

SUPREME COURT OF QUEENSLAND

REGISTRY BRISBANE
NUMBER BS3383/13

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

AND

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

AND

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

AND

Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES AND
INVESTMENT COMMISSION**

OUTLINE OF SUBMISSIONS

ON BEHALF OF THE COURT-APPOINTED RECEIVER

INTRODUCTION

1. This is an application by Mr Whyte, as the person appointed pursuant to s 601NF(1) to ensure that the fund known as the LM First Mortgage Income Fund is wound up in accordance with its constitution and as a Court-appointed Receiver (**Receiver**) pursuant to s 601NF(2) *Corporations Act* 2001 (**Act**)¹, for an order approving his remuneration for work done in the period of the receivership from 1 May 2020 to 31 October 2020 in the sum of \$1,104,433.00 (inclusive of GST).

2. Justice Callaghan on 15 October 2020 made orders for the handling of future applications by the Receiver for remuneration. His Honour ordered that:

- (a) within fourteen days after the Remuneration Application and supporting affidavit/s are served on the first respondent, LM Investment Management Limited (in liquidation) (on its own account and/or as responsible entity for the LM First Mortgage Income Fund and as responsible entity for the LM Currency Protected Australian Income Fund and as



¹ Affidavit of David Whyte filed 2 March 2021, paragraph 12 (Court file number 485)

responsible entity for the LM Institutional Currency Protected Australian Income Fund) (**LMIM**), LMIM shall file and serve on The Receiver:

- (i) a short statement summarising the grounds, if any, on which LMIM opposes the relief sought in the Application (“Short Statement”);
 - (ii) any affidavits relied upon in response to the Application (“LMIM’s Affidavits”).
- (b) within seven days after service of any Short Statement and/or LMIM’s Affidavits, the Receiver shall file and serve on LMIM and any other party or member who has notified The Receiver that they intend to appear on the hearing of the Application, any further Affidavits relied upon by The Receiver, in response to the Short Statement or LMIM’s Affidavits; and
- (c) at least four business days prior to the hearing of the Application, the Receiver shall file and serve on LMIM and any other party or member who has notified The Receiver that that they intend to appear on the hearing of the Application, written submissions in support of the Application.
3. ASIC has been served with the application and has not given any indication that it opposes the making of the orders sought.
 4. The members have been served and no indication has been given by any member that they will appear to oppose the orders.
 5. On 15 February 2021, LMIM, through its liquidators, in compliance with Callaghan J’s orders, advised in writing that they did not intend to file any material opposing the relief sought by the Receiver.
 6. Other interested parties have been served and, likewise, they do not appear to oppose the making of the orders.
 7. These submissions are filed in compliance with Justice Callaghan’s orders.

BACKGROUND

8. As explained below, the Receiver holds office under dual appointments ordered by the Court². The Receiver was appointed the person responsible for ensuring that a registered managed investment scheme operated by LM Investment Management Limited (Receivers & Managers Appointed) (in liquidation) (**LMIM**) is wound up in accordance with its constitution. The Receiver was also appointed by the Court as the receiver of the property of the scheme, for the purpose of aiding the orderly winding up of the scheme.
9. Further, on 25 September 2014, and pursuant to the orders of Jackson J, The Receiver and Mr Fielding were appointed as agents of The Trust Company (**PTAL**), the Custodian of the Fund’s Assets, in respect of six securities held for the fund.³
10. The scheme to which the Receiver is appointed (**Fund**) is the LM First Mortgage Income Fund ARSN 089 343 288 (**FMIF**).
11. The FMIF is a “first mortgage fund”. In short, LMIM, as Responsible Entity for the FMIF, was required to invest the pooled capital subscribed by the members of the FMIF in “Mortgage Investments” to be held on trust for the benefit of the members of the FMIF. Each such investment was to be a loan to a third party to acquire real property on the security of a registered mortgage in favour of LMIM.⁴

² Affidavit of David Whyte filed 2 March 2021, paragraph 3 (Court file number 485)

³ Affidavit of David Whyte filed 2 March 2021, paragraph 8 (Court file number 485)

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

12. In the period post GFC, and most definitely by March 2009, FMIF was experiencing serious difficulties. It closed for new investments in about March 2009 and redemption of units in FMIF was suspended in May 2009, other than redemptions allowed under hardship provisions and certain payments to feeder funds.⁵ On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of LMIM⁶ and on 9 April 2013, ASIC suspended LMIM's Australian Financial Services Licence.⁷
13. On 11 July 2013 Deutsche Bank AG, a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrath Nicol as receivers and managers of the assets and undertakings of the FMIF.⁸ On 1 August 2013, Mr Park and Ms Muller were appointed Liquidators of LMIM.
14. On 8 August 2013, pursuant to s.601ND of the Act, Dalton J directed LMIM to wind up the FMIF and The Receiver was appointed as the person responsible for ensuring that it is wound up in accordance with its constitution.⁹
15. Accordingly, by orders made on 8 August 2013, the Receiver was appointed:
- (a) pursuant to s.601NF(2) of the Act, as the receiver of the property of the FMIF; and
 - (b) pursuant to s.601NF(1) of the Act, to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution.
16. As to the FMIF, the Receiver was charged with taking responsibility to ensure that the winding up of the FMIF occurs by converting to money all of the assets of the FMIF, deducting all proper costs and then dealing with the remaining funds as ordered by the Court.¹⁰
17. As has been identified by the Court on prior remuneration applications, the winding up of the fund is a large and complex undertaking. For instance:
- (a) there are over 4,600 members of the FMIF both in Australia and overseas and it has been necessary to communicate with each of the members during the course of the winding up as to the progress of the winding up to respond to members' queries and update the register of members;¹¹
 - (b) the assets that were held as security for the various loans given by the FMIF consisted in large part of retirement villages situated in multiple States across Australia. Assets of that type, which are heavily regulated, require specialised knowledge regarding realisation strategy and day-to-day management;¹²
 - (c) during the period for which the remuneration is claimed, complex litigation has progressed including claims made to recover funds for the benefit of members of the FMIF and claims made against the assets of the FMIF¹³;
 - (d) the work involved in the winding up is made complex by the inter-relationship between LMIM, LMIM as RE of the FMIF and LM Administration (in liquidation)¹⁴ and by the complex inter-relationship between the FMIF and other funds of which LMIM is RE, including claims against the FMIF by KordaMentha¹⁵;

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

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

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

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

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

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

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

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

¹³ Affidavit of David Whyte filed 2 March 2021, paragraph 22(a) to (e) (Court file number 485)

¹⁴ Affidavit of David Whyte filed 2 March 2021, paragraph 36 (Court file number 485)

¹⁵ Affidavit of David Whyte filed 2 March 2021, paragraph 36 (Court file number 485)

- (e) there has also been a need to liaise with other appointees, including the DB Receivers, the liquidators of LMIM, the liquidator of LMA, the Receivers of the LM Currency Protected Australian Income Fund and LM Institutional Currency Protected Australian Income Fund and the RE of the LM Wholesale First Mortgage Income Fund¹⁶;
 - (f) during the period for which the remuneration is claimed there was extensive work involved in progressing the Auditors Claim and other litigation matters including the Claim against the MPF, the application for judicial advice in relation to the Appeal, the discontinuance of the Appeal and the FTI Remuneration Proceeding¹⁷;
 - (g) during the period for which remuneration is claimed there was work relating to an interim distribution paid in October 2019 to over 4,600 investors and 5,200 investment accounts, which work included¹⁸:
 - (i) corresponding with investors regarding the distribution paid in October 2019;
 - (ii) updating investors' bank account details in the Fund's database to reprocess the distributions that returned;
 - (iii) reprocessing the distributions for any returned distributions from inactive bank account details;
 - (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.
18. By the orders of the Court dated 21 August 2013, the Receiver is entitled to claim remuneration in respect of the time spent by him and by any employees of BDO (the firm of which the Receiver is a member) who perform work in the receivership, and in the winding up of the FMIF, at rates and amounts to be approved by the Court, and to be indemnified out of the assets of the FMIF in respect of such remuneration¹⁹. At the time of the appointment the Receiver's rates were in evidence before the Court²⁰. They have since risen marginally²¹.
19. On 4 September 2014, the Receiver applied for directions that it was appropriate for he and Mr Fielding to take up an appointment as agent of the Custodian of the assets of the Fund, Trust Company Pty Ltd (PTAL) which had been formerly held by the liquidators of LMIM. Jackson J ordered that it was appropriate for the Receiver and Mr Fielding to take up that appointment (**controllership appointment**)²². Although the remuneration is governed by the terms of a Deed²³, the Receiver offered an undertaking to the Court at the time of directions to have their remuneration approved by the Court. In August 2018, PTAL issued notices revoking the appointments of the Receiver and Mr Fielding as controllers of all but one of the securities and in September 2018 PTAL issued notices revoking the appointments of the Receiver and Mr Fielding as controllers of the final security²⁴. In this application the Receiver does not seek remuneration in respect of the controllership appointment.

¹⁶ Affidavit of David Whyte filed 2 March 2021, paragraph 36(h) (Court file number 485)

¹⁷ Affidavit of David Whyte filed 2 March 2021, paragraph 37(a) (Court file number 485)

¹⁸ Affidavit of David Whyte filed 2 March 2021, paragraph 37(b) (Court file number 485)

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

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

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

²² Court document number 223.

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

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

THE PRESENT CLAIM FOR REMUNERATION

20. The Receiver now seeks orders approving his 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). The remuneration sought in this application for the Relevant Period equates to about \$184,000 per month (inclusive of GST) for the Relevant Period.
21. The remuneration for this period compares with²⁵:
- (a) remuneration which was approved in respect of the period 8 August 2013 to 31 March 2014 in the amount of \$702,480.35 by McMurdo J on 28 August 2014;
 - (b) remuneration which was approved in respect of the period 1 April 2014 to 30 September 2014 in the amount of \$1,005,948.35 (receivership) and \$7,000.95 (controllership) by Mullins J on 27 November 2014;
 - (c) remuneration which was approved in respect of the period 1 October 2014 to 30 April 2015 in the amount of \$1,761,911.25 (receivership) and \$442,214.30 (controllership) by Jackson J on 23 June 2015;
 - (d) remuneration which was approved in respect of the period 1 May 2015 to 31 October 2015 in the amount of \$2,279,205.50 (receivership) and \$194,052.10 (controllership) by Martin J on 11 December 2015;
 - (e) remuneration which was approved in respect of the period 1 November 2015 to 30 April 2016 in the amount of \$1,405,155.40 (receivership) and \$36,510.65 (controllership) by Douglas J on 28 June 2016;
 - (f) remuneration which was approved in respect of the period 1 May 2016 to 31 October 2016 in the amount of \$1,119,991.40 (receivership) and \$13,385.35 (controllership) by Daubney J on 2 December 2016;
 - (g) remuneration which was approved in respect of the period of 1 November 2016 to 30 April 2017 in the amount of \$897,580.20 (receivership) and \$12,314.50 (controllership) by Justice Mullins on 30 June 2017;
 - (h) remuneration which was approved in respect of the period of 1 May 2017 to 31 October 2017 in the amount of \$1,280,897.20 (receivership) and \$26,155.25 (controllership) by Justice Applegarth on 30 November 2017;
 - (i) remuneration which was approved in respect of the period of 1 November 2017 to 30 April 2018 in the amount of \$1,041,907.90 (receivership) and \$22,306.90 (controllership) by Justice Boddice on 30 November 2017;
 - (j) remuneration which was approved in respect of the period of 1 May 2018 to 31 October 2018 in the amount of \$1,946,635.35 (receivership) and \$20,902.75 (controllership) by Justice Mullins on 29 November 2018;
 - (k) remuneration which was approved in respect of the period of 1 November 2019 to 30 April 2019 in the amount of \$1,248,853.10 (receivership) by Justice Mullins on 2 July 2019;
 - (l) remuneration which was approved in respect of the period of 1 May 2019 to 31 October 2019 in the amount of \$652,328.05 (receivership) by Justice Mullins on 17 December 2019; and

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

- (m) remuneration which was approved in respect of the period of 1 November 2019 to 30 April 2020 in the amount of \$989,373.55 (receivership) by Justice Callaghan on 15 October 2020.

THE PRINCIPLES

22. The Receiver is entitled to be remunerated in accordance with the Court orders of 8 August 2013.
23. Unlike the case of a liquidator, there are no provisions (such as under the *Corporations Act 2001* (Cth), s.473(10)) which provide guidelines as to how the Court should determine the appropriate remuneration. However, the principles applied in that context must by analogy provide some guidance to the Court's determination in the present case.
24. Callaghan J in the Receiver's most recent remuneration application recognised as much but observed that "appropriate submissions will be best formulated by reference to s 425 of the CA": [2020] QSC 317 at [32] (*13th Application Reasons*). Section 425(8) mirrors s.472(10) so far as matters that may be taken into account in determining whether remuneration is reasonable. It provides:

25.

"(8) [Factors court may take into account in determining whether remuneration reasonable]

In exercising its powers under this section, the Court must have regard to whether the remuneration is reasonable, taking into account any or all of the following matters:

- (a) the extent to which the work performed by the receiver was reasonably necessary;
- (b) the extent to which the work likely to be performed by the receiver is likely to be reasonably necessary;
- (c) the period during which the work was, or is likely to be, performed by the receiver;
- (d) the quality of the work performed, or likely to be performed, by the receiver;
- (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the receiver;
- (f) the extent (if any) to which the receiver was, or is likely to be, required to deal with extraordinary issues;
- (g) the extent (if any) to which the receiver was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
- (h) the value and nature of any property dealt with, or likely to be dealt with, by the receiver;
- (i) whether the receiver was, or is likely to be, required to deal with:
 - (i) one or more other receivers; or
 - (ii) one or more receivers and managers; or
 - (iii) one or more liquidators; or
 - (iv) one or more administrators; or
 - (v) one or more administrators of deeds of company arrangement; or
 - (vi) one or more restructuring practitioners; or
 - (vii) one or more restructuring practitioners for restructuring plans;
- (j) the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors;
- (k) if the remuneration is ascertained, in whole or in part, on a time basis:
 - (i) the time properly taken, or likely to be properly taken, by the receiver in performing the work; and
 - (ii) whether the total remuneration payable to the receiver is capped;
- (l) any other relevant matters."

26. The overriding principle applied by the Court in the cases dealing with the Corporations Act provisions is that the liquidator or receiver is entitled to remuneration that is fair and reasonable²⁶. The Court must determine this question for itself irrespective of the absence of a contradictor²⁷.
27. The Receiver's application falls to be determined by a summary procedure in which the rules of evidence are not strictly observed²⁸. The Receiver carries the onus in establishing his entitlement.
28. To this end, there must be material before the Court which shows that the work undertaken was appropriate and necessary²⁹. The level of detail should be proportionate to the size of the estate and the volume of work done³⁰.
29. Time-based costing has been recognised as being an appropriate basis for determining the remuneration³¹. In the present case the Court has ordered that the Receiver is able to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the appointment at rates and in sums from time approved by the Court. However, in determining whether the claimed amount is appropriate the courts are mindful of the disadvantages associated with time-costing. As such, it is recognised that in determining the appropriate remuneration, time spent represents a measure not of the value of the service rendered but of the cost of performing it, whereas remuneration ought to be fixed so as to reward value rather than to indemnify against cost³².
30. The material assessable value is not the net financial gain to the members of the Fund. It is, rather, the value of the services rendered by or on behalf of the Receiver, which is considered by reference to whether the time was reasonably expended in the circumstances of the receivership³³.
31. The Receiver's expressed views as to what is reasonable are relevant but not decisive. The Court does not gainsay the considered oath of an officer of the Court, but nor does it uncritically accept unsubstantiated assertions³⁴. These principles are reflected in the approach of Callaghan J in the 13th *Application Reasons* at [15] to [17].
32. Work will not be reasonably undertaken where it is unnecessary; where it is performed by persons of inappropriate seniority; and, where it is undertaken at inappropriate hourly rates³⁵. A cost-benefit analysis is desirable, and work done must be proportionate to the difficulty or importance of the task in the context in which it must be performed³⁶.
33. The process of determining whether claimed remuneration is fair and reasonable does not require the item by item analysis that would be necessary on a taxation of a solicitor's costs³⁷.

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

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

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

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

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

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

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

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

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

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

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

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

34. There is otherwise no definitive approach to the exercise. Indeed, it has been observed that even where detailed evidence is before the Court, there is no touchstone or reliable independent measure of reasonableness other than judicial impression³⁸.
35. The above principles have been applied by this Court on prior applications. In particular, the Court accepted and considered the complexity of the task of The Receiver as the person responsible for winding up the Fund and that it is necessary to pay appropriate amounts to ensure that persons of The Receiver's abilities undertake these significant tasks³⁹. Most recently this can be seen in the 13th *Application Reasons* at [4].

The requirement of proportionality

36. In *Templeton v ASIC*⁴⁰ the Full Court of the Federal Court dealt with an application for approval of remuneration for persons who had been appointed to wind up an unregistered managed investment scheme. Under the order appointing them they were entitled to their reasonable remuneration and costs at the rates specified in the order. A registrar of the Federal Court discounted the amounts claimed by the liquidators and a review was made to the Federal Court followed by an appeal to the Full Court, Relevantly:
- (a) The Court considered that in fixing the remuneration for a receiver or liquidator or other controller, the requirement is founded upon the "reasonableness" of the amount⁴¹. That being so it is not necessarily apposite to determine the remuneration by reference to the reasonable time spent doing the work and then make an arithmetical calculation based on a scale of rates.
 - (b) That, in the application of orders of the kind in question, for the remuneration of liquidators etc, it is permissible to take into consideration notions of "proportionality"⁴². Indeed, that is an anterior consideration when ascertaining whether the time spent in undertaking the tasks was "reasonable".
 - (c) "The question of proportionality in terms of the work done as compared with the size of the property or activity the subject of the insolvency administration or the benefit or gain to be obtained from the work is an important consideration in determining overall reasonableness"⁴³.
 - (d) In considering proportionality, the value of the services rendered must be considered such that there is reasonableness in the cost of the work done when compared to the value of the services provided or their benefit⁴⁴.
 - (e) That said, when undertaking proportionality considerations it is important to compare the cost of particular services to the benefits obtained. The comparison might be made on the basis of work done to the benefit realised at that point in time or total work for the total benefit obtained⁴⁵.
 - (f) It must also be kept in mind that the benefit derived from work done is not always immediately apparent and that is particularly so where the work was done to preserve property as opposed to obtaining a benefit. Further, the work may be sufficiently complex

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

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

⁴⁰ (2015) 108 ACSR 545.

⁴¹ (2015) 108 ACSR 545 at [28].

⁴² (2015) 108 ACSR 545 at [30].

⁴³ (2015) 108 ACSR 545 at [32].

⁴⁴ (2015) 108 ACSR 545 at [34].

⁴⁵ (2015) 108 ACSR 545 at [50]-[51].

that the maximising of returns warrant the expenditure of funds at a rate of \$0.60 to \$1.00 in relation to expected returns⁴⁶.

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

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

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

THE EVIDENCE OF THE EARNING OF REMUNERATION IN THE PRESENT MATTER

40. By his affidavit filed 2 March 2021⁴⁹, the Receiver has deposed to the work done by him and his staff and the basis upon which remuneration is sought. The Receiver has provided a detailed schedule of the work done, who it was performed by and the amount charged for that work (paragraphs 22 to 178, Affidavit of David Whyte filed 2 March 2021). He has deposed to the work having been done and that it was required for the purposes of the winding up of the Fund. He has also detailed in his affidavit a fulsome explanation as to the relevance of the tasks referred to in the schedule to fulfilling his role supervising the winding up of the FMIF and as receiver of the FMIF.
41. In addition to the Receiver’s evidence, which is addressed in more detail below, the affidavit of Mr Gerry Collins filed 2 March 2021 is read in support of the Receiver’s application. Mr Collins is a registered liquidator with experience of having been appointed to in excess of 500 receiverships or liquidations. He is a consultant of BDO. Mr Collins reviewed the Receiver’s affidavit, the narrations of work undertaken during the Relevant Period, and a transcript of the hearing before Mullins J on 29 November 2018. On 29 November 2018, Mullins J raised the prospect of having a third party review the Receiver’s costs, even if that third party were “in-

⁴⁶ (2015) 108 ACSR 545 at [52].

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

⁴⁸ [2016] NSWSC 106 at [32]

⁴⁹ Court file number 485.

house". Mr Collins also interviewed the Receiver's staff where that was necessary. Mr Collins reviewed the month of September 2020. He chose that month randomly⁵⁰. His evidence is that the claimed remuneration in September 2020 is fair and reasonable and in line with what insolvency practitioners of similar experience would charge for similar work (paragraph 55), though, of course, there were limitations on his review of the work which he identified (paragraphs 56 and 57). Mr Collins took a similar approach in an affidavit read in support of the Receiver's remuneration approval application heard by Mullins J on 2 July 2019 and her Honour accepted Mr Collins' opinion in that application that the work was appropriate and reasonable and that the amount of time spent on the work appeared to be reasonable. The same approach was also adopted in the most recent remuneration application. Mr Collin's evidence was also accepted by Callaghan J as supporting the Receiver's claim for remuneration as being fair and reasonable: *13th Application Reasons* at [19].

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

Winding up progress and benefits thereof

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

- (a) for advancing Supreme Court of Queensland Proceeding No 2166/15 against the former auditors of the FMIF, Ernst & Young (**Auditors Claim**), a claim for an amount exceeding \$200 million, 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;
 - (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 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 the Receiver in proceedings 3383 of 2013;
 - (xiv) reviewing various correspondence and advices received from solicitors;

⁵⁰ Affidavit of Mr Gerry Collins filed 2 March 2021, (Court file number 484) at [13].

- (xv) reviewing correspondence received from the solicitors for the defendants' and the third parties;⁵¹
- (b) for advancing Supreme Court of Queensland Proceeding No 12317/14 against the trustees of the LM Managed Performance Fund (MPF) for claim for approximately \$15.5 million plus interest (**Claim against the MPF**), the significant work included the following:
- (i) providing instructions and assisting solicitors in the on-going conduct of the 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 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;
 - (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;⁵²
- (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 solicitors regarding correspondence with the Liquidator's solicitors as to the proposed application;⁵³ and
- (d) in relation to Supreme Court of Queensland Proceeding 3383/13 (**Bruce Proceeding**), work to progress the 13th 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 solicitors as to responses to issues raised by LMIM, providing instructions to solicitors in relation to the conduct of the application, attending hearing of the application on 2 July 2020, reviewing and considering the *13th Application Reasons* with respect to the application and providing instructions to solicitors as to costs submissions, and procedural orders for future applications by the Receiver for approval of remuneration.⁵⁴
44. Other significant tasks which the Receiver undertook during the period for which remuneration is claimed were:

⁵¹ Affidavit of David Whyte filed 2 March 2021, paragraph 22(a) (Court file number 485)

⁵² Affidavit of David Whyte filed 2 March 2021, paragraph 22(b) (Court file number 485)

⁵³ Affidavit of David Whyte filed 2 March 2021, paragraph 22(c) (Court file number 485)

⁵⁴ Affidavit of David Whyte filed 2 March 2021, paragraph 22(d) (Court file number 485)

- (a) 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;
- (b) 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;
- (c) complying with the conditions of the ASIC relief from financial reporting and audit requirements;
- (d) 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;
- (e) preparation of unit price calculation as at 30 June 2020;
- (f) preparation of management accounts for the year ending 30 June 2020;
- (g) preparation of reports to members issued in June 2020 and September 2020; and
- (h) 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.⁵⁵

BDO Work Practices

45. In paragraphs 38 to 44 of his affidavit, the Receiver⁵⁶ sets out the reasons as to why it was necessary to draw on various teams in his firm to undertake the work done in the relevant period. The work involved in the winding up required the expertise of the Audit and Corporate Finance groups of BDO. The Receiver addresses the work undertaken by each of those teams and why the work was necessary.
46. The Audit group provided assistance to the Receiver by⁵⁷:
- (a) responding to queries from 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; and
 - (f) assisting with the review and completion of the FMIF management accounts for the year ended 30 June 2020.

⁵⁵ Affidavit of David Whyte filed 2 March 2021, paragraph 22(e) to (l) (Court file number 485)

⁵⁶ Affidavit of David Whyte filed 2 March 2021 (Court file number 485)

⁵⁷ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraph 44

The work performed and remuneration sought

Overview

47. During the Relevant Period, the Receiver has divided the work he and his staff undertook into the five Australian Restructuring Insolvency and Turnaround Association (**ARITA**) categories, namely⁵⁸:
- (a) assets;
 - (b) trade on;
 - (c) creditors; and
 - (d) dividend; and
 - (e) administration.
48. These categories were adopted by the Receiver in an attempt rationally to separate the various strands of the work required in the receivership. In a complex external administration such as this one it is impossible to draw clear lines of separation between categories of work, and in consequence there is unavoidable overlap between categories. However each task and the time for carrying it out has only been recorded once⁵⁹. The Receiver also provides a breakdown of the amount of remuneration attributable to each legal proceeding in paragraph 59 of his Affidavit.
49. The Receiver has prepared a schedule providing from his records a description of each task undertaken under each of the above categories, the name and position of the person who undertook the task, the date the task was undertaken, the length of time it took and the amount charged⁶⁰. At the front of the Schedule is a table summarising the time spent on each category of work by each person.
50. This Schedule satisfies the test for adequacy outlined above, when it is read by reference to the detailed explanations the Receiver provides in his affidavit (and which are canvassed below) for why the work was appropriate and necessary.
51. A scale of the hourly rates of the Receiver and his staff is exhibited to the Receiver's affidavit⁶¹. The Receiver's evidence is that the charges in this scale are reasonable and appropriate⁶².
52. The rates in the scale adopted by the Receiver at all times mirrored the prevailing commercial rates charged by BDO to its private clients, despite the fact that The Receiver's role is, for the reasons outlined above, especially complex and challenging – more so than the ordinary external administration⁶³.
53. The Receiver has adopted cost-saving measures where practicable and appropriate. Where possible, and as explained below, the Receiver delegated to members of his staff the performance of the least complex of the required tasks, where appropriate⁶⁴. At paragraphs 42 to 45 of his affidavit, The Receiver refers to the “audit” team to which he delegated work, the specialised expertise they brought to the delegated tasks and why it was necessary to delegate work to those persons. The summary at exhibit page 3 of The Receiver's affidavit shows that over 2,000 of the just over 3,005 hours of work involved was undertaken by employees of BDO at a junior level (graduate and accountant level), which is approximately 66.7% of the hours. The Receiver's Affidavit also shows that approximately \$507,544.50 of the approximately \$535,518.50 in remuneration claimed in the Asset category, and about \$12,000 in other categories, relates to the

⁵⁸ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraph 46

⁵⁹ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraph 47

⁶⁰ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraph 50 and exhibit pages 5 to 121

⁶¹ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), exhibit pages 1 to 2

⁶² Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraphs 55 and 56

⁶³ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraph 51

⁶⁴ Affidavit of David Whyte filed 11 May 2020, paragraph 53 (Court file number 460)

litigation work associated with the Audit Claim which is a claim for in excess of \$200 million and which is the claim that has the greatest potential for a substantial return to creditors⁶⁵.

54. As mentioned, the work which the Receiver has been required to undertake has been attended by considerable complexity.
55. Further detail of the work performed is canvassed below by reference to each of the five categories of work adopted by the Receiver.

Assets

56. The work falling within this category relates in summary to⁶⁶:
- (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;
57. In total, \$535,518.50 (exclusive of GST) of remuneration is sought for approval in the Relevant Period in respect of the "Assets" category.⁶⁷
58. The bulk of the work relates to the progression of the proceedings in Court which are addressed in turn below together with the Receiver's estimates as to when each proceeding will probably reach its conclusion.

The Auditors' Claim

59. The claim against the former auditors of the FMIF (Brisbane Supreme Court claim 3166 of 2015), is for a quantum of up to \$200 million and it is being managed on the Commercial List by Dalton J⁶⁸.
60. Her Honour delivered judgment on 20 October 2020, with respect to The Receiver's 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 264.⁶⁹
61. The Receiver has spent substantial time instructing and assisting his 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.⁷⁰
62. Orders were 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 in accordance with the Document Plan and Protocol attached to those Orders.⁷¹
63. The matter was reviewed by Justice Dalton on 20 October 2020. At that review, Her Honour made directions (inter alia):
- (a) granting the Plaintiff leave to file a Seventh Further Amended Statement of Claim;

⁶⁵ Affidavit of David Whyte filed 2 March 2021 (Court file number 485) paragraph 58

⁶⁶ Affidavit of David Whyte filed 2 March 2021 (Court file number 485), paragraph 62

⁶⁷ Ibid, paragraph 63

⁶⁸ Ibid, paragraph 69

⁶⁹ Ibid, paragraph 70

⁷⁰ Ibid, paragraph 71

⁷¹ Ibid, paragraph 71

- (b) in relation to the making of the applications referred to 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 2020.⁷²
64. On 21 October 2020, a Seventh Further Amended Statement of Claim was filed.⁷³
65. On 2 November 2020, the Receiver caused the Plaintiff to file:
- (a) an application for leave to file an Eighth Further Amended Statement of Claim;
 - (b) an application to release The Receiver, 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.⁷⁴
66. On 20 November 2020, the Receiver 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 23 July 2020 and 20 October 2020. At pages 431-462 of the Bundle is a copy of the Disclosure Statement.⁷⁵
67. Orders were made providing leave to file an Eighth Further Amended Statement of Claim and releasing The Receiver, and BDO employees, from certain undertakings provided to the Court, pursuant to orders made by Justice Daubney in this proceeding on 29 January 2015.⁷⁶
68. The Receiver anticipates that the Auditor's Claim will go to trial in early 2022. His legal representatives presently estimate that the trial will take around eight weeks.⁷⁷
69. A summary of the work that was completed in respect of the Auditors' Claim, in addition to that which is referred to above is as follows⁷⁸:
- (a) the work with respect to the Auditors Claim detailed in paragraph 42(a) above;
 - (b) the provision of relevant information for briefing audit experts, which due to the EY laptop malfunctioning, required 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 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;

⁷² Ibid, paragraph 72

⁷³ Ibid, paragraph 73

⁷⁴ Ibid, paragraph 74

⁷⁵ Ibid, paragraph 75

⁷⁶ Ibid, paragraph 76

⁷⁷ Ibid, paragraph 77 and 78

⁷⁸ Affidavit of David Whyte filed 11 May 2020, paragraph 79 (Court file number 460)

- (f) reviewing the submissions of both parties in relation to the Privilege Application and the Sadie Ville decision;
 - (g) liaising with defendants and 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.⁷⁹
70. The complexities of the Auditor's claim and work that arises out of that for the Receiver and BDO cannot be underestimated.
71. The Auditor's Claim involves allegations against EY of negligence, misleading conduct and contravention of auditor's duties under the *Corporations Act* over nine audits/reviews half yearly over five years (1 July 2007 to 30 June 2012). The current Statement of Claim is 137 pages and the current Defence is 246 pages. The ascertainment of the relevant facts, both those asserted by the Plaintiff and the Defendant, and briefing and instructing the relevant audit, banking and forensic experts, has to be undertaken by reference to a large volume of documents and information over many years. That is in circumstances where neither The Receiver nor BDO employees have any first-hand knowledge of the relevant events and matters. The task is necessarily lengthy and cumbersome.
72. While the cost associated with this claim are significant, so is the potential return for creditors. The claim seeks an award in excess of \$200 million against a top 4 accountancy firm who would be expected to be able to meet any judgment awarded by this Honourable Court (either through insurance or otherwise).

The Claim against the MPF

73. The claim against the trustees of the LM Managed Performance Fund, and other parties including various former directors of LMIM (Brisbane Supreme Court proceeding 12317 of 2014) sought the amount of \$15,546,147.85 plus interest calculated from 2011⁸⁰.
74. Jackson J delivered judgment in the proceeding on 22 November 2019. The Receiver filed a notice of appeal on 20 December 2019 and an application to the Supreme Court for judicial advice in relation to the appeal on 31 January 2020⁸¹.
75. On 28 August 2020, Callaghan J delivered judgment in *LM Investment Management Ltd v Drake & Ors* [2020] QSC 265 refusing the Receiver's application for judicial advice that he would be

⁷⁹ Ibid, paragraph 79

⁸⁰ Ibid, paragraph 81

⁸¹ Ibid.

justified pursuing an appeal against the judgment of Jackson J dismissing this claim. The appeal has now been discontinued.⁸²

76. The work involved during the Relevant Period included
- (a) the work related to the application for judicial advice as detailed in paragraph 42(b) above;
 - (b) conferences with solicitors and Counsel in relation to the application for judicial advice;
 - (c) liaising, instructing and assisting solicitors and counsel in relation to the application for judicial advice;
 - (d) liaising, instructing and assisting solicitors and counsel in relation to outlines of submissions for the application for judicial advice;
 - (e) liaising, instructing and assisting solicitors and 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 solicitors and counsel in relation to the Judgement in the application;
 - (g) liaising and instructing solicitors and counsel in relation to the costs of the application; and
 - (h) liaising and instructing solicitors and counsel in relation to the discontinuance of the Appeal.⁸³
77. The total remuneration claimed for the Relevant Period relating to the appeal and the application for judicial advice is \$19,872.00⁸⁴.

The \$2 million WCL Convertible Bonds proceeding

78. Federal Court of Australia proceeding 2014/332566 was successfully prosecuted and the FMIF is entitled as first ranking creditor to the funds recovered from the \$2 million bonds, after costs. The MPF Trustee has made a claim to an amount of \$678,336 from these funds, which has been abandoned. The net proceeds of the \$2 million bonds are presently held by the Belpac liquidator and are being utilised to fund the recovery of the \$8 million of WCL convertible bonds (which are addressed under the next heading below). A distribution of \$1 million was received by the FMIF from the Bellpac liquidator in November 2019⁸⁵.
79. During the Relevant Period, work included ongoing liaising with the Liquidator regarding requests for payment of the Liquidator's fees and legal fees from the bond proceeds.⁸⁶
80. 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.⁸⁷
81. The total remuneration claimed for the Relevant Period is \$1,168.50⁸⁸.

⁸² Ibid, paragraph 84 and 85

⁸³ Ibid, paragraph 86

⁸⁴ Ibid, paragraph 58

⁸⁵ Ibid, paragraphs 88 to 90

⁸⁶ Ibid, paragraph 91

⁸⁷ Ibid, paragraph 92

⁸⁸ Ibid, paragraph 58

The Trust Company (PTAL) Ltd v Ross Lamb

82. In New South Wales Supreme Court proceeding *The Trust Company (PTAL) Ltd v Ross Lamb*, PTAL obtained default judgment against Mr Lamb for approximately \$3 million plus interest and costs resulting in Mr Lamb's bankruptcy. The bankrupt was, together with others, party to a development agreement and the proceeds of sale of 11 properties owned by the bankrupt and his wife are presently held in a solicitor's trust account (about \$12 million). The trustee in bankruptcy has pursued a public examination in order to access the funds so that the judgment can be satisfied and the public examination occurred in November 2019. Following the public examinations the trustee issued letters of demand to various parties. Mediations with relevant parties were held in May and September of 2020 and the mediation has been adjourned with settlement discussions ongoing.⁸⁹
83. During the Relevant Period the Receiver and his staff undertook work including:
- (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
 - (e) liaising with solicitors, and PTAL in relation to further variations to the Deed of Indemnity.
84. The total remuneration claimed for the Relevant Period is \$5,229.00⁹⁰.

"Trade on"

85. The quantum of the claimed remuneration for this category is \$59,059,50 excluding GST⁹¹. The work within this category consists of work which was incidental to the winding up such as⁹²:
- (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:-
 - (f) maintenance of accounts and preparation of the management accounts for the financial year ended 30 June 2020;
 - (g) status of litigation matters and work to be done to progress same;
 - (h) investor issues including content for reports to members, status of investigations, creditor claims and the application for approval of remuneration; and
 - (i) meeting with members of the BDO Audit practice group regarding the preparation of the management accounts for the financial year ended 30 June 2020.

⁸⁹ Ibid, paragraphs 109 to 113

⁹⁰ Ibid, paragraph 58

⁹¹ Ibid, paragraph 50

⁹² Ibid, paragraph 117

86. The Receiver's work in respect of completing the management accounts for the financial year ended 30 June 2020 management accounts included:
- (a) reviewing work papers to verify the accuracy of the management accounts;
 - (b) ascertaining amounts that are outstanding on 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;
 - (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
 - (o) reviewing and amending the management accounts and notes in accordance with Australian Accounting Standards and recommendations by solicitors.
87. The Receiver was directed to apply on behalf of the FMIF to ASIC for relief from compliance with financial reporting and audit obligations under Part 2M.3 and s.601HG *Corporations Act* 2001. He made that application in 2016. It has been necessary for the relief that was granted by ASIC to be extended. The Receiver instructed his solicitors to apply to ASIC for the relief to be

extended and complied with the conditions of the relief. 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 2022.⁹³

88. 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.⁹⁴
89. In relation to the work associated with the FTI Indemnity Proceeding, the background to which is detailed in paragraphs 112 to 124 of the Receiver's November 2017 Affidavit and which also comes within the category "Trade on", the Receiver during the Relevant Period did work including reviewing correspondence from 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 costs⁹⁵, and responding to a request from the Liquidator to increase the quantum of costs payable under a costs order made with respect to the Liquidator's second remuneration application, as a result of the omission of certain invoices from the Liquidator's Counsel from the amount claimed.⁹⁶

Creditors

90. The Receiver seeks approval of remuneration of \$310,442.00 excluding GST for work undertaken in this category⁹⁷.
91. The work falling within this category was extensive and consisted of the Receiver's work in⁹⁸:
- (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
 - (e) work in relation to claims by LMIM (by its Liquidators) for indemnity against the FMIF.
92. During the period for which remuneration is sought, the Receiver produced two reports to members (being his 30th and 31st reports)⁹⁹. The tasks for the purposes of reporting to members of the FMIF, included:
- (a) drafting and reviewing the reports to members;
 - (b) preparing material summarising remuneration for inclusion in the report;
 - (c) liaising with solicitors in relation to 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

⁹³ Ibid, paragraphs 121 to 124

⁹⁴ Ibid, paragraphs 125

⁹⁵ Ibid, paragraphs 135

⁹⁶ Ibid, paragraphs 132

⁹⁷ Ibid, paragraphs 148

⁹⁸ Ibid, paragraphs 149

⁹⁹ Ibid, paragraph 151

- (h) for the 31st report, setting out the actions taken in the relevant 6 months period and proposed to be undertaken in the next 12-month period.¹⁰⁰
93. The work undertaken in this category also involves contact between the Receiver and members wherein the Receiver provided information as to¹⁰¹:
- (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 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.
94. This category also included:
- (a) liaising with the beneficiaries and/or trustees of deceased members' estates. The Receiver and his staff 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. They 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; and
 - (b) maintain the Microsoft AX investor management database. This included work updating investor details, transferring units as requested or as directed by executors of deceased estates and generating reports to attend to members' unit balance enquiries.¹⁰² In the month of September 2020 alone, BDO sent approximately 135 emails or letters answering investor queries and processed 68 change of investor details¹⁰³.

Dividend

95. The Receiver seeks approval of remuneration of \$7,719 excluding GST for work undertaken in this category¹⁰⁴. The work falling within this category consists of the Receiver's work in resolving returned payments and reprocessing interim capital distribution to certain investors¹⁰⁵.

Administration

96. The Receiver claims remuneration of \$91,291.00 excluding GST for work within this category¹⁰⁶. The work within this category includes¹⁰⁷:
- (a) work necessary for the proper and efficient administration of the winding up;
 - (b) ensuring proper accounts and records were maintained;
 - (c) preparing applications for approval of remuneration;
 - (d) residual administrative functions in respect of preparing reports to members, such as copying, mailing and uploading reports to the FMIF website.
97. This work also involved:
- (a) arranging distribution of notice of the application to the members of the FMIF. In accordance with the Receiver's usual practice during this administration, the tasks of

¹⁰⁰ Ibid, paragraph 152

¹⁰¹ Ibid, paragraph 153

¹⁰² Ibid, paragraph 154 and 156

¹⁰³ Affidavit of Gerry Collins filed 2 March 2021 (court document number 484), paragraph 52

¹⁰⁴ Ibid, paragraph 161

¹⁰⁵ Ibid, paragraph 162

¹⁰⁶ Ibid, paragraph 166

¹⁰⁷ Ibid, paragraph 165

copying, mailing and uploading reports to members to the FMIF is outsourced to external providers who perform such work at bulk rates;¹⁰⁸

- (b) conducted internal meetings and discussions in order to discuss the progression of the job, maintenance of the accounts and preparation of the management accounts for the financial year ended 30 June 2020, investor issues and content for reports to members, status of the various investigations, claims and court proceedings, status of creditor claims and coordinating the application for approval of remuneration;¹⁰⁹
- (c) 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;¹¹⁰
- (d) regularly fielding inquiries from members regarding changes to their details;¹¹¹ and
- (e) attending to general file administration including filing and archiving books and records.¹¹²

Write off of the time

98. The Receiver has written off a portion of the amount charged, being \$16,738.50 excluding GST¹¹³.

The Remuneration is appropriate having regard to s 425(8)

99. An assessment of the Receiver's present claim for remuneration against the relevant considerations detailed in s 425(8) supports the conclusion that the claim is appropriate:
- (a) as to s 425(8)(a) and (b), the Receiver has explained in detail the work that he and his employees have done, and are still yet to do, and why it was, in his opinion, reasonably necessary for that work to be done. That opinion is soundly based having regard to the size and complexity of the receivership and is supported by Mr Collin's review of the work done in the sample month of September 2020;
 - (b) as to s 425(8)(c), the period during which the work was done 6 months, which is the period for which each remuneration application by the Receiver has been brought. The amount sought for this six month period is in line with what has been sought over previous six month periods;
 - (c) as to s 425(8)(d), the quality of the work performed has varied between high value work (ie instructing experts on the Audit Claim) and low value (ie administrative tasks). Importantly, the Receiver has ensured that tasks have been appropriately delegated to people who have the requisite skills so as to reduce expense where possible;
 - (d) as to s 425(8)(e) and (f), the receivership is complex and has required the Receiver to deal with extraordinary issues. The nature of the scheme, the assets involved, the litigation that has had to be prosecuted and defended, the number of investors/creditors and having to deal with the liquidators of LMIM have all added to that complexity;
 - (e) as to s 425(8)(g), the Receiver has been required to accept a higher level of risk or responsibility than is usually the case. This can be seen particularly in the major litigation that the Receiver has had to take on responsibility for such as the Drake Proceedings and the EY Proceedings. The level of responsibility that the Receiver has had to bear in agitating these claims has been significant;

¹⁰⁸ Ibid, paragraph 168(b)

¹⁰⁹ Ibid, paragraph 169

¹¹⁰ Ibid, paragraph 171

¹¹¹ Ibid, paragraph 172

¹¹² Ibid, paragraph 176

¹¹³ Ibid, paragraph 179

- (f) as to s 425(8)(h), the value of the property dealt with by the Receiver has been very substantial. \$32 million has been paid out to members to date. \$34.32 million in cash is presently held in the bank.¹¹⁴ The Audit Claim for \$200 million has the potential to increase the return to members;
- (g) as to s 425(8)(i), the Receiver has been required to deal with the Liquidators of LMIM. The history of this matter reveals that the Liquidator has had a propensity to agitate matters. This has added to the complexity and cost of the receivership;
- (h) as to s 425(8)(j), the Receiver has had to deal with a large number of member investors. The nature of the assets and litigation that the Receiver has had to deal with is such that the receivership has gone on for some years and will continue for another 1 to 2 years; and
- (i) as to s 425(8)(k), the Receiver's remuneration has never been capped. The appropriateness of the time taken to do the work is attested to by both the Receiver and Mr Collins.

Further applications for approval of remuneration

100. The winding up of the fund is ongoing.

101. The Receiver proposes to make further regular applications for the approval of his remuneration as the receivership progresses¹¹⁵.

Damien O'Brien QC

Counsel for the Receiver

22 March 2021

¹¹⁴ Ibid, paragraph 13 to 18.

¹¹⁵ Ibid, paragraph 183