me of same within 14 days;

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Witnessed by:



- (b) Within 14 days of notification of any such indemnity claims, I may request from the Liquidator any further information I reasonably consider necessary to assess the claim;
- (c) Within 30 days of notification of any such indemnity claims or receipt of the further information requested, I am required to accept the claim, reject the claim, accept part and reject part of the claim, and to give the Liquidator written notice of my decision;
- (d) I am required to give the Liquidator a written reason for rejecting any part of the claim within seven days after giving notice of my decision to the Liquidator; and
- (e) Within 28 days of receiving a notice of rejection, the Liquidator may apply to Court for directions in relation to whether the claim is one for which LMIM has a right to be indemnified out of the scheme property of the FMIF and must notify the creditor for any rejected claim of, *inter alia*, my decision, any reasons for that decision and whether the liquidator intends to apply to Court for directions in respect of my decision.

138. The Creditor Indemnity Claims received to date and my decision in relation to or the status of those Creditor Indemnity Claims, is summarised in paragraphs 175 to 178 of my May 2020 Affidavit.

139. It is possible that further Creditor Indemnity Claims may be received during the course of the winding up.

*Further application by FTI for directions - Supreme Court of Queensland proceeding 3508 of 2015*

140. On 10 October 2018, the Liquidator filed an application seeking directions in relation to the dual appointments of the Liquidator and myself to wind up the FMIF including directions to the general effect that:

Signed:



Witnessed by:





- (a) My appointment continues only in relation to certain specified legal proceedings and Mr Park take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
- (b) That the Liquidator is directed to act as contradictor to the Breach of Trust Proceeding (SC 11560/2016) and the Feeder Fund Proceeding (SC 13534/16); and
- (c) That the Liquidator and Receiver each submit budgets of remuneration and expenses to the conclusion of the winding up, that the Remuneration of the Liquidator and the Receiver be fixed or determined on the hearing of the application in the amount of 50% of the amount stated in the relevant budget and paid during the course of the winding up, with all other remuneration and expenses of the Liquidator and the Receiver to be deferred and sought at the conclusion of the winding up at which time the amounts stated in the budgets can be reduced, increased or stay the same.

- 141. On 2 October 2019, His Honour delivered judgment dismissing the application: *LM Investment Management Limited & Anor v Whyte* [2019] QSC 233.
- 142. On 17 October 2019, His Honour ordered that my costs of the application be assessed on the indemnity basis and paid from property of the FMIF.
- 143. During the Relevant Period, the work performed by me has included reviewing correspondence from my solicitors and providing instructions to my solicitors with respect to an application to appoint a costs assessor to assess the quantum of my costs, the directions made by the costs assessor and the outcome of the assessment.

*Application to Court for authority to make interim distribution and declarations as to the entitlements of "C Class" members – BS3508/15*

- 144. On 1 February 2019, I applied to His Honour Justice Jackson for authority to make an interim distribution to FMIF members and for declarations as to the

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proper entitlements of "C Class" members (the members who invested with a foreign currency).

145. On 2 October 2019, His Honour delivered judgment, granting the relief sought by the Authority Application and declaring that each "C Class" member 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 Australia dollar prevailing at the date of commencement of the winding up of the FMIF.
146. On 2 October 2019, His Honour ordered that my costs of the application be assessed on the indemnity basis, and paid from property of the FMIF.
147. During the Relevant Period, the work performed by me in relation to this Application has included reviewing correspondence from my solicitors and providing instructions to my solicitors with respect to the application to appoint a costs assessor to assess the quantum of my costs, the directions made by the costs assessor and the outcome of the assessment.

*Creditors*

148. I am seeking approval for remuneration in the order of \$310,442.00 (exclusive of GST) in respect of work that is categorised as "Creditors".
149. Generally, work attributed to this category includes or has included:-
  - (a) Preparing reports to members;
  - (b) Attending to queries from members in relation to the reports to members;
  - (c) Maintaining and updating the AX investor management database;
  - (d) Corresponding with investors regarding the interim distribution, returned payments and reprocessing distributions after updating members details; and

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Witnessed by:



- (e) work in relation to claims by LMIM (by its Liquidators) for indemnity against the FMIF.

150. I consider that all of this work was necessary for the winding up of the FMIF in accordance with its constitution and the orders relating to my appointment.

*Reports to Members*


151. During the Relevant Period, I published on the FMIF website two reports to members of the FMIF updating them as to the ongoing winding up of the FMIF. At pages:-


- (a) 465-475 of the Bundle is a copy of my 30<sup>th</sup> report to members; and
- (b) 476-491] of the Bundle is a copy of my 31<sup>st</sup> report to members.

Each of those reports contains information which is, or was at the time of the report, correct, to the best of my knowledge and belief.

152. During the Relevant Period my staff and I were required to undertake tasks for the purposes of reporting to members of the FMIF, including:

- (a) Drafting and reviewing the reports to members;
- (b) Preparing material summarising my remuneration for inclusion in the report;
- (c) Liaising with my solicitors in relation to my reports to members;
- (d) Updating the status of litigation matters;
- (e) Reconciling the cash at bank and the loan balances;
- (f) Considering and calculating the updated estimated return to members;
- (g) Considering and calculating the updated unit price; and
- (h) For my 31<sup>st</sup> report, setting out the actions taken in the relevant 6 months period and proposed to be undertaken in the next 12-month period.

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Witnessed by: 


*Contact with members in respect of reports to members*


153. In addition to the reports to members set out above, my staff and I have also been contacted during the Relevant Period, by email and telephone by members of the FMIF and their financial advisors. This contact required responses regarding:-

- (a) The status of the receivership and the winding up of the FMIF;
- (b) Updating contact details;
- (c) Confirming unit balances and distributions paid prior to my appointment;
- (d) The transfer of units and the documentation required to effect same;
- (e) Queries arising from the reports to members regarding the receivership; and
- (f) Queries in relation to the interim distribution.

154. During the Relevant Period my staff and I have also liaised with the beneficiaries and/or trustees of deceased members' estates. Where appropriate we have liaised with the beneficiaries, trustees and/or their solicitors/advisors to effect a transfer of the unit holding at the request of the investor's estate. My staff and I were required to undertake tasks including considering the request for a transfer of units, reviewing the documentation provided in support of such request, and processing such transfers.

155. Work undertaken in relation to communications with members is sometimes also recorded in the "Administration" category of work depending on the context of the call or correspondence, and the work required following that communication. However, time for carrying out any task is only recorded once.

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Witnessed by: 

*AX Database*

156. During the Relevant Period my staff and I were required to continue to maintain the Microsoft AX investor management database. This included work:-
- (a) Updating investor details;
  - (b) Transferring units as requested or as directed by executors of deceased estates; and
  - (c) Generating reports to attend to members' unit balance enquiries.
157. The AX Database is where the Register of Members is kept and maintained. In accordance with the Residual Powers Orders, this is a duty charged to me.
158. I consider that it is necessary for the proper administration of the winding up to keep the investors properly informed as to the progress of the winding up of the FMIF, and to try to minimise the number of direct inquiries from members of the FMIF requesting the same information.

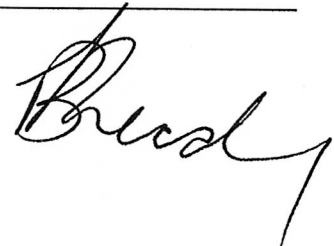
*Dividend*

159. During the course of the winding up, my staff and I have undertaken various tasks that can be described as falling within the category "*Dividend*".
160. This category relates to work undertaken in pursuit of my interim capital distribution to investors in the amount of 6.5 cents per unit as per the Court order dated 2 October 2019.
161. In total, \$7,719.00 (exclusive of GST) in remuneration is sought for approval in respect of the "*Dividend*" category.
162. The work in the Relevant Period in this category relates primarily to returned payments and reprocessing of the interim capital distribution to certain investors in the amount of 6.5 cents per unit, made in accordance with the Court's orders between 16 and 23 October 2019 and is detailed in paragraph 37 of this Affidavit.

Signed:



Witnessed by:





163. All of this work was necessary for the winding up of the FMIF in accordance with its constitution.

*Administration*

164. In my role, my staff and I have undertaken various tasks that can be described as falling within the category "Administration".

165. Generally, work attributed to this category includes:-

- (a) Work my staff and I undertook that was necessary for the proper and efficient administration of the winding up;
- (b) Ensuring proper accounts and records were maintained;
- (c) Preparing applications for approval of my remuneration; and
- (d) Residual administrative functions in respect of preparing reports to members, such as organising for copying, mailing and uploading to the FMIF website. The tasks of copying, mailing and uploading reports to members to the FMIF is outsourced to external providers who perform such work at bulk rates.

166. In total, \$91,291.00 (exclusive of GST) of remuneration is sought for approval in respect of the "Administration" category.

167. The main tasks my staff and I undertook in the Relevant Period are set out further below.

*Applications for approval of remuneration*

168. For the purposes of my remuneration application filed on 11 May 2020, work was undertaken in the Relevant Period, including:

- (a) the work detailed in paragraph 22(d);
- (b) arranging distribution of notice of the application to the members of the FMIF. In accordance with my usual practice during this

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Witnessed by:



administration, the tasks of copying, mailing and uploading reports to members to the FMIF is outsourced to external providers who perform such work at bulk rates.

*Job management*

169. In the Relevant Period, my staff and I have conducted internal meetings and discussions in order to discuss:-


- (a) The progression of the job;
- (b) Maintenance of the accounts and preparation of the management accounts for the financial year ended 30 June 2020;
- (c) Investor issues and content for my regular reports to members;
- (d) Status of the various investigations, claims and court proceedings;
- (e) Status of creditor claims; and
- (f) Coordinating my application for approval of my remuneration.


170. I consider that such tasks are necessary for the proper administration of the winding up and to ensure the winding up is conducted in an efficient manner. These meetings also allow me to delegate tasks in accordance with the complexity of the work to be undertaken, and my staff's individual charge out rates.

*Investor relations and communications*

171. During the Relevant Period, my staff and I have attended to answering member enquiries both by telephone and in person. Members are updated as to the progress of the winding up, including the status of court proceedings to recover funds for the benefit of members and the expected return to members.

172. Regularly during the Relevant Period enquiries were fielded from members regarding changes to their details.

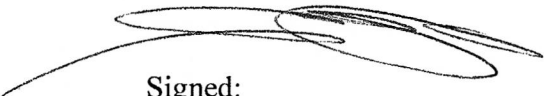
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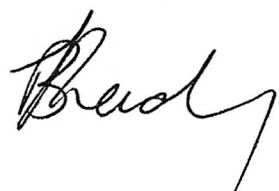
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173. For the purposes of member communications, including my two reports to members exhibited to this Affidavit, during the Relevant Period, my staff and I have been required to prepare and collate relevant material, including:-
- (a) information concerning the status of the various legal proceedings;
  - (b) Updates as to the estimated value of the FMIF and estimated return to members; and
  - (c) "work in progress" and remuneration reports.
174. I consider that these tasks are necessary to keep members of the FMIF properly informed as to the progress of the winding up of the FMIF.
175. Some work undertaken in relation to communications with members may be recorded in other categories, that is, under Creditors and/or Trade On, depending on the context of the phone call or correspondence. However, time for carrying out each task is only recorded once.

*General*

176. In addition to the above specific matters, my staff and I also conducted the following ongoing tasks and activities in the Relevant Period:-
- (a) Attending to general file administration including filing and archiving books and records.
177. I consider that each of these tasks was necessary for the proper administration of the winding up so as to keep accurate records of my work, progress of the winding up of the FMIF, and keeping members informed and up to date.
178. Work undertaken in respect of "*Administration*" may be recorded in other categories. However, the work undertaken is only recorded once.

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Witnessed by: 

*Write-offs & reductions*

179. I have conducted a detailed review of all time charged by BDO staff in the Relevant Period. I have reduced the amount of remuneration sought by \$16,738.50 excluding GST.
180. The amount of the reduction represents, in summary, the value of work which I considered, while appropriate to be performed, was not directly connected to, or in furtherance of, my appointment (for example discussions and correspondence with investors of other LMIM investment funds).

**Remuneration approval**

*Winding up*

181. Given the nature and volume of the work involved in this winding up, I believe that the sum of \$1,104,433.00 inclusive of GST, represents a fair and reasonable amount for remuneration for the Relevant Period and that the work undertaken to which the remuneration relates was necessary for the proper conduct of the winding up of the FMIF pursuant to the Orders.
182. I respectfully request this Honourable Court to make orders that my remuneration in relation to my receivership appointment for the Relevant Period be fixed in the amount of \$1,104,433.00 inclusive of GST.
183. As the winding up of the FMIF is ongoing, there will be a need for further applications for approval of remuneration. These will be made on a regular basis.

*Statements of Receipts and Payments*

184. Copies of the statements of receipts and payments lodged by the DB Receivers with the Australian Securities and Investments Commission with respect to the winding up of the FMIF, appear at:
- (a) the following pages of the Bundle of exhibits to my November 2018 Affidavit:



Signed:

Witnessed by:



- (i) Pages 494 to 506 – Receipts and payments account for the period 11 July 2013 to 10 January 2014;
  - (ii) Pages 507 to 520 – Receipts and payments account for the period 11 January 2014 to 10 July 2014;
  - (iii) Pages 521 to 536 – Receipts and payments account for the period 11 July 2014 to 10 January 2015;
  - (iv) Pages 537 to 568 – Receipts and payments account for the period 11 January 2015 to 10 July 2015;
  - (v) Pages 569 to 583 – Receipts and payments account for the period 11 July 2015 to 10 January 2016;
  - (vi) Pages 584 to 597 – Receipts and payments account for the period 11 January 2016 to 10 July 2016;
  - (vii) Pages 598 to 610 – Receipts and payments account for the period 11 July 2016 to 10 January 2017;
  - (viii) Pages 611 to 622 – Receipts and payments account for the period 11 January 2017 to 10 July 2017;
  - (ix) Pages 623 to 632 – Receipts and payments account for the period 11 July 2017 to 10 January 2018; and
  - (x) Pages 633 to 640 – Receipts and payments account for the period 11 January 2018 to 10 July 2018;
- (b) The following pages of the Bundle of exhibits to my June 2019 Affidavit:

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Signed:



Witnessed by:



- (i) Pages 156 to 166 – End of administration return showing receipts and payments for the period 11 July 2018 to 10 December 2018; and
- (ii) Pages 167 to 169 – Request for correction of end of administration return showing receipts and payments for the period 11 December 2018 to 14 December 2018.


185. I also lodge my own statements of receipts and payments with ASIC, but prior to the retirement of the DB Receivers, and the transfer of control of the bank accounts of the FMIF to me, such statements of receipts and payments only contained limited information including my remuneration and disbursements.


186. A summary of receipts and payments:

- (a) for the period 15 December 2018 (when I took over operation of the Fund's bank accounts), until 30 April 2019, appears at paragraph 227 of my June 2019 Affidavit;
- (b) for the period from 1 May 2019 until 31 October 2019, appears at paragraph 232 of my November 2019 Affidavit;
- (c) for the period 1 November 2019 to 30 April 2020, appears at paragraph 238 of my May 2020 Affidavit.

187. A summary of the receipts and payments for the period 1 May 2020 to 31 October 2020, appears hereunder:

Description	Amount (\$)
<b>Receipts</b>	
Interest	186,006.64
LMA Operational Costs Reimbursement	176,363.12
Refund of unclaimed trust monies in relation to a borrower	3,952.87

Signed: 

Witnessed by: 

<b>Description</b>	<b>Amount (\$)</b>
<b>Total receipts</b>	<b>366,322.63</b>
<b>Payments</b>	
Bank charges	(388.30)
Custodian fees	(5,500.00)
Receivers fees and disbursements	(990,737.04)
Bankrupt Trustee's fees in relation to Bankrupt Estate of Guarantor	(75,740.43)
Legal fees and disbursements	(2,201,238.90)
Court Application Costs	(79,755.24)
IT expenses	(58,963.00)
Printing and stationary	(13,264.76)
Record management and storage	(7,497.52)
Reprocess of the First Interim Distribution to investors (6.5 cents per unit)	(54,818.62)
<b>Total payments</b>	<b>(3,487,903.81)</b>
<b>Net receipts (payments)</b>	<b>(3,121,581.18)</b>

*Summary of receipts and payments during the winding up*

188. Full details of all receipts and payments during the course of the winding up of the FMIF are provided in statements of receipts and payments lodged by the DB Receivers, or myself, with ASIC. Copies of the following documents lodged with ASIC appear within the Bundle of exhibits to this Affidavit at:

- (a) Pages 492-502 – Form 5603 End of Administration Return dated 10 January 2019 for the period 11 July 2018 to 10 December 2018;
- (b) Pages 503-517 – Form 5602 Annual Administration Return dated 4 November 2019 for the period 8 August 2018 to 7 August 2019;



Signed:

Witnessed by:



- (c) Pages 518-520 – Form 492 Request for Correction dated 7 February 2019 for the period 11 December 2019 to 14 December 2019; and
- (d) Pages 521-627– Form 5602 Annual Administration Return dated 4 November 2020 for the period 8 August 2019 to 7 August 2020.

*Financial Reports*

189. Copies of the following financial statements of the FMIF prepared by BDO during the winding up, appear:

- (a) At the following pages of the Bundle of exhibits to my November 2018 Affidavit:
  - (i) Pages 641 to 665 - Financial statements of the FMIF for the year ending 30 June 2014;
  - (ii) Pages 666 to 688 - Financial statements of the FMIF for the year ending 30 June 2015;
  - (iii) Pages 689 to 711 - Financial statements of the FMIF for the year ending 30 June 2016;
  - (iv) Pages 712 to 736 - Financial statements of the FMIF for the year ending 30 June 2017; and
  - (v) Pages 737 to 762 - Financial statements of the FMIF for the year ending 30 June 2018;
- (b) At pages 170 to 195 of the Bundle of exhibits to my June 2019 Affidavit – financial statements of the FMIF for the half-year ending 31 December 2018;

Signed:



Witnessed by:





- (c) At pages 207 to 231 of the Bundle of exhibits to my November 2019 Affidavit - financial statements of the FMIF for the financial year ending 30 June 2019;
- (d) At pages 212 to 237 of the Bundle of exhibits to my May 2020 Affidavit - financial statements of the FMIF for the financial half year ending 31 December 2019.

- 190. At pages 628-654 of the Bundle of exhibits to this Affidavit is a copy of the financial statements of the FMIF for the financial year ending 30 June 2020.
- 191. These financial statements include details of the remuneration, disbursements and legal fees of the DB Receivers, myself, and the Liquidators in the winding up of the FMIF.

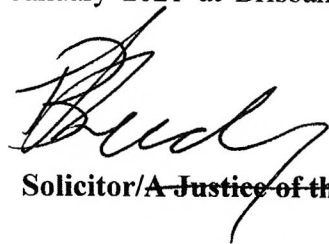
*Legal professional privilege*

- 192. In this Affidavit, I have referred to dealings with solicitors and Counsel in order to explain work undertaken for which I seek to be remunerated. I do not intend, in doing so, to waive any legal professional privilege that may attach to communications between me and my solicitors and Counsel.
- 193. 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 22<sup>nd</sup> day of January 2021 at Brisbane in the presence of:



**Deponent**



**Solicitor/A Justice of the Peace**

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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  
(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**

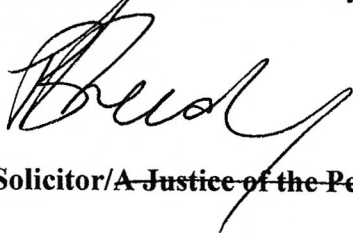
**AND**

**Intervener: AUSTRALIAN SECURITIES & INVESTMENTS  
COMMISSION**

**CERTIFICATE OF EXHIBIT**

Exhibit "**DW-124**" to the Affidavit of **DAVID WHYTE** sworn this 22<sup>nd</sup> day of  
January 2021

  
**Deponent**

  
**Solicitor/A Justice of the Peace**

**CERTIFICATE OF EXHIBIT:**  
Form 47, R.435

Filed on behalf of the Applicant

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

**SUPREME COURT OF QUEENSLAND**

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

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**Third Respondent:** **ROGER SHOTTON**

**AND**

**Intervener:** **AUSTRALIAN SECURITIES & INVESTMENTS  
COMMISSION**

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19.	Financial statements of the FMIF for the financial year ending 30 June 2020	29.09.2020	628-654