

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 2021 to 31 October 2021 in the sum of \$924,169.40 (inclusive of GST)².
2. On 15 October 2020 Justice Callaghan made directions for the handling of the Receiver's future applications for remuneration. His Honour directed 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 responsible entity for the LM Institutional Currency Protected Australian Income Fund) (**LMIM**), shall file and serve on the Receiver:

¹ Affidavit of David Whyte filed 2 December 2021, paragraph 3 (Court file number 512)

² Affidavit of David Whyte filed 2 December 2021, paragraph 12 (Court file number 512)

- (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 26 November 2021, LMIM, through its liquidators, in compliance with Callaghan J’s orders, advised in writing that whilst they maintain a general objection to the Receiver’s remuneration, they did not intend to file any material opposing the relief sought by the Receiver, or appear to oppose the application.
 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 Court³. The Receiver was appointed the person responsible for ensuring that a registered managed investment scheme operated by 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 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.⁴
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.⁵
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

³ Affidavit of David Whyte filed 2 December 2021, paragraph 3 (Court file number 512)

⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 8 (Court file number 512)

⁵ Affidavit of David Whyte filed 7 November 2014, paragraph 18 (Court document number 225)

certain payments to feeder funds.⁶ On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of LMIM⁷ and on 9 April 2013, ASIC suspended LMIM's Australian Financial Services Licence.⁸

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.⁹ 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.¹⁰
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.¹¹
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;¹²
 - (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;¹³
 - (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;
 - (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;

⁶ Affidavit of David Whyte filed 7 November 2014, paragraph 21 (Court document number 225)

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

⁸ Affidavit of David Whyte filed 7 November 2014, paragraph 23 (Court document number 225)

⁹ Affidavit of David Whyte filed 7 November 2014, paragraph 24 (Court document number 225)

¹⁰ Affidavit of David Whyte filed 7 November 2014, paragraphs 25 and 26 ex DW-1 p 31, DW-2 (Court document number 225)

¹¹ 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)

¹² Affidavit of David Whyte filed 11 May 2020, paragraph 37(a) (Court file number 460)

¹³ 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)

¹⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 36 (Court file number 512)

¹⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 36 (Court file number 512)

- (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 Claim¹⁷; and
 - (g) during the period for which remuneration is claimed there was work relating to maintaining the FMIF register of investors (numbering over 4,600), including maintaining and updating the register of members, responding to member queries and reprocessing interim distribution payments for investors whose payments were returned¹⁸.
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.

THE PRESENT CLAIM FOR REMUNERATION

20. The Receiver now seeks orders approving his remuneration for work performed in the period from 1 May 2021 to 31 October 2021 (**Relevant Period**) for acting as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution in the sum of \$924,169.40 (inclusive of GST). The remuneration sought in this application for the Relevant Period equates to about \$154,028.23 per month (inclusive of GST) for the Relevant Period²⁵.
21. The remuneration for this period compares with²⁶:
- (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;

¹⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 36(h) (Court file number 512)

¹⁷ Affidavit of David Whyte filed 2 December 2021, paragraph 37(a) (Court file number 512)

¹⁸ Affidavit of David Whyte filed 2 December 2021, paragraph 37(b) (Court file number 512)

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 2 December 2021, paragraph 1 and 2 (Court file number 512)

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 2 December 2021, paragraph 8 (Court file number 512)

²⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 14 (Court file number 512)

²⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 11 (Court file number 512)

- (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 2018 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
- (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;
- (n) remuneration which was approved in respect of the period of 1 May 2020 to 31 October 2020 in the amount of \$1,104,433.00 (receivership) by Justice Callaghan on 26 March 2021; and
- (o) remuneration which was approved in respect of the period of 1 November 2020 to 30 April 2021 in the amount of \$1,383,829.15 (receivership) by Justice Callaghan on 13 August 2021.

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. In the Receiver's 13th remuneration application Callaghan J 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:

(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.

25. 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 reasonable²⁷. The Court must determine this question for itself irrespective of the absence of a contradictor²⁸.
26. The Receiver's application falls to be determined by a summary procedure in which the rules of evidence are not strictly observed²⁹. The Receiver carries the onus in establishing his entitlement.

²⁷ *Conlan v Adams* (2008) 65 ACSR 521 at [28] per McLure JA (Buss JA and Newnes AJA agreeing)

²⁸ *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

²⁹ *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at 102 per Kennedy and Ipp JJ

27. To this end, there must be material before the Court which shows that the work undertaken was appropriate and necessary³⁰. The level of detail should be proportionate to the size of the estate and the volume of work done³¹.
28. Time-based costing has been recognised as being an appropriate basis for determining the remuneration³². 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 to 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 cost³³.
29. 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 receivership³⁴.
30. 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 assertions³⁵. These principles are reflected in the approach of Callaghan J in the *13th Application Reasons* at [15] to [17].
31. 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 rates³⁶. 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 performed³⁷.
32. 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 costs³⁸.
33. 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 impression³⁹.
34. 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 tasks⁴⁰. For instance this can be seen in the *13th Application Reasons* at [4].

³⁰ *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

³¹ *Re Stockford Ltd; Korda and Anor* (2004) 52 ACSR 279 at 295 per Finkelstein J

³² *Venetian Nominees Pty Ltd v Conlan* (1998) 20 WAR 96 at [105]- [106], followed in *Conlan v Adams* (2008) 63 ACSR 521 at [37]

³³ *Mirror Group Newspapers plc v Maxwell & Ors (No 2)* [1998] 1 BCLC 638 at 652 per Ferris J

³⁴ *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]

³⁵ *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

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

³⁷ *Conlan v Adams & Ors* (2008) 65 ACSR 521 at 532-533 per McLure JA (Buss JA and Newnes AJA agreeing)

³⁸ *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

³⁹ *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

⁴⁰ See the reasons for judgment of Mullins J dated 27 November 2014 and Jackson J dated 23 June 2015.

The requirement of proportionality

35. In *Templeton v ASIC*⁴¹ 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 amount⁴². 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”⁴³. 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”⁴⁴.
 - (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 benefit⁴⁵.
 - (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 obtained⁴⁶.
 - (f) It must also be kept in mind that the benefit derived from work done is not always immediately apparent and that is particularly so where the work was done to preserve property as opposed to obtaining a benefit. Further, the work may be sufficiently complex that the maximising of returns warrant the expenditure of funds at a rate of \$0.60 to \$1.00 in relation to expected returns⁴⁷.
36. In *Re Wine National Pty Ltd*⁴⁸, 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

⁴¹ (2015) 108 ACSR 545.

⁴² (2015) 108 ACSR 545 at [28].

⁴³ (2015) 108 ACSR 545 at [30].

⁴⁴ (2015) 108 ACSR 545 at [32].

⁴⁵ (2015) 108 ACSR 545 at [34].

⁴⁶ (2015) 108 ACSR 545 at [50]-[51].

⁴⁷ (2015) 108 ACSR 545 at [52].

⁴⁸ [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.

complexity of the work; whether the receiver was, or is likely to be, required to deal with extraordinary issues, or accept a higher level of risk or responsibility than is usually the case; the value and nature of any properly dealt with, or likely to be dealt with, by the receiver; whether the receiver was, or is likely to be, required to deal with other insolvency practitioners; the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors; and, if the remuneration is ascertained, in whole or in part, on a time basis, the time properly taken, or likely to be properly taken, by the receiver in performing the work; and whether the total remuneration payable to the receiver is capped.

37. It is noted that in *Independent Contractor Services (Aust) Pty Ltd (in liq) (No.2)*⁴⁹ 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 property is available. He also identified that an *ad valorem* approach might be adopted in such cases.
38. *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

39. By his affidavit filed 2 December 2021⁵⁰, 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 174, Affidavit of David Whyte filed 2 December 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.
40. On 29 November 2018, Mullins J raised the prospect of having a third party review the Receiver's costs, even if that third party were “in-house”. Therefore, in addition to the Receiver's evidence, which is addressed in more detail below, the affidavit of Mr Gerry Collins filed 2 December 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, and the narrations of work undertaken during the Relevant Period.
41. Mr Collins reviewed the month of September 2021. He chose that month randomly⁵¹. Mr Collins interviewed the Receiver's staff where that was necessary. His evidence is that the claimed remuneration in September 2021 is fair and reasonable and in line with what insolvency practitioners of similar experience would charge for similar work (paragraph 60), though, of course, there were limitations on his review of the work which he identified (paragraphs 19 to 21, and 39 to 42).
42. 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 last two remuneration applications before Callaghan J. Mr Collin's evidence was accepted by Callaghan J as supporting the Receiver's claim for remuneration as being fair and reasonable:

⁴⁹ [2016] NSWSC 106 at [32]

⁵⁰ Court file number 512.

⁵¹ Affidavit of Mr Gerry Collins filed 2 December 2021, (Court file number 511) at [13].

13th Application Reasons at [19] and *Bruce & another v LM Investment Management Limited & others* [2021] QSC 203 at [20].

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

Winding up progress and benefits thereof

44. 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 various correspondence received from his solicitors and from the solicitors for the defendants;
 - (ii) liaising with his solicitors in relation to disclosure, searching for, locating and review of documents in a series of disclosure categories, in order to complete further disclosure in accordance with the Document Plan;
 - (iii) reviewing disclosure statements in respect of further tranches of disclosure and arranging access for EY to an electronic database of financial records, as part of the disclosure process;
 - (iv) locating, reviewing and providing documents to his solicitors to assist with briefs to experts and preparation of expert reports;
 - (v) reviewing and providing comments on 29 retrospective valuations of properties charged to the Fund, covering up to nine valuation dates for the purposes of a loss and damage report where the assets valued in these reports included six retirement villages, completed residential and commercial properties, part completed properties and land;
 - (vi) reviewing and providing comments on three additional supplementary valuation reports to assist with calculation of loss and damages and reviewing and providing comments on financial statements auditor supplementary expert report in relation to updating the impairment of twenty three loans and taking into account the retrospective valuations;
 - (vii) reviewing and providing comments on an expert report in relation to how investors would have acted differently in relation to their investments, if different levels of impairments had been reported by EY;
 - (viii) reviewing and providing comments on an expert report in relation to ASIC's likely response to alternative reported levels of impairments;
 - (ix) reviewing and providing comments on expert report regarding how a Responsible Entity would have reacted to the alternative reported levels of impairments and how that would have affected the conduct of an earlier winding up of the Fund;
 - (x) preparing an expert report regarding how a Receiver of the Fund would have disposed of the assets of the Fund in an earlier winding up;
 - (xi) preparing a report and swearing an affidavit regarding how certain costs and expenses of the Fund were incurred and paid to assist the expert witness in the preparation of their calculations of loss and damage;
 - (xii) reviewing and providing comments on an expert report in relation to the calculation of loss and damage, where the loss and damage calculations are

complex because of the various elements of the claim include assessment of revised management fees to take into account increased level of impairments (and reduced level of funds under management), assessment of the earlier realisation of properties charged to the Fund for twenty three loans taking into account the retrospective valuations, calculating the effect of related party transactions that would not have taken place and accounting for the Feeder Fund settlement, calculating the earlier repayment of the secured creditor, reduced interest and other costs and loss of return to members of an earlier distribution of capital;

- (xiii) providing instructions and assistance to his solicitors for the preparation of a reply to the defendants' defence to the eighth further amended statement of claim; and
 - (xiv) providing instructions to his solicitors with respect to a number of commercial list reviews⁵².
- (b) in relation to Supreme Court of Queensland Proceeding BS3508/15 (**FTI Remuneration Proceeding**), the work related to an application filed by the Liquidator on 12 February 2021 seeking payment of remuneration of \$260,633.12 from the FMIF for the period 1 July 2018 to 31 October 2020 and the work included:
- (i) instructing his solicitors with respect to correspondence received from the Liquidator's solicitors, swearing an affidavit of service and reviewing orders made by the Court; and
 - (ii) arranging payment of remuneration to the Liquidator and agreeing on the quantum of the Liquidator's costs payable from the FMIF⁵³.
- (c) in relation to Supreme Court of Queensland Proceeding 3383/13 (**Bruce Proceeding**), work to progress the 15th application for approval of remuneration including reviewing and swearing a detailed supporting affidavit, providing instructions to his solicitors regarding the conduct of the application and attending the hearing on 13 August 2021⁵⁴.
45. Other significant tasks which the Receiver undertook during the period for which remuneration is claimed were:
- (a) complying with the conditions of the ASIC relief from financial reporting and audit requirements;
 - (b) reprocessing returned interim capital distributions paid in October 2019 in the amount of 6.5 cents per unit to FMIF members, which involved: corresponding with investors regarding the distribution paid in October 2019; updating investors' bank account details in the FMIF's database to reprocess the distributions that were returned; reprocessing the distributions for any returned distributions from inactive bank account details; providing instructions and information to PTAL to reprocess distributions; creating payment files to reprocess the distributions to the member's nominated bank account;
 - (c) preparation of unit price calculation as at 30 June 2021;
 - (d) preparation of management accounts for the year ending 30 June 2021;
 - (e) preparation of reports to members issued in June 2021 and September 2021; and

⁵² Affidavit of David Whyte filed 2 December 2021, paragraph 22(a) (Court file number 512)

⁵³ Affidavit of David Whyte filed 2 December 2021, paragraph 22(b) (Court file number 512)

⁵⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 22(c) (Court file number 512)

- (f) 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 units⁵⁵.

BDO Work Practices

46. In paragraphs 42 to 45 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 Business Restructuring and Audit groups of BDO. The Receiver addresses the work undertaken by each of those teams and why the work was necessary.
47. The Audit group provided assistance to the Receiver by⁵⁷:
- (a) attending conferences with solicitors and counsel in relation to expert evidence in the Auditors Claim proceeding;
 - (b) providing assistance in relation to documents to be considered by experts in the Auditors Claim proceeding;
 - (c) attending and preparing for conferences with valuation experts and providing information for briefing same;
 - (d) assisting with the review and completion of the management accounts for the year ended 30 June 2021; and
 - (e) reviewing expert reports, including expert report on retrospective valuations, supplementary expert report from the financial statement auditor expert, and the loss and damage expert report.

The work performed and remuneration sought

Overview

48. 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
 - (d) dividend; and
 - (e) administration.
49. These categories were adopted by the Receiver in order to separate the various strands of the work required in the receivership into rational categories. 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 58 of his Affidavit.
50. 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

⁵⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 22(d) to 22(i) (Court file number 512)

⁵⁶ Affidavit of David Whyte filed 2 December 2021 (Court file number 512)

⁵⁷ Affidavit of David Whyte filed 2 December 2021, paragraph 44 (Court file number 512)

⁵⁸ Affidavit of David Whyte filed 2 December 2021, paragraph 46 (Court file number 512)

⁵⁹ Affidavit of David Whyte filed 2 December 2021, paragraph 47 (Court file number 512)

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.

51. The 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.
52. 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.
53. 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.
54. 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.
55. The summary at exhibit page 3 of the Receiver's affidavit shows that 412.5 of the just over 1,892 hours of work involved was undertaken by employees of BDO at a junior level (graduate and accountant level, accounting assistant or professional services support), which is approximately 22% of the hours. The Receiver's Affidavit also shows that \$585,276.00 of the \$588,838.50 in remuneration claimed in the Asset category relates to the 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.
56. As mentioned, the work which the Receiver has been required to undertake has been attended by considerable complexity.
57. Further detail of the work performed is canvassed below by reference to each of the five categories of work adopted by the Receiver.

Assets

58. The work falling within this category relates in summary to⁶⁶:
 - (a) advancing claims against guarantors; and
 - (b) court proceedings, including:-
 - (i) pursuing the Auditors Claim;
 - (ii) the litigation associated with the realisation of bonds held in WCL by Bellpac;
59. In total, \$592,077.90 (exclusive of GST) of remuneration is sought for approval in the Relevant Period in respect of the “Assets” category⁶⁷.

⁶⁰ Affidavit of David Whyte filed 2 December 2021, paragraph 50 and exhibit pages 5 to 98 (Court file number 512)

⁶¹ Affidavit of David Whyte filed 2 December 2021, exhibit pages 1 and 2 (Court file number 512)

⁶² Affidavit of David Whyte filed 2 December 2021, paragraphs 54 and 176 (Court file number 512)

⁶³ Affidavit of David Whyte filed 2 December 2021, paragraphs 43 and 54 (Court file number 512)

⁶⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 51 (Court file number 512)

⁶⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 58 (Court file number 512)

⁶⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 62 (Court file number 512)

⁶⁷ Affidavit of David Whyte filed 2 December 2021, paragraph 50 (Court file number 512)

60. The bulk of the work relates to the progression of the proceedings in Court which are addressed in turn below.

The Auditors Claim

61. The claim against the former auditors of the FMIF (Brisbane Supreme Court claim 3166 of 2015), is for a quantum of up to \$249.6 million and it is being managed on the Commercial List by Dalton J⁶⁸.
62. Substantial progress was made during the Relevant Period including the following⁶⁹:
- (a) the Receiver served a substantial number of expert reports, including twenty nine retrospective valuations reports at up to nine different valuation dates, three additional supplementary valuation reports and the other expert witness reports. Many of these experts reports are of considerable scope and complexity;
 - (b) the Receiver completed substantial additional disclosure in accordance with a document plan. A total of approximately 450,000 documents have been disclosed in six tranches by the plaintiff in the case (including further tranches of disclosure during the Relevant Period, of approximately 330,000 documents in total) and 6,500 documents by the defendants.
63. On 7 June 2021, in a review of the Auditor Claim, Justice Dalton made orders that⁷⁰:
- (a) the plaintiff file and serve a reply by 25 June 2021. The reply was filed and served on 1 July 2021;
 - (b) the plaintiff give any remaining disclosure by 25 June 2021. The further disclosure was made on 24 June 2021;
 - (c) by 30 June 2021 the plaintiff file and serve the balance of its expert retrospective valuation reports. These reports were filed and served progressively throughout June 2021, save for one report filed and served on 6 July 2021. Three supplementary reports were filed and served on 22 July 2021;
 - (d) by 30 June 2021 the plaintiff file and serve the expert report of Mr Weston as to the behaviour of investors and their advisers. This report was filed and served on 29 June 2021. A supplementary report of Mr Weston was filed and served on 27 July 2021;
 - (e) by 30 June 2021 the plaintiff file and serve the expert report of KordaMentha as to any matters other than their assessment of loss and damage. This report was served on 30 June 2021 and filed on 1 July 2021;
 - (f) on or before 30 July 2021 the plaintiff file and serve the expert report of Mr Brian Morris as to his calculation of the true impairment of the Fund's loans. This report was filed and served on 23 July 2021;
 - (g) on or before 30 July 2021 the plaintiff file and serve any expert reports as to the management of the Funds portfolio by LMIM or a receiver. The reports of Mr Seeto were delivered by 30 July 2021 and the Receiver's report was filed and served on 30 July 2021;
 - (h) on or before 30 July 2021, the plaintiff file and serve the balance of its lay or expert evidence (except as to loss and damage). An affidavit from the Receiver and the balance of the plaintiff's lay evidence was filed and served on 30 July 2021. An additional expert

⁶⁸ Affidavit of David Whyte filed 2 December 2021, paragraphs 68 and 69 (Court file number 512)

⁶⁹ Affidavit of David Whyte filed 2 December 2021, paragraph 71 (Court file number 512)

⁷⁰ Affidavit of David Whyte filed 2 December 2021, paragraphs 72(a) to 72(h) (Court file number 512)

report from Dr Pamela Hanrahan was served on 2 August 2021 and filed on 3 August 2021.

64. As to the expert evidence of KordaMentha as to the assessment of loss and damage, reports were to be filed and served on 30 September 2021 and 26 November 2021. The filing and service of those reports were delayed⁷¹.
65. On 21 July 2021, Justice Dalton made orders that the appendices to Mr Seeto's report be delivered by 13 August 2021 and his report be filed and served by 13 August 2021. Mr Seeto's report was delayed. On 13 August 2021, Justice Dalton made orders that Mr Seeto's evidence be filed and served by 18 August 2021. Mr Seeto's report was filed and served on 18 August 2021⁷². The defendants were ordered to serve any valuation reports of expert witnesses and any lay evidence on which they intend to rely by 13 December 2021⁷³.
66. On 8 October 2021, Justice Dalton made orders on the papers extending the time for the plaintiff to file and serve KordaMentha's report as to loss and damage based on counterfactual assumptions commencing from 1 July 2009, and any further lay evidence on which the report is based, to be filed by 1 November 2021. This has been complied with⁷⁴.
67. Further, orders were made by Justice Dalton on 8 October 2021 extending the time for the plaintiff to deliver KordaMentha's report as to loss and damage based on counterfactual assumptions commencing from any further and subsequent dates, and any further lay evidence on which the report is based, to be delivered by 24 December 2021. Assuming the dates under these orders are met by the plaintiff, the plaintiff would have completed disclosure, and delivered the expert reports and lay evidence which it intends to rely upon at trial by 24 December 2021⁷⁵.
68. The defendants were also granted further time to deliver any expert valuation reports and lay evidence to 28 February 2021⁷⁶.
69. In his 31 May 2021 affidavit the Receiver expressed his expectation that the Auditor's claim would go to trial in the first half of 2022 however the Receiver no longer has that expectation because⁷⁷:
 - (a) the plaintiff's evidence has taken longer than anticipated to finalise. In particular, the valuation evidence was delayed by between one and two months because of problems with the availability of the experts in the first half of this calendar year. The causation evidence was delayed by around a further month because the plaintiff's funds management expert, Mr Seeto, required more time than he had anticipated to form and document his opinions. The loss and damage evidence was delayed by around two further months because of complexities associated with modelling the cash flows of the Fund;
 - (b) the disclosure process was more burdensome and time consuming than the plaintiff had originally anticipated because of the volume of material and the manner in which the material was stored and organised by LMIM; and
 - (c) in the event, the defendants did not proactively start preparing their evidence until recently. In the circumstances, the defendant sought and were granted additional time to first prepare their valuation evidence, and despite the Receiver's expectations, no orders have yet been made by the Court at this time, as to the balance of the defendants' expert and lay evidence.

⁷¹ Affidavit of David Whyte filed 2 December 2021, paragraph 72(i) (Court file number 512)

⁷² Affidavit of David Whyte filed 2 December 2021, paragraphs 73 and 74 (Court file number 512)

⁷³ Affidavit of David Whyte filed 2 December 2021, paragraph 74 (Court file number 512)

⁷⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 75 (Court file number 512)

⁷⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 76 (Court file number 512)

⁷⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 77 (Court file number 512)

⁷⁷ Affidavit of David Whyte filed 2 December 2021, paragraphs 81 and 82 (Court file number 512)

70. Setting down the matter for trial is a matter that is typically raised at Commercial List reviews before Dalton J⁷⁸. The length of trial is presently estimated by the Receiver to be 12 weeks⁷⁹, although this could increase significantly if the extent of disputes surrounding valuation evidence cannot be confined⁸⁰. The Receiver is working to ensure the EY Proceeding is ready for trial as soon as is reasonably possible, but acknowledges that he is presently unable to provide a firm estimate of when the Auditor's Claim will go to trial as that will depend upon, among other things, the evidence which the Defendants put on and the availability of trial dates⁸¹.
71. The Auditor's claim and work that arises out of it for the Receiver and BDO is complex. It involves allegations against EY of negligence, misleading conduct and contravention of auditors' 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.
72. 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.
73. 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 firm of accountants which should be expected to be able to meet any judgment (either through insurance or otherwise).

The Claim against the MPF

74. 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 2011⁸².
75. 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 2020.
76. 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 justified pursuing an appeal against the judgment of Jackson J dismissing this claim. The appeal has now been discontinued.
77. No remuneration is claimed with respect to this proceeding in the Relevant Period.

The \$2 million and \$8 million WCL Convertible Bonds proceedings

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 Belpac liquidator in November 2019⁸³.

⁷⁸ Affidavit of David Whyte filed 2 December 2021, paragraph 87 (Court file number 512)

⁷⁹ Affidavit of David Whyte filed 2 December 2021, paragraph 90 (Court file number 512)

⁸⁰ Affidavit of David Whyte filed 2 December 2021, paragraph 91 (Court file number 512)

⁸¹ Affidavit of David Whyte filed 2 December 2021, paragraphs 84 to 86, 88 (Court file number 512)

⁸² Affidavit of David Whyte filed 2 December 2021, paragraph 93 (Court file number 512)

⁸³ Affidavit of David Whyte filed 2 December 2021, paragraph 100 (Court file number 512)

79. Federal Court of New South Wales Proceeding 2016/00120239 concerned the Bellpac liquidator bringing proceedings against WCL in relation to \$8M of bonds. This resulted in a settlement and the Fund receiving distributions totalling \$2.75M.
80. No remuneration is claimed with respect to these proceedings in the Relevant Period.

Federal Court Proceeding 2016/00120239

81. This proceeding concerns a claim brought by the Bellpac Liquidator against WCL seeking orders requiring WCL to convert the bonds to shares. The Receiver consider that the FMIF, as first ranking creditor, will be entitled to the funds received from this proceeding (after costs)⁸⁴.
82. The Bellpac Liquidator entered into a Heads of Agreement (**HOA**) with WCL to settle this proceeding and it was a condition precedent to the settlement that WCL obtain shareholder approval of the settlement. The time for satisfying that condition precedent was extended, a number of times, ultimately to 31 October 2020⁸⁵.
83. As the condition precedent was not going to be satisfied by 31 October 2020, further settlement negotiations took place, which resulted in a Deed of Settlement being entered into on 30 October 2020, which was subject to creditor approval⁸⁶.
84. On 18 November 2020, creditors approved a revised version of this Deed of Settlement resulting in a distribution of \$2.5 million to the FMIF on 27 November 2020, and, a further distribution of \$250,000 to the FMIF on 11 March 2021⁸⁷.
85. During the Relevant Period, the work of the Receiver and his staff has included considering and obtaining legal advice regarding a proposal for the shares in WCL owned by Bellpac (over which the FMIF holds security) to be assigned to the FMIF⁸⁸.

The Trust Company (PTAL) Ltd v Ross Lamb

86. 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).
87. The trustee in bankruptcy 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 examination, the trustee issued letters of demand to various parties. Mediations with relevant parties were held in May and September of 2020⁸⁹. The matter settled in September 2021. The Trustee of the bankrupt estate estimates that the net return to the bankrupt estate (of which the FMIF is a major creditor) after deducting costs, repayment of funding provided by the FMIF and Trustee's remuneration and expenses will be approximately \$1,004,711 to \$1,964,161 not including allowances for future remuneration or expenses or taxation liabilities, with an application to Court to be made by the Trustee to give the FMIF a priority over other creditors⁹⁰.
88. During the Relevant Period the Receiver and his staff undertook work including reviewing reports and updates from the trustee, liaising with the trustee in relation to settlement negotiations, considering and providing instructions to PTAL as custodian of the FMIF in relation to the

⁸⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 103 (Court file number 512)

⁸⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 104 (Court file number 512)

⁸⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 105 (Court file number 512)

⁸⁷ Affidavit of David Whyte filed 2 December 2021, paragraph 106 (Court file number 512)

⁸⁸ Affidavit of David Whyte filed 2 December 2021, paragraph 107 (Court file number 512)

⁸⁹ Affidavit of David Whyte filed 2 December 2021, paragraph 115(c) (Court file number 512)

⁹⁰ Affidavit of David Whyte filed 2 December 2021, paragraph 115(e) and 116 (Court file number 512)

settlement and preparing and lodging a proof of the debt owing to PTAL as custodian of the FMIF⁹¹.

“Trade on”

89. The quantum of the claimed remuneration for this category is \$39,860.00 excluding GST⁹². The work within this category consists of work which was incidental to the winding up such as⁹³:
- (a) preparation of unaudited management accounts for the financial year ended 30 June 2021;
 - (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 2021;
 - (ii) status of litigation matters and work to be done to progress same;
 - (iii) investor issues including content for reports to members, status of litigation matters, creditor claims and the application for approval of remuneration;
 - (f) meeting with members of the BDO Audit practice group regarding the preparation of the management accounts for the year ended 30 June 2021.
90. The Receiver’s work in respect of completing the management accounts for the year ended 30 June 2021 included⁹⁴:
- (a) reviewing work papers to verify the accuracy of the management accounts;
 - (b) ascertaining amounts that were outstanding on 30 June 2021;
 - (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 half year ending 30 June 2021,
 to determine the accrued expenses;
 - (f) calculating provisions for the remaining loan accounts or receivable balances and updating the loan spreadsheet;
 - (g) preparing a trial balance and processing the:
 - (i) accrued expense journals;
 - (ii) impairments journals;

⁹¹ Affidavit of David Whyte filed 2 December 2021, paragraph 117 (Court file number 512)

⁹² Affidavit of David Whyte filed 2 December 2021, paragraph 121 (Court file number 512)

⁹³ Affidavit of David Whyte filed 2 December 2021, paragraph 120 (Court file number 512)

⁹⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 122 (Court file number 512)

- (iii) bank transaction journals;
 - (iv) write off journals; and
 - (v) relevant expenses and income journals.
- (h) preparing work papers to support the notes to the accounts, including, but not limited to, the movement in impairments as between the periods 1 January 2021 and 30 June 2021;
- (i) preparing the management accounts for distribution to members, which included:
- (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.
- (j) liaising with the BDO Audit practice group regarding movements in asset values, provisions and default loans between 1 January 2021 and 30 June 2021;
- (k) reviewing and amending the trial balance in respect to changes required by the BDO Audit practice group;
- (l) reviewing and amending financial statements in respect to changes required by the BDO Audit practice group;
- (m) reviewing and considering disclosure requirements with reference to Australian Accounting Standards; and
- (n) reviewing and amending the management accounts and notes in accordance with Australian Accounting Standards and recommendations by solicitors.
91. 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 2022⁹⁵.
92. 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 relief⁹⁶.
93. In relation to the work associated with the FTI Remuneration 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", during the Relevant Period the Receiver undertook the work identified in paragraph 44(b) above.

Creditors

94. The Receiver seeks approval of remuneration of \$144,550.50 excluding GST for work undertaken in this category⁹⁷.
95. The work falling within this category was extensive and consisted of the Receiver's work in⁹⁸:
- (a) preparing reports to members;

⁹⁵ Affidavit of David Whyte filed 2 December 2021, paragraphs 124 to 126 (Court file number 512)

⁹⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 129 (Court file number 512)

⁹⁷ Affidavit of David Whyte filed 2 December 2021, paragraph 138 (Court file number 512)

⁹⁸ Affidavit of David Whyte filed 2 December 2021, paragraph 139 (Court file number 512)

- (b) attending to queries from members in relation to the reports to members;
 - (c) maintaining and updating the AX investor management database; and
 - (d) corresponding with investors regarding the interim distribution, returned payments and reprocessing distributions after updating members details.
96. During the period for which remuneration is sought, the Receiver produced two reports to members (being his 34th and 35th reports)⁹⁹. The tasks for the purposes of reporting to members of the FMIF, included¹⁰⁰:
- (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
 - (h) for the 35th report, setting out the actions taken in the relevant 6 months period and proposed to be undertaken in the next 12-month period.
97. 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.
98. This category also included¹⁰²:
- (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) maintaining 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.
99. The work involved in maintaining the AX investor database and responding to queries from investors is significant having regard to the number of members of the FMIF. Further details as to the extent of this work is provided in Mr Collins Affidavit – in September 2021, BDO responded to 61 queries from investors and processed 16 changes to investor details¹⁰³.

⁹⁹ Affidavit of David Whyte filed 2 December 2021, paragraph 141 (Court file number 512)

¹⁰⁰ Affidavit of David Whyte filed 2 December 2021, paragraph 147 (Court file number 512)

¹⁰¹ Affidavit of David Whyte filed 2 December 2021, paragraph 148 (Court file number 512)

¹⁰² Affidavit of David Whyte filed 2 December 2021, paragraph 149 and 151 (Court file number 512)

¹⁰³ Affidavit of Mr Gerry Collins filed 2 December 2021, paragraph 54(a) (Court file number 511)

Dividend

100. The Receiver seeks approval of remuneration of \$2,251.50 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

101. The Receiver claims remuneration of \$61,415.00 excluding GST for work within this category¹⁰⁶. The work within this category includes¹⁰⁷:

- (a) preparing reports to members, which include updates as to steps taken in the legal proceedings, an estimated return to members and remuneration work in progress reports;
- (b) ensuring proper accounts and records were maintained, including preparing management accounts of the FMIF;
- (c) preparing applications for approval of remuneration including preparing or reviewing detailed supporting Affidavits, providing instructions as to the progression of the application including the steps required to be taken under the 15 October 2020 orders, and attending the hearing of the application;
- (d) responding to investor queries; and
- (e) residual administrative functions in respect of preparing reports to members, such as copying, mailing and uploading reports to the FMIF website.

102. This work also involved:

- (a) arranging distribution of notice of the application for approval of remuneration to the members of the FMIF. In accordance with the Receiver's usual practice during this 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 rates¹⁰⁸;
- (b) answering member enquiries both by telephone and in person. Updating members 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 members¹⁰⁹;
- (c) attending to general file administration including filing and archiving books and records¹¹⁰.

Write off of the time

103. The Receiver has written off a portion of the amount charged, being \$10,857.00 excluding GST¹¹¹.

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

104. 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

¹⁰⁴ Affidavit of David Whyte filed 2 December 2021, paragraph 156 (Court file number 512)

¹⁰⁵ Affidavit of David Whyte filed 2 December 2021, paragraph 157 (Court file number 512)

¹⁰⁶ Affidavit of David Whyte filed 2 December 2021, paragraph 161 (Court file number 512)

¹⁰⁷ Affidavit of David Whyte filed 2 December 2021, paragraph 160 (Court file number 512)

¹⁰⁸ Affidavit of David Whyte filed 2 December 2021, paragraph 163(b) (Court file number 512)

¹⁰⁹ Affidavit of David Whyte filed 2 December 2021, paragraph 166 (Court file number 512)

¹¹⁰ Affidavit of David Whyte filed 2 December 2021, paragraph 171 (Court file number 512)

¹¹¹ Affidavit of David Whyte filed 2 December 2021, paragraph 174 (Court file number 512)

size and complexity of the receivership and is supported by Mr Collin's review of the work done in the sample month of September 2021;

- (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 (and is about 30% lower than the amount sought in the previous application);
- (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 and 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;
- (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. \$27.506 million in cash is presently held in the bank¹¹². The Auditors Claim for an amount of up to \$249.6 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
- (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

105. The winding up of the fund is ongoing.

106. The Receiver proposes to make further regular applications for the approval of his remuneration as the receivership progresses¹¹³.

David de Jersey QC

Counsel for the Receiver

10 December 2021

¹¹² Affidavit of David Whyte filed 2 December 2021, paragraph 13 (Court file number 512)

¹¹³ Affidavit of David Whyte filed 2 December 2021, paragraph 178 (Court file number 512)