

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

AND

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

AND

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

AND

Third Respondent: **ROGER SHOTTON**

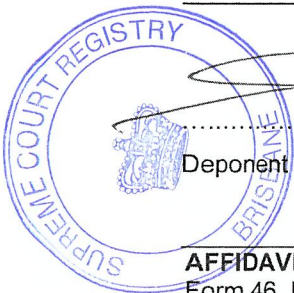
AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

**AFFIDAVIT OF DAVID WHYTE
SWORN ON 9 APRIL 2024**

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

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Deponent

Witness

AFFIDAVIT:
Form 46, R.431

Filed on behalf of the Applicants

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1. I am a Registered Liquidator and a Consultant in the employ of the firm BDO. I am an affiliate member of the Chartered Accountants Australia and New Zealand.
2. Now produced and shown to me and marked "DW-128" is an indexed paginated bundle of the documents referred to in this Affidavit ("**the Bundle**").
3. I swear this Affidavit in support of an application by me for authority to make a final distribution to FMIF members and other orders to finalise the winding up of the FMIF (**Application**).


PART 1: Background

4. The LM First Mortgage Income Fund ("**FMIF**") was registered as a managed investment scheme on 28 September 1999.
5. At pages 1 to 12 of the Bundle is an ASIC search for the FMIF.
6. The FMIF is governed by a constitution, which has been amended at various times since the registration of the FMIF as a managed investment scheme.
7. The current Constitution of the FMIF is the "Replacement Constitution" dated 11 April 2008, as amended by supplemental deeds dated 16 May 2012 and 26 October 2012 ("**the Constitution**").
8. At pages 13 to 76 of the Bundle is a copy of the Constitution of the FMIF, together with those amendments.
9. The members of the FMIF subscribed capital for investment purposes. The FMIF's investment activities consisted of advancing funds to borrowers under loan agreements on the security of (mainly) first registered mortgages. The assets of the FMIF primarily consisted of its rights against borrowers under these loan agreements and mortgages. At pages 77 to 159 of the Bundle is a copy of the FMIF's Product Disclosure Statement dated 10 April 2008.
10. LM Investment Management Limited (In Liquidation) ("**LMIM**") is the responsible entity ("**RE**") of the FMIF, and has been since the FMIF's inception.
11. At pages 160 to 175 of the Bundle is an ASIC search for LMIM.

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12. The property of the FMIF is held by a custodian, The Trust Company (PTAL) Limited ("PTAL") (formerly known as Permanent Trustee Australia Limited). At pages 176 to 225 of the Bundle is a copy of the Custody Agreement dated 4 February 1999 by which PTAL agreed to provide custodian services to LMIM, together with variations to the Custody Agreement dated 14 June 1999 and 1 September 2004 respectively.
13. The Custody Agreement has also been amended at other times to add or remove other managed investment schemes or trusts managed by LMIM to the custody arrangements, and/or to change the schedule of fees payable to the Custodian (on 20 May 1999, 24 May 2000, 18 March 2002, 19 November 2002 and 27 September 2006). I have not exhibited the documents by which those amendments were effected because those amendments are not, in my view, relevant for the purposes of the Applicants' application presently before this Honourable Court
14. LMIM was also the responsible entity or trustee of a number of other funds.
15. Those included three 'Feeder Funds', whose assets were predominately units in the FMIF. They are the funds known as the LM Currency Protected Australian Income Fund ("CPAIF"), the LM Institutional Currency Protected Australian Income Fund ("ICPAIF"), and the LM Wholesale First Mortgage Income Fund ("WFMIF").
16. In addition, LMIM was trustee of the LM Managed Performance Fund ("MPF") and responsible entity of the LM Australian Income Fund ("AIF"), the Australian Structured Products Fund ("ASPF") and the LM Currency Protected Fund ("CPF").
17. The FMIF started to face difficulties around the time of the Global Financial Crisis, which eventually led to the FMIF being closed for new investments in March 2009, and the suspension of redemptions shortly thereafter in May 2009.

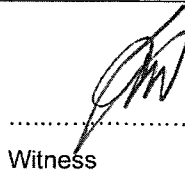
Appointments

18. On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of each of LMIM and LM Administration Pty Ltd ("LMA"), a service company providing services for LMIM's funds management operations under a series of services agreements.

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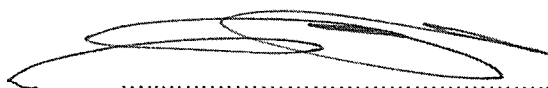
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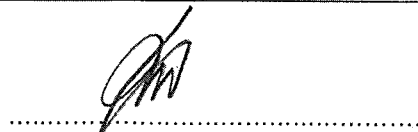
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19. On 11 July 2013, Deutsche Bank AG ("**DB**"), a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol ("**DB Receivers**") as receivers and managers of the assets and undertaking of the FMIF.
20. On 1 August 2013, Mr Park and Ms Muller were appointed liquidators of LMIM ("**Liquidators**"). Mr Park has remained a liquidator of LMIM, however Ms Muller retired from the role on 17 May 2017.
21. By Order of Justice Dalton made in this proceeding on 8 August 2013 and later embodied in an Order dated 21 August 2013, I was appointed:
 - (a) pursuant to section 601NF(1) of the *Corporations Act* 2001 (Cth) ("**the Act**") to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution; and
 - (b) pursuant to section 601NF(2) of the Act, as the receiver of the property of the FMIF.
22. A sealed copy of these orders is at pages 226 to 229 of the Bundle.
23. The Liquidators of LMIM filed an application in proceeding 3508/15 on 8 April 2015 for directions as to their and my respective powers in the conduct of the winding up of the FMIF ("**Residual Powers Application**").
24. On 15 October 2015, Jackson J delivered judgment with respect to the Residual Powers Application: *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.
25. At pages 230 to 258 of the Bundle, is a copy of His Honour's reasons for judgment.
26. His Honour's reasons for judgment were then given effect to by the Order of this Honourable Court made on 17 December 2015 ("**December 2015 Orders**"), which:-
 - (a) empowered me, subject to the balance of orders therein, to determine the extent LMIM is entitled to be indemnified from the property of the FMIF, in respect of any expense or liability, or claim against, LMIM, in acting as RE of the FMIF;

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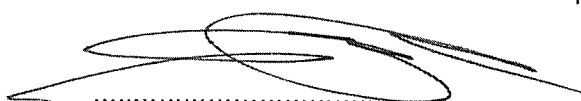
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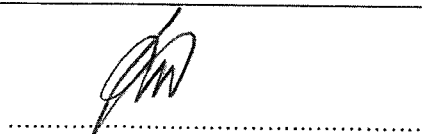
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- (b) authorised, and empowered, me to exercise the powers of, and be responsible for, the functions of the RE of the FMIF as set out in Clauses 9,10 and 22 of the Constitution of the FMIF, in respect of:-
 - (i) the transfer, registration and suspension of units in the FMIF (Clause 9);
 - (ii) transmission of units (Clause 10); and
 - (iii) maintaining the Register of Members of the FMIF (Clause 22).
 - (c) directed me not to make any distribution to the members of the FMIF, without the authority of a further order of the Court;
 - (d) directed me to apply to ASIC to obtain relief from the financial reporting obligations imposed by Part 2M.3 of the Act and section 601HG of the Act.
27. A sealed copy of these orders is at pages 259 to 265 of the Bundle.
28. By order of this Honourable Court made on 18 July 2018 in proceeding 3508/15, it was directed that the Liquidators would be entitled to claim their further reasonable costs and expenses of carrying out the work they or LMIM are required to do by and under the Residual Powers Orders in connection with the FMIF, not being the subject of a claim already made under the Residual Powers Orders, and to be paid therefore out of the assets of the FMIF, in such amounts as are approved by the Court from time to time.
29. A sealed copy of these orders is at page 266 to 267 of the Bundle.
30. On 10 October 2018, the Liquidators applied for further directions as to the "dual appointments" of the Liquidators and myself, to wind up the FMIF ("**Dual Appointments Application**").
31. Further, on 1 February 2019, I applied to Court for the authority to make an interim distribution to FMIF members ("**Interim Distribution Application**"), and for declaratory relief regarding how to calculate the entitlements of FMIF members who had invested in a foreign currency.

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Deponent



Witness

32. On 2 October 2019, Jackson J delivered judgment with respect to the Dual Appointments Application and the Interim Distribution Application: *LM Investment Management Limited & Anor v Whyte* [2019] QSC 333.
33. At pages 268 to 296 of the Bundle is a copy of His Honour's reasons for judgment.
34. At pages 297 to 298 of the Bundle is a copy of the sealed orders dated 2 October 2019 by which I was authorised and empowered to make an interim distribution from the property of the FMIF among the members of the FMIF of up to \$40million.

PART 2: THE WINDING UP OF THE FMIF

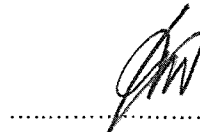
High Level overview of key steps in winding up

35. At the time of my appointment, the FMIF had cash at bank of about \$9 million. It owed approximately \$25 million to DB, a secured creditor of the FMIF.
36. All of the real property security assets of the FMIF have now been realised, by me or, in many cases, by the DB Receivers.
37. I had carriage of the more complex realisations of retirement village assets, and the DB Receivers had carriage of the less complex realisations having been identified as those that could be realised the fastest in order to pay out their appointor.
38. As a result of realisations of real property assets, DB was paid out in early January 2014. Around that time, the DB Receivers informed me to the effect that, and I believe that, DB did not terminate their appointment, because of claims against the FMIF by the trustee of the MPF (by then, KordaMentha Pty Ltd) ("**MPF Trustee**").
39. Relevantly, the MPF Trustee commenced the following proceedings seeking relief against FMIF assets:-
 - (a) Supreme Court of Queensland Proceedings 8032/14 and 8034/14 ("**KPG and Lifestyle Proceedings**"). In these proceedings, the total amount claimed against assets of the FMIF was approximately \$24 million plus interest and costs; and

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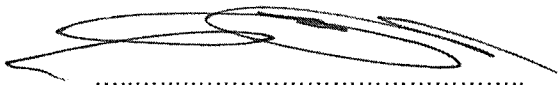


Witness

(b) Supreme Court of Queensland Proceeding 12716/15 ("**AIIS Proceeding**"). In this proceeding, the total amount claimed against assets of the FMIF was approximately \$3.9 million plus interest and costs.

40. I completed the sale of the FMIF's retirement village assets by August 2015.
41. The DB Receivers continued to be responsible for the sale of the remaining real properties securing loans of the FMIF, which they completed by December 2017.
42. The KPG and Lifestyle Proceedings were discontinued by the MPF Trustee on 7 June 2018, and the AIIS Proceeding was discontinued on 10 August 2018.
43. On 10 December 2018, the DB Receivers retired. Following the retirement of the DB Receivers, control of the FMIF's bank accounts (which are in the name of the FMIF's Custodian, PTAL) was transferred to me.
44. The bank accounts of the FMIF were and remain in the name of PTAL as custodian of the FMIF. Until late 2018, PTAL transacted on the FMIF's bank accounts on instructions approved by the DB Receivers. Since the DB Receivers retired, PTAL has continued to transact those accounts on my instructions alone.
45. Following the retirement of the DB Receivers in 2018, the electronic receipts and payments of the FMIF maintained by the DB Receivers during the period of their appointment were provided to me. However, I do not have all of the books and records of the DB Receivers. Although from time to time during their appointment I was provided with some of their books and records in relation to receipts and payments, accrued liabilities, cashflow and asset realisations, I do not have a complete copy of those records, and I have not been provided with any of their working papers.
46. Between 16 and 23 October 2019, an interim distribution of 6.5 cents per unit in the FMIF (approximately \$32 million in total, before taking into account amounts withheld from distributions to the Feeder Funds), was paid to members of the FMIF.
47. The balance of the FMIF's assets constituted the benefit of certain legal proceedings, which I had caused to be prosecuted and/or funded.

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Significant Legal Proceedings

48. I set out below a brief chronology of each of the main legal proceedings I have brought in the winding up of the FMIF, or in which the FMIF has an interest, their determination or resolution and current status.

Claim against quantity surveyors

49. I took over a claim that had been commenced in 2012 against a quantity surveyor (BMT & Associates) who had over-certified the work in progress in relation to an uncompleted development funded by the FMIF. The claim was resolved in 2016 by a favourable judgment for \$2,408,903.58 plus interest and costs: see *LM Investment Management Ltd (In Liq) (Recs Apptd) v BMT & Assoc Pty Ltd* [2015] NSWSC 1902 and *LM Investment Management Ltd (In Liq) (Recs Apptd) v BMT & Assoc Pty Ltd (No 2)* [2016] NSWSC 317.

Public Examinations

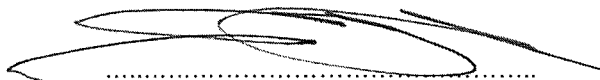
50. I caused public examinations to be conducted of various directors and officers of LMIM, as well as of the FMIF's former auditors Ernst & Young (otherwise known as EY), across four weeks in June and October 2015.

The Drake Proceeding

51. I caused Supreme Court of Queensland Proceeding 12317/14 to be commenced against LMIM, various former directors of LMIM and the MPF Trustee, seeking damages of \$15,546,147.85, plus interest (calculated from 2011) and costs ("**Drake Proceeding**"). The damages claim reflected the amount paid to the MPF, out of amounts received in the settlement of certain litigation with a borrower from both the FMIF (as first mortgagee) and the MPF (as second mortgagee), allegedly in breach of LMIM's and its directors' alleged duties to the members of the FMIF.

52. Whilst the claim was brought in the name of LMIM, pursuant to the orders of Justice Jackson on 21 July 2015, the interests of LMIM as the responsible entity of the FMIF were represented by me.

53. The claim as against the MPF Trustee as the eighth defendant was settled in March 2019. On 27 March 2019, Jackson J made orders by consent granting leave to the



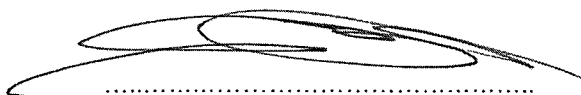
Deponent



Witness

plaintiff to discontinue its claim against the eighth defendant with no order as to costs. At pages 299 to 300 of the Bundle is a copy of the orders dated 27 March 2019.

54. On 22 November 2019, Jackson J delivered judgment dismissing this claim with costs orders made in favour of the director defendants: *LM Investment Management Ltd v Drake & Ors* [2019] QSC 281.
55. On 6 December 2019, Jackson J made orders by consent as to the first, second, third, fourth and sixth defendants' costs of the Drake Proceeding. At pages 301 to 302 of the Bundle is a copy of the orders dated 6 December 2019.
56. No order was made as to the costs of the fifth defendant (Mr John O'Sullivan), as I did not prosecute the proceedings against him.
57. On 28 February 2020, Jackson J further ordered that the plaintiff pay the seventh defendant's costs of the Drake Proceeding: see *LM Investment Management Limited (receivers and managers appointed) (in liquidation) v Drake & Ors* [2020] QSC 19.
58. However, on the same day, Jackson J made orders recording the seventh defendant's undertaking not to take any steps to recover any entitlement to costs in the Drake Proceeding but instead ordering the payment of a fixed amount from the assets of the FMIF on account of those costs. At pages 303 to 304 of the Bundle is a copy of the orders of Jackson J made on 28 February 2020.
59. On 28 August 2020, Callaghan J delivered judgment in *LM Investment Management Ltd v Drake & Ors* [2020] QSC 265 refusing to exercise his Honour's discretion to grant my application for judicial advice that I would be justified pursuing an appeal (Queensland Court of Appeal No 14258 of 2019) against the judgment of Jackson J dismissing this claim.
60. On 23 September 2020, orders were made by consent that the appeal be dismissed with costs.
61. On 11 November 2022, I reached a settlement with the first to fourth, and sixth defendants in respect of the quantum of the costs orders made against LMIM as RE of the FMIF (the **Settlement**).



Deponent



Witness

62. On 17 November 2022, Mr Park caused LMIM in its own right, and in its capacity as the responsible entity of the FMIF, the ICPAIF and the CPAIF, to bring an application in the Supreme Court of Queensland (Proceeding No 14389/22) against me in my capacity as the Court Appointed Receiver of the FMIF, seeking a declaration that LMIM is not entitled to pay the costs orders from the FMIF, an injunction restraining payment of the costs from the FMIF and an order that I pay the costs orders personally (**Liquidator's Proceeding**).
63. On 19 February 2024, Kelly J made orders to the following effect by consent:
- (a) an order pursuant to 601NF(2) of the *Corporations Act 2001* (Cth) that I am empowered to cause LMIM to comply with the terms of the Settlement;
 - (b) an order dismissing the Liquidator's Proceeding; and
 - (c) orders that the costs of Mr Park and myself be paid out of assets of the FMIF on the indemnity basis.

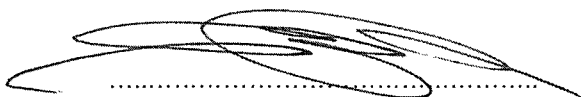
64. A copy of these orders are at pages 305 to 306 of the Bundle.

65. I caused the amount due under the Settlement to be paid on 23 February 2024.

The EY Proceeding

66. I caused Supreme Court of Queensland Proceeding 2166/15 to be commenced against EY as the former auditors of the FMIF, claiming damages for negligence and breach of contract in relation to the audits and reviews of the financial statements for each half year and annual period from 30 June 2008 to 30 June 2012 and in relation to the compliance plan audits for FY2008 to FY2012 ("**EY Proceeding**").
67. LMIM's primary claim for loss was based on the contention that the Fund's financial statements did not recognise any (or, from 31 December 2010, sufficient) impairment, when they should have done so, that four categories of related party transactions were a breach of the Corporations Act and should not have occurred, and that a reasonably competent auditor would have recognised these failures and would not have signed off on the accuracy of the financial statements.

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68. LMIM's claim was then that:
- (a) the incorrect calculation of the unit price had the effect of distorting decision making by LMIM and its directors during and after the GFC. That contention informs a counterfactual to the effect that:
 - (b) LMIM would have had to have prepared accurate Financial Statements which recognised substantial impairment in the unit price of the Fund, the Fund would have then reported a net loss in each relevant period, LMIM would not have continued to pay adviser commissions or income distributions, and ultimately more investors would have sought to redeem their units;
 - (c) separately, LMIM would not have engaged in the related party transactions;
 - (d) in order to meet redemptions, properties securing loans of the Fund could have been sold, and LMIM would have done so because the sale of properties would not have impacted the unit price (as the unit price would have been correctly calculated based upon up to date valuations of what the properties could be sold for);
 - (e) all of this together would have caused LMIM to wind up the Fund around the middle of 2009.
69. LMIM's case was that, had this occurred, the Fund's cashflows would have altered in the following ways:
- (a) the net realisations from the Fund's loans (taking into account different holding costs and sale prices in the counterfactual) would have been greater;
 - (b) management fees charged by LMIM to the Fund would have been lower as funds under management decreased, and would have effectively ceased once it was wound up;
 - (c) adviser commissions would not have been paid;
 - (d) interest and costs paid to banks would have been avoided and/or reduced;
 - (e) the related party transactions, which resulted in the payment of funds out of the Fund, would not have occurred.

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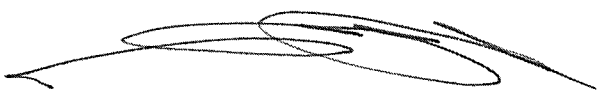


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70. The amount of the claim was assessed by expert evidence filed in 2021 as being approximately \$266 million, including interest.
71. This was the biggest and most complicated claim which I caused LMIM to pursue for the benefit of the FMIF.
72. A second mediation was held on 31 May 2022 which resulted in a confidential settlement, subject to judicial advice that I was justified in causing the plaintiff to settle the proceeding.
73. On 24 June 2022, Kelly J gave judicial advice to the effect that I was justified in causing the plaintiff to settle the proceedings on the terms agreed: *Re LM Investment Management Ltd (in liq)* [2022] QSC 132.
74. On 11 August 2022, Dalton J gave the plaintiff and the defendants leave to discontinue the EY Proceeding with each party to bear their own costs of the proceeding. At page 307 of the Bundle is a copy of the orders of Dalton J, made on 11 August 2022.

Feeder Fund Proceeding

75. I caused Supreme Court proceedings 13534/16 ("**Feeder Fund Proceedings**") to be commenced in the name of LMIM as responsible entity of the FMIF to seek orders declaring that the Feeder Funds were disentitled from receiving further distributions in the winding up of the FMIF, to the extent of the benefits previously provided to them from the FMIF in breach of trust (subject to any necessary adjustments), and to confirm whether a number of income distributions and deemed re-investments were void.
76. The key defendants to the Feeder Fund Proceedings were:
 - (a) LMIM in its capacity as responsible entity of the CPAIF, as the first defendant;
 - (b) Trilogy Funds Management Limited in its capacity as responsible entity of the WFMIF, and The Trust Company Limited as the custodian of the property of the WFMIF, as the second and fifth defendants;



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- (c) LMIM in its capacity as responsible entity of the ICPAIF, as the second defendant; and
 - (d) LMIM in its own right, as the fourth defendant.
77. On 13 June 2018, his Honour Justice Jackson made directions under section 59 of the *Trusts Act 1973 (Qld)* regarding the representation of LMIM in its different capacities. At pages 308 to 313 of the Bundle is a copy of the orders of Jackson J made on 13 June 2018.
78. Following a mediation with the Honourable Richard Chesterman AO, the plaintiff and the first, second, third and fifth defendants to the Feeder Fund Proceedings agreed to a confidential settlement in November 2018 subject to certain conditions precedent, including that I receive judicial advice that I was justified entering into and performing the settlement for the plaintiff, and that an interim distribution is made from the FMIF in an amount of at least \$30 million.
79. On 22 May 2019, Mullins J gave judicial advice that I, as well as Mr Jahani as the privately appointed receiver of the assets of the CPAIF and ICPAIF, and Trilogy as the trustee of the WFMIIF, were each justified entering into and performing, the settlement of the Feeder Fund Proceedings: *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.
80. On 22 November 2019, the Feeder Fund Proceedings were discontinued as against the first, second, third and fifth defendants.
81. I have not otherwise caused the plaintiff to prosecute its claim against the fourth defendant, being LMIM in its own right, in circumstances where there is no prospect of recovery against the fourth defendant due to a lack of assets in LMIM's liquidation, and the further matters set out in paragraphs 207 to 211 below. The fourth defendant (represented by the liquidator) has never filed a defence in the proceeding and, to my knowledge, other than to attend the first day of a mediation on 5 November 2018, has not taken any other substantive step in response to the allegations that have been advanced therein.



Deponent

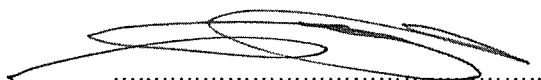


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The Clear Accounts Proceeding

82. I caused Supreme Court proceedings 11560/16 ("**the Clear Accounts Proceeding**") to be commenced in the name of LMIM as responsible entity of the FMIF against LMIM in its own right, to preserve claims for damages or equitable compensation suffered by the FMIF as a result of breaches of trust or duty by LMIM.
83. This was an important proceeding for FMIF members. My purpose in causing it to be commenced was to preserve a clear accounts rule defence to the indemnity that would otherwise be available to LMIM as trustee against the assets of the FMIF. At the time, there were various very substantial claims that were on foot against the FMIF which sought to rely on LMIM's right of indemnity, in particular the claims made by the MPF Trustee, referred to in paragraph 39 above,
84. A copy of the Amended Claim and Statement of Claim, and the Consolidated Particulars, in the Clear Accounts Proceeding is at pages 314 to 364 of the Bundle.
85. On 17 October 2017, Jackson J delivered judgment on an application made by the Liquidators for indemnity for expenses from the FMIF, which found that the clear accounts rule operated to suspend certain claims made by LMIM for indemnity from the FMIF, until the claims made in the Clear Accounts Proceeding were determined or resolved: *Park & Muller (Liquidators of LM Investment Management Ltd) v Whyte No 3* [2018] 2 Qd R 475; [2017] QSC 230.
86. A copy of this judgment is at pages 365 to 401 of the Bundle.
87. In circumstances where the Clear Accounts Proceedings involved LMIM on both sides of the record in different capacities, I applied for directions as to representation under section 59 of the *Trusts Act 1973* (Qld).
88. By the orders of the Honourable Justice Jackson made on 25 July 2018, Mr Park was appointed as the person to represent the interests of LMIM in its own right in the Clear Accounts Proceeding, and I was appointed to represent its interests as responsible entity of the FMIF.
89. As at 25 July 2018, the KPG and Lifestyle Proceedings had been discontinued, and I was aware that the AIIIS proceedings would be discontinued shortly subject to judicial advice which had been sought by the MPF Trustee. In the circumstances, I applied

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for and obtained orders that the Clear Accounts Proceedings be stayed until further order of the Court, pending completion of the proof of debt process, and the identification of the creditors who might stand to benefit from any indemnity claims who might be called upon to fund a defence of the Clear Accounts Proceedings.

90. A copy of the orders made on 25 July 2018 is at pages 402 to 403 of the Bundle.
91. At pages 404 to 412 of the Bundle is a copy of my Counsel's written submissions in support of the application under section 59 of the Trusts Act and for a stay of the Clear Accounts Proceeding.
92. At pages 413 to 415 of the Bundle is a copy of the *ex temporaneous* reasons for judgment of Jackson J dated 25 July 2018.
93. The Clear Accounts Proceeding continues to be subject to the stay ordered on 25 July 2018. LMIM in its own right (represented by the Liquidator) has never filed a defence in the proceeding, nor taken any other substantive step in response to the allegations that have been advanced therein.

Other recoveries

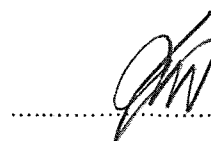
94. In addition to the above, I caused the FMIF to make several claims against and/or negotiated settlement agreements with a number of borrowers/guarantors.
95. I refer to the two most complex and lengthy recoveries below

The Lamb bankruptcy
96. PTAL obtained a default judgment against Mr Lamb in the Supreme Court of New South Wales for approximately \$3 million, plus interest and costs.
97. Mr Lamb subsequently filed a debtor's petition and was declared bankrupt.
98. However, Mr Lamb and his wife were parties to a Development Agreement, along with another party. The proceeds of sale of 11 lots owned by them (in some cases, with another party) that were developed and sold under the Development Agreement were paid into a solicitor's trust account.

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Deponent



Witness

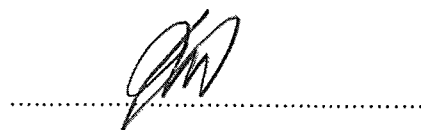
99. On my instructions, in December of 2018, PTAL as custodian of the FMIF entered into a Deed of Indemnity to fund a public examination to further investigate the claims available to the trustee of the bankrupt estate and any relevant recovery proceedings entitlement in respect of the funds held in the solicitor's trust account. The public examinations were heard in November 2019, following which demands were served on several parties.
100. A settlement was reached on 1 September 2021. The funding advanced by the FMIF under the Deed of Indemnity, has since been repaid. The amount which the FMIF would receive from the bankrupt's estate following the settlement was dependent upon the resolution of a taxation objection lodged by the other party to the Development Agreement, and the outcome of an application seeking orders giving the FMIF priority over other creditors.
101. On 16 November 2022, an application by the trustee of Mr Lamb's bankrupt estate (**Trustee**) to give PTAL as custodian of the FMIF a priority or advantage over other creditors was approved by the Federal Circuit Court.
102. On 23 November 2022, the taxation objection which had been lodged by the other party to the Development Agreement, was disallowed which impacted the amount of the settlement sum payable to the trustee of the bankrupt estate.
103. On 22 November 2022, the FMIF received a distribution of \$810,000 from the trustee of the bankrupt estate (this is in addition to repayment of the funding advanced by the FMIF).
104. On 10 January 2023, the FMIF received a final distribution from the trustee of the bankrupt estate of approximately \$67,000.

Bellpac Bonds proceedings

105. The FMIF had a first ranking security over the assets of a borrower from the FMIF, Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation) ("**Bellpac**").
106. In August 2008, \$10 million of bonds were issued by Wollongong Coal Ltd (**WCL**) to Bellpac (**Bonds**). Between 2010 and 2017, the liquidator of Bellpac and WCL were involved in various proceedings in which Bellpac established that it remained the true owner of the Bonds, and sought orders to enforce the conversion of the Bonds to



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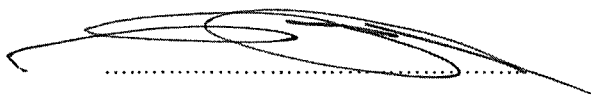
shares: see *Warner v Hung; Re Bellpac Pty Ltd (Receivers and Managers appointed) (in liquidation)* (2001) 297 ALR 56), *Hung v Warner; Re Bellpac Pty Ltd (Receivers and Managers appointed) (in liquidation)* [2013] FCAFC 48 and *Warner v Wong re Bellpac Pty Ltd (Recs and Mgrs Apptd) (In Liq) (No 5)* [2015] FCA 784.

107. As a result of the action by Bellpac's liquidator, the FMIF has to date received a number of distributions from the Bellpac Liquidator. The total distributions received by the FMIF has been \$4,045,485, after payment of the liquidator's costs. The final distribution was made on 5 July 2022.

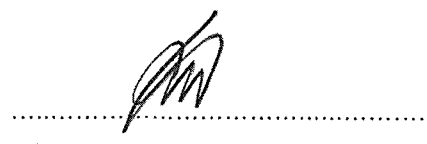
Creditors Indemnity Claims

108. Under the December 2015 Orders:-
- (a) the Liquidator was directed to ascertain the debts payable by and the claims against, LMIM, to identify any debts or claims in respect of which LMIM has a claim for indemnity from the FMIF ("**Creditor Indemnity Claims**"), and to notify me of the same within 14 days;
 - (b) within 14 days of notification of any such Creditor Indemnity Claims, I may request from the Liquidator any further information I reasonably consider necessary to assess the claim;
 - (c) within 30 days of notification of any Creditor's Indemnity Claim or receipt of the further information requested, I am required to accept the claim, reject the claim, accept part of it and reject part of the claim, and to give the Liquidator written notice of my decision;
 - (d) I am required to give the Liquidator a written reason for rejecting any part of the claim within seven days after giving notice of my decision to the liquidator; and
 - (e) within 28 days of receiving a notice of rejection, the liquidator may apply to Court for directions in relation to whether the claim is one for which LMIM has a right to be indemnified out of scheme property of the FMIF, and must notify the Creditor for any rejected claim of, *inter alia*, my decision, any reasons for that decision and whether the Liquidator intends to apply to Court for directions in respect of my decision.

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109. I am informed that Mr Park called for lodgement of Proofs of Debt in early September 2018, with a due date of 2 October 2018.
110. I was not involved with and I am not aware of the process followed by Mr Park in calling for lodgement of Proofs of Debt in LMIM's liquidation.
111. On 20 December 2018, I received a letter from Mr Park informing me that "*claims against FMIF have been received and admitted*", with respect to proofs of debt lodged by Ernst & Young ("EY") in the amount of \$158,896.51, and Norton Rose Fulbright Australia ("**Norton Rose**") in the sum of \$315,601.21 ("**Norton Rose Proof**"). A copy of that correspondence is at pages 416 to 491 of the Bundle.
112. On 16 January 2019, I received a letter from Mr Park responding to a request I had made for further information in relation to the Norton Rose proof of debt, and providing a copy of a revised proof of debt lodged by EY ("**First EY Proof**"). At pages 492 to 503 of the Bundle is a copy of that correspondence, and the revised EY proof of debt.
113. On 24 January 2019, Ms Renee Lobb of FTI Consulting confirmed to me that the Liquidator had made a determination and was making a Creditor Indemnity Claim against assets of the FMIF with respect to the First EY Proof and the Norton Rose Proof. At pages 504 to 513 of the Bundle is a copy of that correspondence.
114. On 25 January 2019, I received a letter from Mr Park attaching a further proof of debt lodged by EY ("**Second EY Proof**") for the sum of approximately \$180 million. That proof asserts that, to the extent that the claim made in the Auditor's Action is successful, EY will recover loss or damage which is recoverable from LMIM and noting that the Liquidator has requested further information from EY in relation to this proof of debt to enable him to adjudicate upon this claim. At pages 514 to 674 of the Bundle is a copy of the Second EY Proof.
115. On 14 February 2019, I wrote to Mr Park regarding the First EY Proof. At pages 675 to 677 of the Bundle is a copy of that letter.
116. On 14 February 2019, I wrote to Mr Park rejecting the Creditor Indemnity Claim made in respect of the claim notified by the Norton Rose Proof. At pages 678 to 683 of the Bundle is a copy of that letter.

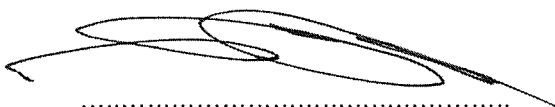
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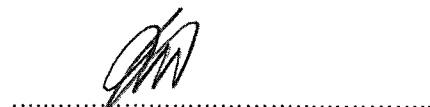
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117. On 22 February 2019, Mr Park sent a letter to Norton Rose in relation to my rejection of the Creditor Indemnity Claim made in respect of that proof of debt. At pages 684 to 690 of the Bundle is a copy of that letter.
118. On 18 July 2022, my solicitors Cowen Schwarz Marschke Lawyers, sent correspondence to Russells Lawyers, the solicitors for Mr Park, in relation to Creditor Indemnity Claims. A copy of this correspondence is at pages 691 to 692, of the Bundle.
119. On 19 July 2022, my solicitors Cowen Schwarz Marschke Lawyers, received a letter from Russells stating they are instructed that Mr Park does not intend to make any further Creditor Indemnity Claims. A copy of this correspondence is at page 693, of the Bundle.
120. On 16 September 2022, my solicitors Cowen Schwarz Marschke Lawyers received a response from Russells accepting an offer I had made regarding the Norton Rose Proof. A copy of this correspondence is at page 694, of the Bundle.
121. I caused the agreed sum to be paid to Norton Rose on 27 September 2022.
122. On 4 October 2022, Clifford Chance, the solicitors for EY, sent correspondence to Mr Park in relation to the First EY Proof and the Second EY Proof.
123. At pages 695 to 705 of the Bundle is a copy of this correspondence, a copy of which was provided to my solicitors Gadens.
124. On 18 October 2022, Cowen Schwarz Marschke Lawyers sent correspondence to Russells seeking confirmation that, given the withdrawal of these proofs of debt by EY, the creditor indemnity claims made in respect of those proofs were withdrawn.
125. At page 706 of the Bundle is a copy of this correspondence (excluding the enclosures).
126. On 28 October 2022, Russells responded confirming that their client withdrew his creditor indemnity claim in respect of the proofs of debt lodged by Ernst & Young. At pages 707 to 720 of the Bundle is a copy of this correspondence (including the enclosures).



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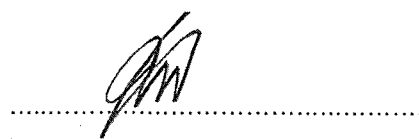
The financial reporting and audit obligations of the FMIF

127. The last formal audit of the FMIF was undertaken by EY of the accounts for the financial year ending 30 June 2012. EY's review of the accounts for the half-year ended 31 December 2013 was not completed before LMIM was placed into external administration in March 2013.
128. I have caused BDO to prepare financial statements for each year and half-year from 30 June 2013, each of which I have signed in my capacity as the Court appointed receiver of the assets of the FMIF.
129. On my instructions, the financial statements prepared by BDO were prepared in accordance with the scheme constitution, the recognition and measurement requirements of the Australian Accounting Standards, and were reviewed by the BDO audit division. The review by the audit division, however, did not constitute a full audit as they are unable to sign off the accounts on a formal basis given my appointment.
130. Pursuant to the December 2015 Orders, I applied to ASIC for relief from the FMIF's financial reporting and audit obligations.
131. On 29 September 2016, ASIC granted the FMIF a 24 month deferral from the FMIF's financial reporting and audit obligations.
132. ASIC granted further 24-month deferrals, on the same terms, on 15 March 2018, 3 March 2020 and 11 March 2022.
133. At pages 721 to 728 of the Bundle is a copy of each of these instruments of relief.
134. These deferrals were each subject to the following conditions (as set out in paragraph 6 of the Instrument of Relief):
- (a) That I publish in a prominent place on the website maintained by the RE (the Website, referred to in paragraph 215 below) a copy of the instrument of relief with a notice explaining the relief;
 - (b) That I prepare and make available to members, a report for each "relevant period" that includes certain information about the progress and status of the winding up, and the financial position of the FMIF;

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- (c) That I maintain adequate arrangements to answer, within a reasonable period of time and without charge to the member, any reasonable questions asked by members of the scheme about the winding up of the FMIF.
135. I have complied with the terms of each of the ASIC deferrals. By way of example, at pages 729 to 742 of the Bundle is a copy of my 45th report to investors issued 28 March 2024. BDO have also prepared financials for the FMIF for each financial year and half-year during the winding up. At pages 743 to 763 of the Bundle is a copy of the most recent financials for the FMIF prepared by BDO for the half year ended 31 December 2023. All of my reports to investors, and half year and full year financial statements for the FMIF, and statements of receipts and payments of the FMIF, remain available on the Website referred to in paragraph 215 below, and can be produced by me to the Court if required and upon request.
136. On 2 August 2022, I applied to ASIC for financial reporting and audit relief. At pages 764 to 789 of the Bundle is a copy of this application, excluding the bundle of supporting documents provided to ASIC in support of the application.
137. On 14 September 2022, ASIC issued an instrument of relief granting the FMIF a complete exemption from the relevant financial reporting and audit obligations, for each of the financial years ended 30 June 2016 to 30 June 2023, and for each of the half-years of the Scheme ended 31 December 2016 to 31 December 2023.
138. At pages 790 to 791 of the Bundle is a copy of ASIC Instrument 22-0765 issued on 14 September 2022.
139. On 2 February 2024, I applied to ASIC for further financial reporting and audit relief. At pages 792 to 819 of the Bundle is a copy of this application, excluding the bundle of supporting documents provided to ASIC in support of the application.
140. On 1 March 2024, ASIC issued an instrument of relief granting the FMIF a complete exemption from the relevant financial reporting and audit obligations for the half-years ending 31 December 2024 and 31 December 2025 and the financials years ending 30 June 2024 and 30 June 2025.
141. At pages 820 to 821 of the Bundle is a copy of ASIC Instrument 24-0114, issued on 1 March 2024.

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PART 3: RELIEF

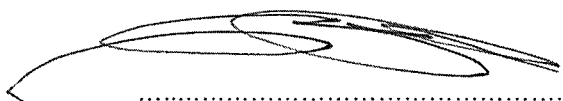
Relief – Final Distribution

142. The FMIF has cash at bank of approximately \$55,063,214 as at 5 March 2024, and existing liabilities of approximately \$5,601,248.
143. In the circumstances set out above in this affidavit, the winding up of the FMIF is nearly at a point when a further and final distribution to the FMIF members can be made.
144. I have estimated, as recorded in my most recent report to investors dated 28 March 2024, that the further return to investors in a final distribution will be around 11.4 cents per unit (if the benefit of the Feeder Fund Settlement is taken into account).
145. In total, the following amounts will then have been returned to investors per unit:


First 2013 Capital Distribution (February 2013)	1.17 cents
Second 2013 Capital Distribution (June 2013)	0.79 cents
Interim Distribution (23 October 2019)	6.5 cents
Final Distribution (estimated)	11.4 cents
Total	19.86

146. During the course of the winding up, BDO have regularly communicated with FMIF members, including by responding to member queries (whether over the telephone, or by email or letter), providing regular quarterly reports to members, sending notices to members in relation to court applications, and posting documents relating to various court applications on the FMIF website.
147. Further, since my appointment, BDO have maintained the register of members. The register of members is maintained on a bespoke Microsoft Dynamics AX database system, that had been specifically designed by LMIM, and that I have caused to be actively maintained and updated by BDO since my appointment. This includes updating the register as required, for example, if a member's contact details or bank account details change, or transferring units to the executors of deceased estates. As a result, the staff assisting me at BDO have become proficient at using this system.

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Witness

148. The interim distribution made in October 2019 was made by BDO, using the information contained within this system. This process involved:

- (a) calculating the amount to be distributed to members, including:
 - (i) calculating the amounts to be withheld from the distributions to the Feeder Funds pursuant to the confidential settlement of the Feeder Fund Proceedings;
 - (ii) calculating the amounts to be distributed to investors in foreign currencies, having regard to the declaration made by Jackson J on 2 October 2019;
- (b) extracting from the register details of the number of units held by FMIF members and their bank account details;
- (c) creating payment files to make the distribution to members; and
- (d) instructing PTAL to effect the payments to members;
- (e) cataloguing returned payments, which occurred most recently as a result of members bank account details not being up-to-date;
- (f) re-processing many distribution payments with updated payment details, which involved:
 - (i) contacting the affected investors regarding the returned payments;
 - (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; and



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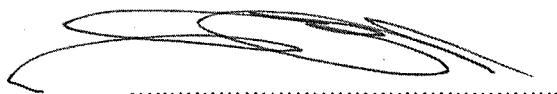
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(vi) instructing PTAL to effect the re-processed payments to members.

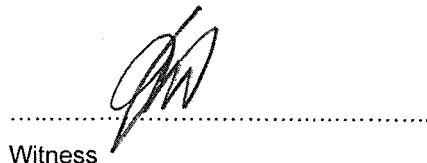
149. As a result of their experience processing the interim distribution, BDO staff are familiar with and have experience with undertaking the necessary steps required to make the final distribution to FMIF members as outlined above.
150. The total amount of returned payments relating to the interim distribution made in October 2019, that had not been reprocessed and remained outstanding as at 31 December 2019 was \$2,583,437. The total distribution was \$32 million so the returned funds represent about 8.07% of the total.
151. The outstanding amount of the returned payments has been reduced progressively.
152. I issued further notices to members in July 2022 urging them to provide up to date details, given that the winding up of the FMIF is coming to its conclusion. At that time there were outstanding distributions of \$1,541,692.23 relating to 602 investment accounts. As of 31 December 2023 this has reduced to \$1,101,337.77 relating to 441 investment accounts.

Relief – Liability ledgers

153. In the FMIF's accounts, there are a series of five liability account ledgers which record current liabilities, namely:
- (a) Distributions Payable (20400);
 - (b) Investor Funds Payable (Redemptions) (20401);
 - (c) Returned Investor Payments (20003);
 - (d) Trade – Settlements Payable / (Receivable) (20040); and
 - (e) Other payables (20001).
154. At page 822 of the Bundle is the FMIF's Trial Balance as at 30 June 2022 exported from the AX database.



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Distributions Payable Ledger (20400) – General

155. The 20400 "Distributions Payable Ledger" appears to have been used to record the balance of income distributions declared and payable, but not paid to members.
156. The unpaid balance of that account as at 30 June 2020 was \$1,372,036.38.
157. On my instruction, BDO staff have analysed the entries in that account so as to identify amounts that may still be owing to members of the FMIF. I am informed that, to do so, they:
- (a) disregarded entries in the ledger that were not directly allocated to an investor;
 - (b) accounted for distribution payments or re-investments in July 2009 that were in satisfaction of distributions declared prior to 1 July 2009 for which there was no matching entry (due to migration issues between two different accounting systems); and
 - (c) otherwise matched equal debit and credit entries on a first-in-first-out basis.
158. I am informed and believe that, in the result, they have identified the following outstanding distribution entitlements:
- (a) entries totalling \$573,236.63 which represent the November 2010 income distribution still payable to members;
 - (b) entries totalling \$619,470.81 which represent the December 2010 income distribution still payable to members; and
 - (c) other entries made up of missed distributions and returned payments with a net value of \$139,992.58.

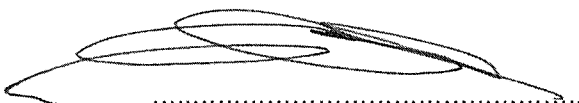
Distributions Payable Ledger (20400) – November and December 2010 Income Distributions

159. A significant proportion of the amount payable recorded in the Distributions Payable Ledger relates to income distributions declared for the months of November and December 2010, but never paid.

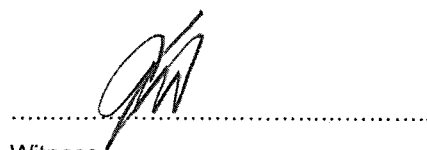

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160. The FMIF's Product Disclosure Statement permitted members to elect either to automatically re-invest their distribution entitlement, or to receive cash.
161. Pursuant to the requirements of the FMIF's constitution, LMIM declared income distributions monthly. However, from November 2009 the members who had elected to be paid cash were paid increasingly late. The amounts paid were analysed by KordaMentha in their expert report filed in the EY Proceedings dated 30 June 2021 in Part D, Chapter 15, as follows:-
- (a) the cash income distributions for February to May 2010 were paid in July to November 2011;
 - (b) the cash income distribution for June 2010 was paid in May 2012;
 - (c) the cash income distributions for July to October 2010 were paid in January 2013; and
 - (d) the cash income distributions for November and December 2010 have never been paid.
162. At pages 823 to 829 of the Bundle is a copy of the Chapter 15 of KordaMentha's report dated 30 June 2021 as filed in the EY Proceeding.
163. Notwithstanding the late payment of cash distributions, for unitholders who had elected to re-invest their distribution entitlements, that occurred when the distributions were declared and those unitholders have since received the benefit of their increased unitholding including in the payment of capital distributions in February and June 2013 and October 2019.
164. LMIM continued to declare income distributions for a short period after December 2010.
165. However, on 27 June 2011, LMIM published the financial statements for the FMIF for the half year ended 31 December 2010. Those financial statements, for the first time, recorded a significant net loss in the Statement of Comprehensive Income, as a result of their recognition of \$80,551,148 in "Impairment losses on loans and receivables". But for that expense, the accounts would have recorded a small net profit before distributions of around \$7million.



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166. At pages 830 to 857 of the Bundle is a copy of the financial statements of the FMIF for the 6 months ended 31 December 2010.
167. In a report prepared by Mr Brian Morris of Morris Forensics, an expert accountant and auditor, that was filed in the EY Proceeding, Mr Morris recalculated the correct unit price of the FMIF as at a series of reporting dates, correctly applying Australian Accounting Standard AASB139 as to the assessment of impairment, and using retrospective valuations of the properties securing the FMIF's loans also obtained for the purposes of the EY Proceedings. His conclusions were as follows:

Financial Statements Reporting Date	Date of Publication	Reported Unit Price	Adjusted Unit Price
		\$	\$
30-Jun-08	10-Mar-09	1.00	0.90
with post balance date events	10-Mar-09	1.00	0.82
31-Dec-08	16-Jun-09	1.00	0.77
30-Jun-09	30-Sep-09	1.00	0.65
31-Dec-09	07-Jun-10	1.00	0.60
30-Jun-10	06-Oct-10	1.00	0.54
31-Dec-10	27-Jun-11	0.80	0.47
30-Jun-11	16-Sep-11	0.80	0.41
31-Dec-11	15-Mar-12	0.73	0.32
30-Jun-12	16-Nov-12	0.59	0.30

168. As a result of the increasing levels of impairment, Mr Morris further concluded that the expenses of the FMIF (including the impairment expense, correctly calculated) in fact exceeded the income of the FMIF in each six-month period ended from 31 December 2008 to 30 June 2012. At pages 858 to 859 of the Bundle is a copy of Chapter 7A of the report of Mr Morris dated 23 July 2021.
169. At a board meeting held on 4 July 2011, the directors of LMIM resolved to declare a zero distribution for the period 1 January 2011 to 30 June 2011 because of "the impact of the distribution payments on the unit price", and to reverse the income distributions that had already been processed for January to March 2011.
170. At pages 860 to 865 of the Bundle is a copy of the minutes of the board meeting held on 4 July 2011.



Deponent



Witness

171. As to the income distributions from July 2010 to December 2010, LMIM sent correspondence to unitholders dated 21 July 2011 stating the following:

"We report that the LM First Mortgage Income Fund will record an accounting and tax loss for the year ended 30 June 2011, due to the write down in mortgage security values.

Accordingly, as LM First Mortgage Income Fund has no income to distribute, the ordinary monthly cash and accrued payments received by investors, including the feeder funds ... in the period 1 July 2010 to 31 December 2010 (once we catch up) are all partial repayments of capital and not income, and therefore will not need to be included in the assessable income in an investor's tax return for the current year."

172. At pages 866 to 867 of the Bundle is a copy of the letter dated 21 July 2011.

173. In the 31 December 2010 financial statements, the unpaid distributions were recorded in the Statement of Financial Position as a liability, under the description "Distributions payable". That description continued thereafter in each of the audited financial statements published by LMIM, and subsequently by unaudited financial statements published by BDO.

174. LMIM also regularly wrote to investors expressing its intention to pay the outstanding income distributions in unequivocal terms. In particular:

(a) In a letter to investors dated 6 May 2010, LMIM stated:

"Please note that all outstanding investor distributions continue to accumulate and will be paid."

(b) In a letter to investors dated 13 July 2010, LMIM stated:

"We are focused on the catch up payments of outstanding investor distributions and will continue to make these payments as free cashflow comes to hand."

(c) In a letter to investors dated 28 October 2010, LMIM stated:

"We note that all interest/income declared on your investment for the year is taxable. This includes income for which you are awaiting payment, as this income has been declared and accounted for by the fund and has accrued to your investment."

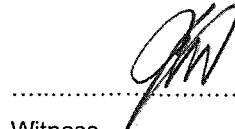
(d) In a letter to investors dated 15 November 2010, LMIM stated:

"We note that the investor income has been declared and whilst not distributed, is accrued. We assure you that in an accounting sense, your income has been provided for within the fund."

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- (e) In a letter to investors dated 26 May 2011, LMIM stated:
"Assuming all current sales contracts proceed to settlement, the cash flow budget for the fund shows that the payment of outstanding investor distributions should commence progressively, from 31 August 2011. We anticipate that the catch up of investor distributions will take place progressively, ie not in one lump sum payment, but progressively until all the payments are up to date."
- (f) In a letter to investors dated 14 September 2011, LMIM stated (in a 'Frequently asked questions' section):
"2. Will I receive my outstanding income?"
Yes. All investors have had income distributions accrue or reinvest to end of December 2010. As a Fund expense, accrued income will be paid. We have commenced the payment of the income catch up, and will continue to report on this as the sales progress continues."
- (g) In a letter to investors dated 20 December 2011, LMIM stated:
"Q. What about the Catch Up on Investor Income?"
All income will be caught up as previously advised. We will provide timeframes for further payments as we can."
- (h) In a letter to investors dated 27 January 2012, LMIM stated:
"... we are continuing with the sales programme engaged by the Fund at the beginning of 2011. It has been a quiet period for sales over Christmas and hence there have been no catch up income distributions to investors in December or January. We are working on this and we will keep you updated with respect to future payments."
- (i) In a letter to investors dated 18 September 2012, LMIM stated:
"Investor Income Catch Up"
We have continued with the sales program of assets within the Fund. The pipeline of settlements of those sales has strengthened in the last quarter of the year, and as a result we expect to recommence the catch up of investor distribution payments moving into the end of this year."
- (j) In a letter to investors dated 27 February 2013, LMIM stated:
"There are outstanding income distributions for 2010 which remain due to investors in the LM First Mortgage Income Fund. It is expected that these catch up payments will be resumed in the next couple of months.

As previously stated, the income payments are provided for in the Fund accounts, and will be paid."

175. At pages 868 to 891 of the Bundle is a copy of each of these letters.
176. At pages 892 to 896 of the Bundle is a copy of a statement from a sample investor (with the investor's name and other details redacted), who had elected to receive payment of their income distributions in cash.

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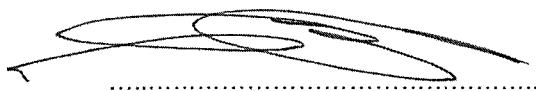

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Investor Funds Payable (Redemptions) ledger (20401)

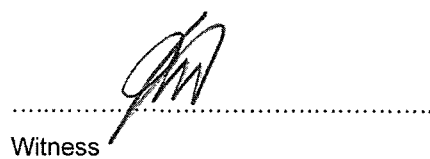
- 177. This ledger appears to have been used to process redemption (including hardship) payments to investors, as well as the payment of capital distributions. The ledger appears to have been used as a clearing account for redemptions at the time payment was processed.
- 178. The balance of the Investor Funds Payable (Redemptions) ledger as at 30 June 2020 was \$39,828.00.
- 179. On my instruction, BDO staff have analysed the entries in that account so as to identify amounts that may still be owing to members of the FMIF, by disregarding apparent overpayments to certain members of \$2,094.22 and a \$86.62 transaction that could not be matched to any investor, and otherwise by matching equal debit and credit entries.
- 180. I am informed and believe that, in the result, they have identified a total of 63 investors owed an aggregate amount of \$42,008.84, of which 7 are no longer listed as members of the FMIF, and of which 12 do not have bank account details listed in the Register of Members.

Returned Investor Payments ledger (20003)

- 181. This ledger appears to have been used to record returned investor payments, and the subsequent attempts to pay the returned amounts to the investors in question.
- 182. The balance of the Returned Investor Payments ledger as at 30 June 2022 was \$43,347.02.
- 183. On my instruction, BDO staff have analysed the entries in that account so as to identify amounts that may still be owing to members of the FMIF, by disregarding apparent overpayments to certain members of \$5,877.77 and a \$296.31 transaction that could not be matched to any investor, and otherwise by matching equal debit and credit entries.
- 184. I am informed and believe that, in the result, they have identified a total of 112 investors owed an aggregate amount of \$49,521.10, of which one does not have bank account details listed in the Register of Members.



Deponent



Witness

Payment of outstanding entitlements

185. I intend to write to all current members of the FMIF requesting that they update their details in the Register of Members, and requesting any member who believes that they are entitled to a payment to come forward and provide relevant supporting documentation. I will investigate any claims that are notified to me.
186. I will otherwise endeavour to pay the outstanding liabilities identified by BDO staff in the 20400, 20401 and 20003 ledgers, according to the payment details recorded in the Register of Members.
187. However, if a member's or former member's payment or other details have changed but they have not notified me of the change, their records in the Register of Members (which staff at BDO maintain under my supervision) will be wrong or out of date. If that is the case, then in my experience, there is a very good chance that any attempted payments to them will be returned.
188. In the event that any payments are returned, I propose to transfer the funds in question to ASIC as unclaimed monies at the conclusion of the winding up.

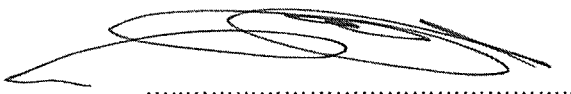
Trade – Settlements Payable (Receivable) ledger (20050)

189. The net liability recorded in ledger 20050 (Trade – Settlements Payable (Receivable)) is \$92,087.77.
190. This ledger is the ledger in which the FMIF's foreign exchange entitlements and liabilities were recorded.
191. I have not been advised by the Liquidator of any Creditor Indemnity Claim made by him with respect to any proof of debt lodged with him regarding any foreign exchange liability.


Other Payables Ledger (20001)

192. The net liability recorded in ledger 20001 (Other payables) is \$3,766.86.
193. This ledger is the ledger in which various related party payments and other payables were recorded.

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Deponent



Witness

194. I have not been advised by the Liquidator of any Creditor Indemnity Claim made by him with respect to any proof of debt lodged with him regarding any such liability.

Relief – Further liabilities

195. The FMIF has a number of further current liabilities, in addition to those referred to above, as follows:

- (a) **First**, BDO's work in progress and unpaid expenses of my appointment and the winding up of the FMIF; and
- (b) **Second**, further remuneration and expenses payable to the liquidator of LMIM.

196. In addition, the FMIF will continue to incur liabilities in the future to the conclusion of the winding up, in particular remuneration for my and BDO's further work to the conclusion of my appointments, my expenses of my appointments, and any further remuneration and expenses that may be claimed by the liquidator of LMIM.

197. In order to make a final distribution to members, it is necessary for me to finally identify and resolve the quantum of any further liabilities required to be paid out of the assets of the FMIF in advance of that distribution.

Relief – Final audit of the accounts of the FMIF

198. Under clause 16.10 of the Constitution of the FMIF, the Responsible Entity is required to arrange for an auditor to audit the final accounts of the Scheme, after the scheme is wound up.

199. I have access to, maintain and am familiar with the books and records of the FMIF which would be required to undertake a final audit. They are maintained in the Microsoft Dynamics AX database system, specifically designed by LMIM.


200. Furthermore, in complying with the conditions of the relief granted by ASIC, I caused BDO to prepare financial statements of the FMIF for each financial year and half-year, I reported to the members of the FMIF on the progress of the winding up quarterly.

201. I have undertaken most of the substantive tasks in the winding up, including realisations of the real property securities (apart from those realised by the DB

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Deponent

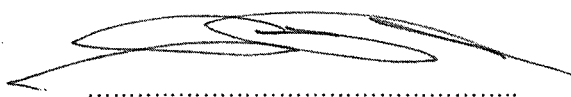

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Witness

Receivers), prosecuting proceedings brought for the benefit of FMIF members, defending certain proceedings brought against LMIM as responsible entity of the FMIF, and making the interim distribution.


202. If this final audit is to be arranged by any other party, based on my experience as an accountant and as a receiver, it will be necessary for them to familiarise themselves with the relevant books and records of the FMIF, and it will be necessary for BDO to spend additional time considering and responding to queries from the Liquidator, given BDO's greater familiarity with this matter.
203. In light of the above matters and the matters referred to in paragraphs 127 to 138, I seek:
- (a) a direction from the Court dispensing with the requirement under the Constitution of the FMIF for an audit to be undertaken of the "final accounts" of the FMIF after the winding up has been completed; or
 - (b) alternatively, a direction from the Court conferring responsibility on me to prepare the final accounts, and to arrange a final audit of those accounts by an independent auditor.
204. On 20 October 2022, my solicitors sent correspondence to ASIC inquiring as to its view in relation to the scope of the obligation to audit the "final accounts" of the FMIF. At pages 897 to 899 of the Bundle is a copy of this correspondence.
205. On the same date, my solicitors received a response from Mr Pak of ASIC acknowledging receipt of my letter. At pages 900 to 901 of the Bundle is a copy of this correspondence.
206. As at the date of swearing this affidavit, I have not, and I am informed and believe that my solicitors have not, received a substantive response from ASIC to my correspondence.

Relief – Discontinuing the Clear Accounts Proceeding

207. As I explain above, the Clear Accounts Proceeding was commenced to preserve the clear accounts rule defence to the indemnity that would otherwise be available to



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Deponent


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Witness

LMIM against the assets of the FMIF, in particular in relation to the substantial claims against LMIM by the MPF Trustee, referred to in paragraph 39 above.

208. The clear accounts rule defence is also technically available as a defence to other liabilities of LMIM insofar as LMIM seeks to rely on its right of indemnity against the assets of the FMIF. However, I am informed and believe that reliance on the defence would require the Clear Accounts Proceeding to be pursued at significant further expense to the FMIF.
209. I have now resolved all creditor indemnity claims advanced by the Liquidator against the assets of the FMIF under the December 2015 Orders. In particular, I have reached agreement with Norton Rose and the Liquidator as to payment of the Norton Rose Proof of Debt, and the First and Second EY Proofs of Debt have been withdrawn by EY.
210. I have also now resolved all legal proceedings and costs orders against LMIM as responsible entity of the FMIF, including in particular the substantial claims against LMIM by the MPF Trustee that were discontinued, as referred to in paragraph 42 above.
211. I am otherwise unaware of any unresolved claims by LMIM for indemnity that would be subject to the application of the clear accounts rule.

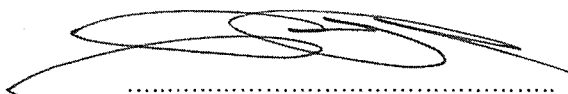
PART 4: SUBSTITUTED SERVICE ORDERS

212. The FMIF presently has over 4600, members. Of these, about 700 are located in Queensland, about 3000 are located in various other locations across Australia, and about 800 are located outside Australia.

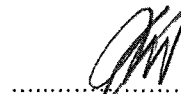
Register of Members

213. The register of members of the FMIF is maintained at BDO on the Microsoft Dynamics AX investor database, by BDO staff under my supervision. The Register of members of the FMIF records each member's preferred method of communication which is either by post or by email.
214. In some cases, the postal or email address of a financial advisor is nominated at that member's preferred method of communication.

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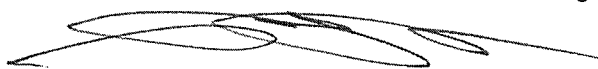


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Communications with FMIF Investors

215. Shortly after my appointment, I set up a website www.lmfmf.com (the "Website") to enable me to provide members of the FMIF with information as to the winding up of the FMIF.
216. Since 31 March 2021, only FMIF members and professional advisors have been permitted to access the information on the Website; prior to that, access to the FMIF website was not restricted.
217. During the course of the winding up, I have used the Website to make available to FMIF members (among other things):
- (a) a copy of applications for approval of my remuneration and other court applications in the winding up of the FMIF and supporting Affidavit material, in accordance with substituted service orders made by the Court, either in this proceeding or proceeding 3508/15.
 - (b) my quarterly reports to members of the FMIF;
 - (c) financial statements of the FMIF for each financial year or half-year; and
 - (d) receipts and payments lodged with ASIC by the DB Receivers and BDO which includes details of every receipt and payment from 11 July 2013 to 7 August 2023.
218. Typically, substituted service orders made in the winding up of the FMIF have required me to serve or notify FMIF members of court applications by, broadly speaking, sending to each member, by that member's preferred method of communication, a notice informing them of (among other things) the substance of the orders sought in the application, the date and time of hearing of the Application and directing them to the Website to obtain a copy of the Application and supporting Affidavits.
219. My remuneration applications in this proceeding have been served in accordance with orders of P Lyons J on 1 June 2015, as amended by orders of Mullins J on 17 December 2019.

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Deponent



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Witness

220. A copy of the orders of P Lyons J of 1 June 2015 is at pages 902 to 907 of the Bundle and a copy of the orders made by Mullins J on 17 December 2019 is at pages 908 to 910 of the Bundle.

Costs of service of application and supporting material

221. In order to serve the application and supporting affidavit on each of the members of the FMIF, I would need to outsource the task of printing and compiling all of the relevant material given the size of the material and the number of members.

222. I estimate that the cost of outsourcing the printing of the application and supporting affidavit (including exhibits), and of serving the application and supporting affidavit to be about \$340,000 including GST. This assumes that the application and supporting Affidavit (including exhibits) will be about 829 pages or 415 sheets in total, printed double sided. A copy of an estimate from Kwik Kopy is at page 911 of the Bundle.

223. Given that there are over 4,600 members of the FMIF, it would in my assessment be impracticable, costly and time consuming to effect ordinary service of the application and supporting affidavit on each member of the FMIF in accordance with the manner of ordinary service prescribed by the *Uniform Civil Procedure Rules 1999 (Qld)*.

224. I believe that, if the orders sought in the substituted service application are made, taking the steps required by those orders will be sufficient to bring the Application to the attention of FMIF members. That is because:

(a) Notice of the application will be sent to each member of the FMIF in accordance with their nominated preferred method of distribution of notices, as recorded in the FMIF's register of members, which will inform them as to how and where to obtain the relevant supporting materials;

(b) I have used the Website for now over ten years to communicate with and make information available to the members of the FMIF.

225. I have previously advised the members of the FMIF of a number of other applications by notice according to their preferred method of communication and provided copies of the material in support of those applications on the Website.



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Deponent



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Witness

226. In doing so, I have not become aware of anything to suggest to me that this method of notification has not been effective, other than in cases where a member has not kept their contact information up to date.

Final matters

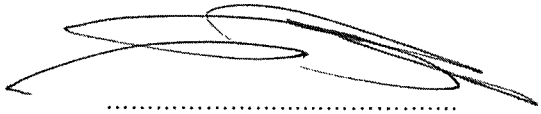
227. This affidavit was made, signed and witnessed under part 6A of the Oaths Act 1867.

The contents of this affidavit are true, except where they are stated on the basis of information and belief, in which case they are true to the best of my knowledge.

I understand that a person who provides a false matter in an affidavit commits an offence.

SWORN by DAVID WHYTE
at Brisbane

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9 April 2024

BEFORE ME:

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Alex Nase

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Australian legal practitioner
Cowen Schwarz Marschke Lawyers
Special witness under the *Oaths Act 1867*

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9 April 2024

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

AND

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

AND

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

AND

Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

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